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LAW OF

RIGHTS IN SECURITY

HERITABLE AND MOVEABLE

INCLUDING

CAUTIONARY OBLIGATIONS

BY

W. M. GLOAG, B.A. (Oxon.)

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EDINBURGH

WILLIAM GREEN & SONS

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PREFACE

In this book an attempt is made to fill an acknowledged gap in Scottish legal literature, by supplying a treatise on the legal relations arising between persons who give and receive securities for debt, and between such persons and third parties. The sense in which the term "Rights in Security" is employed is explained in Chapter I. Those forms of security which consist of rights over property belonging to the debtor are treated in Chapters II.–XVIII. (pp. 15–641), the general arrangement of these chapters being based on the nature of the property over which the creditor's right subsists, and not on the manner in which the right is constituted. The remaining chapters—XIX.–XXVI. (pp. 642–946)—are devoted to Cautionary Obligations, in which the security consists in a personal obligation by third parties, accessory to the debtor's obligation. It is hoped that the work will prove useful, not only to the legal profession, but also to bankers, accountants, and others concerned in the relations between debtor and creditor.

Mr. Gloag is responsible for Chapters II.–XII. (pp. 15–439), and for Chapter XVIII. (pp. 611–641). Mr. Irvine is responsible for Chapters XIII.–XVII. (pp. 440–610), and for Chapters XIX.–XXVI. (pp. 642–946).

The authors desire to express their thanks to Mr. William Galbraith, W.S., and Mr. James Smart, S.S.C., who undertook the labour of reading large portions of the work in manuscript, and made many important suggestions. They also cordially thank those of their brethren at the Bar who have assisted in revising the proofs, and in particular Mr. F. M. Anderson, Advocate, to whose care many valuable corrections are due.

Edinburgh, 2*nd July* 1897.

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ADDENDA

Pages 227, 228, 229, 234. Robertson *v.* Walker. This case has been affirmed, Nov. 10, 1896, 34 S. L. R. 82.

Page 245, note 1. *Add*: But if the article hired is so attached to land or to a building as to become a fixture, it becomes the property of the owner of the land, and cannot be recovered in a question with a purchaser or security-holder from him (Hobson *v.* Gorringe [1897] 1 Ch. 182).

„ 257. Irvine *v.* Inglis. This case was affirmed by the whole Court (Lord Young dissenting), and is reported as Robertson and Baxter *v.* Inglis, March 18, 1897, 34 S. L. R. 577.

„ 396, note 1. *Add*: A London stockbroker cannot set off a debt due to him by the country broker, in a question with the client (Anderson *v.* Sutherland, Jan. 21, 1897, 13 T. L. R. 163).

„ 438, note 8. *Add*: *The Castlegate* [1893] A. C. 38; *The Oriental* [1895] P. 49.

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CHAPTER I

RIGHTS IN SECURITY

"Rights in security."
Term is here used only as applying to voluntary or contractual rights.
Classification of rights in security—
(*a*) Those which confer on the creditor a *jus in personam*, *e.g.* cautionary obligations or guarantees.
(*b*) Those which confer on the creditor a *jus in re*, a right over specific property.
Varieties of rights in security over specific Property.
A mere personal obligation by the debtor is not a right in security,—
Even though the obligation is for payment of a particular fund.
Illustration: company issuing debentures.
Constitution of rights in security over property.
(*a*) Rights in security over property constituted by simple contract.
(*b*) Rights in security over property implied by law in certain circumstances.
(*c*) Rights in security over property in the ordinary case are constituted by agreement between the parties, followed by some overt act.
Rights of parties, where the legal requisites necessary to make a right in security effectual have not been completed.
Effect of Act 1696, c. 5, on the rights of the parties to an incompleted right in security.
Act does not strike at a security completed within sixty days of the bankruptcy of the debtor, if the act completing it is performed by the creditor.
Effect of the Act upon acts done by debtor within sixty days of bankruptcy.
Distinction between general obligation to give security and obligation to complete specific security.
Cases on this subject.

Rights in security.

We shall not attempt to frame any formal definition of the expression "right in security," as that expression is used in these pages. To formulate a definition, which would be at once comprehensive enough to include all the subjects treated in this volume and at the same time sufficiently definite to be useful as a guide to its contents, might perhaps be an even more dangerous task than the work of definition generally is. It is sufficient for practical purposes to state generally that the expression "right in security," as here employed, denotes any right which a creditor may hold for ensuring the payment or satisfaction of his debt, distinct from, and in addition to, his right of action and execution

against the debtor under the latter's personal obligation. A creditor, in other words, who holds a right in security, has at his disposal some means of realising payment or exacting performance of the obligation due to him, distinct from, and in addition to, the means which are at the disposal of the debtor's general creditors, who have relied solely on the debtor's personal credit. Whatever the special form of the right in security may be, its effect is in all cases to put the party entitled to it in a position of advantage, and to render his power of realising payment of his debt more sure. So in Roman law any right that rendered a creditor *cautior et securior* was, in the eye of the law, of the nature of a right in security (*cautionalis*).[1] Further, a right of this kind is always necessarily accessory in its nature, being constituted for the merely subsidiary purpose of enabling the person entitled to it to make sure of receiving a certain sum which is due to him, if not otherwise, then at all events by means of the right in question. Accordingly, when payment of the sum due is made, the accessory right is extinguished along with the principal obligation, to secure which it was constituted.[2] All the varieties of rights in security, then, which are dealt with in the following pages, agree in these two characteristics: *first*, they confer on the creditor, who is entitled to enforce them, some benefit or power of realising payment which is not shared by the general creditors of the debtor, and, *secondly*, they necessarily presuppose some principal obligation, to which they are subsidiary.

The term is here used only as applying to voluntary or contractual rights.

Moreover, the term "right in security," as employed in this treatise, connotes that the additional and distinct resource which is available to the creditor for effecting the due performance of the obligation due to him, is the result of a contract, express or implied, between himself and his debtor. A creditor who holds no contractual right in security may subsequently acquire, by the use of diligence, certain preferential rights or means of enforcing payment of the nature of rights in security.[3] Rights of this latter class, however, fall outside the scope of this treatise, except so far as they require discussion incidentally in connection with voluntary or contractual rights in security, which have been offered by the debtor and accepted by the creditor, or with rights

[1] *Dig.* 46. 5. 1. 4.

[2] This is true of securities which confer a *jus in re*, equally with those which confer a *jus in personam* (Bell, *Com.* i. 711, M'L. ed.).

[3] As to the effect of an arrestment in putting a creditor in the position of one holding a right in security, see *Woodside* v. *Esplin*, 1847, 9 D. 1486; *Gibson* v. *Greig*, 1853, 16 D. 233. As to the effect of an inhibition, see *Hay* v. *Durban*, 1850, 12 D., at p. 683.

in security resulting, as by implied contract, from the possession of property or from certain specialties in the relation between the parties.

Classification of rights in security:

Rights in security, or the means which creditors may have at their disposal for enforcing payment of debts, in addition to their rights under the debtor's personal obligation, may take one of two forms. The effect of the additional and accessory right may be either (*a*) to give the creditor a *jus in personam* or *jus ad rem*, a right, in other words, against certain persons, other than his debtor, or (*b*) to give him a *jus in re*, a right, in other words, over certain specific property belonging, in the ordinary case, to his debtor.[1]

(*a*) Those which confer on the creditor a *jus in personam*, as cautionary obligations or guarantees.

Very frequently a creditor, in virtue of a subsidiary contract, is entitled, in default of receiving payment from his debtor, to realise payment from some third party or third parties, other than the debtor, who have intervened on the debtor's behalf and undertaken to pay the debt if the debtor fail to do so. Where a right in security takes the form of such a subsidiary obligation to the creditor on the part of third parties, it is a cautionary obligation or guarantee. In this case the additional means of realising payment at the disposal of the secured creditor consists in a *jus in personam* or *jus ad rem*, *i.e.* a right, on the debtor's default, to claim payment of his debt from the third parties, other than the debtor, who are bound subsidiarily. Rights in security of this kind, of which cautionary obligations or guarantees are the standard example, are properly termed "personal," since they consist in a *jus in personam*, or obligation subsidiarily due by a third person or persons.[2] They form the subject of the chapter on Cautionary Obligations or Guarantees.

On the other hand, the additional means, which a right in

[1] The distinction is clearly marked in Roman law: *Cautum intelligitur, sive personis sive rebus cautum sit* (*Dig.* 50. 16. 188. 1).

[2] The use of this terminology may be open to misconstruction, for the reason that the term "personal security" is frequently used in a vague sense to denote the merely personal obligation of the debtor himself. In this popular sense the phrase implies that the creditor relies merely on the pecuniary credit of his debtor, and not on any right in specific property, by means of which he can realise payment. Such a personal obligation is not, of course, in a legal sense a right in security at all (*vide infra*, p. 5). The kindred use of the term personal securities to denote I. O. U.'s, personal bonds, or other similar documents of debt, by which personal obligations are evidenced, is also a misnomer from a legal point of view, though it is in everyday commercial use. Curiously enough, however, the expression *nuda cautio* in the Roman texts is occasionally similarly used in a popular way to denote documents evidencing debts.

(*b*) Those which confer on the creditor a *jus in re*, a right over specific property.

security puts at the disposal of the creditor for realising payment, may take the form of a *jus in re*, or a real right in certain specific property. In the former class of security-rights, the accessory right which the creditor holds in security of the debtor's obligation is a *jus in personam* against certain persons, other than the debtor; in the latter class, it is a *jus in re*, or a real right to realise payment out of some definite property which, in the ordinary case, belongs to the debtor, but may belong to some third party.[1] Hence rights of the latter class are properly termed "real" rights in security. The real right which the creditor has in the property over which his security extends, may either be of the nature of a right of property, or it may be a right of mere possession and retention.[2] Whether, however, the right in security consists in a right of property or in a right of mere possession, it subsists only so long as the principal personal obligation, to which it is accessory. A right in security, in other words, is in every case defeasible by payment of the debt in security of which it is held.[3] Where, as is usually the case, the property over which the creditor has a real right in security belongs to the debtor, the practical effect of the security is to confer on the creditor holding it a preference over the other creditors of the debtor in the debtor's sequestration. For if such a real security has been effectually constituted, *i.e.* if there is in the creditor a *jus in re* which is not null or reducible, then, on the bankruptcy of the debtor, his property vests in his trustee, always subject to such preferable securities as exist at the date of the sequestration.[4]

Varieties of rights in security over specific property.

The forms of real rights in security vary with the kinds of property which form the subject of these rights. The nature of the property over which the creditor's *jus in re* is constituted is, indeed, all-important in determining the particular legal method which is necessary to make the right in security effectual. Taking, then, as the principle of division, the nature of the property which forms the subject of the security, we find that it may consist either of the whole estate of the debtor; or of heritable subjects; or of moveable subjects. The moveable subjects, again, may be either (*a*) corporeal moveables, or (*b*) incorporeal moveables,

[1] These two species of *cautio* are in Roman law clearly distinguished as *cautio fide jussoria* and *cautio pignoraticia* or *hypothecaria* respectively.

[2] Bell, *Com.* i. 711 (M'L. ed.).

[3] *Ib.*

[4] See Bankruptcy Act, 1856, s. 102. The trustee may indeed have an interest in such preferable securities, *e.g.* he may obtain an interdict against their sale till he has inspected them—*Ross* v. *Equitable Loan Co. of Scotland*, 1826, 5 S. 192. As to the valuation and deduction of securities for voting, see s. 59, and, for ranking, s. 65 of the Bankruptcy Act, 1856.

i.e. debts due to the debtor by third parties. Further, as regards incorporeal moveables or debts, a distinction falls to be taken according as such debts are, or are not, incorporated in negotiable instruments. Where the debt is not so incorporated, it can be made the subject of security only by being assigned to the creditor, with intimation to the debtor; where, on the other hand, the debt is incorporated in the instrument which evidences it, and that instrument is negotiable, a right in security over the debt can be constituted by mere delivery of the instrument to the creditor, or by the delivery of the instrument accompanied by its indorsation.

A mere personal obligation by the debtor is not a right in security.

Since the main characteristic of a right in security over property lies in its conferring on the creditor, who is entitled to it, the right to vindicate a particular subject, and, consequently, a preference over that subject on the bankruptcy of the debtor, it is clear at the outset that a merely personal pecuniary obligation by the debtor himself is not in any legal sense a right in security.[1] The distinction was clearly and concisely stated by Mr. Gillies, afterwards Lord Gillies, in argument in *Bowe* v. *Spankie*:[2]—"Where nothing more is granted than the personal obligation of the debtor, it can never be understood that a security is given. Every creditor has a personal claim against the debtor who does not deny the debt, but he has no security in legal language, unless he hold some other person or some special subject bound for the debt." So I. O. U.'s,[3] deposit receipts,[4] personal bonds,[5] promissory notes,[6] or other acknowledgments of, or vouchers for, debt, which contain nothing more than the personal obligation of the debtor, are not, as between granter and grantee, in any true sense rights in security. Such documents are merely obligations to pay, or evidence of obligations to pay, which confer on the grantee no *jus in re* or real right over any special property, but merely a personal claim against the debtor. Accordingly, they entitle the creditor, on the debtor's bankruptcy, merely to a dividend in the sequestration, and do not constitute a preferable security. Of course a *jus in re* or real right in the

[1] As to the use of the expression "personal security," *vide* note, p. 3. A special power to trustees to lend on personal security has been construed in Scotland as including power to lend on personal credit. As to this, however, see *Knox* v. *M'Innon*, 1888, 15 R. (H. L.) 83, per Lord Watson, at p. 61.

[2] 1 June 1811, Fac. Dec.

[3] *Barry* v. *Harding*, 1844, 1 J. & Lat. 475.

[4] *Hopkins* v. *Abbot*, 1875, L. R. 19 Eq. 222.

[5] *Moffat* v. *Robertson*, 1834, 12 S. 369.

[6] *Bowe* v. *Spankie*, 1 June 1811, Fac. Dec.; *Blair* v. *Paterson*, 1836, 14 S. 361; *Ross* v. *Allan's Trs.*, 1850, 13 D. 44. "A promissory note," said Lord Hardwicke, in *Walker* v. *Symonds*, 1818, 3 Swans. 81, note, "is evidence of a debt, but no security for it."

debt represented or evidenced by a voucher or other document of that sort, may be constituted by the grantee or creditor assigning the debt in security to a third party. The third party has then a real right or *jus in re* over the obligation of the granter of the document. So where the debt is incorporated in a promissory note or other negotiable instrument, the instrument may be pledged or delivered to a third party in security of the debt; and here, too, the effect is to create in the third party a *jus in re* or real right over the contents of the instrument. Also where a promissory note is signed by obligants who are not debtors of the person to whom it is granted, it becomes a means of constituting a right in security in the form of a cautionary obligation.[1]

Even though the obligation is to pay out of a particular fund.

Again, an obligation on the part of a debtor to pay his debt in a particular manner is not a right in security. Thus an obligation to pay out of a particular fund, unless it amounts to an assignation of the fund, is not a right in security, but merely a personal obligation. An undertaking, for example, by a company to repay a debt by fixed annual instalments out of profits earned by a ship owned by the company does not give the creditor a *jus in re* over the profits as they accrue, so as to entitle him to a preference upon the profits over the general creditors of the company.[2] "It is perfectly clear," said Lord M'Laren in this case, "that a mere pecuniary obligation is not a security, and that it does not become one by reason of a fund being designated out of which payments shall be made. The question is not whether the company acted honestly in paying away their profits to other creditors, but whether the pursuers have a preferable claim in competition with other creditors who have not been paid. According to elementary principles in the law of debtor and creditor, an obligation to pay out of profits is no more than an obligation to pay, and that it only entitles the creditor to a dividend in the sequestration."[3] Where, on the other hand, a creditor obtains a real *nexus* over property, it is effectual to constitute a right in security, though the property in question exists only in expectancy. Thus an actual assignation by a debtor of all the book-debts due and owing, or which might become due and owing, to him during the continuance of the security, is effectual to give the assignee a valid right in security over all book-debts becoming due to the debtor as soon as they come into existence.[4]

[1] *Vide* Chapter XIX.

[2] *Graham & Co.* v. *Raeburn & Verel*, 1895, 23 R. 84.

[3] Per Lord M'Laren in *Graham & Co.* v. *Raeburn & Verel*, 1895, 23 R. 84, at p. 89.

[4] *Tailby* v. *Official Receiver*, 1888, 13 App. Cas. 523. In an assignation

A joint-stock company has, apart from Statute, no more power than an individual to create an effectual right in security over its property in favour of creditors, unless the requisites necessary at common law for the completion of a right in security have been complied with. Thus a debenture granted by a trading company registered under the Companies Acts, 1862 and 1869, is merely a personal obligation for the repayment of a loan, and does not constitute a right in security. Apart from statutory provisions,—such, for example, as are contained in the Companies Clauses Act of 1845,[1]—neither the sanction of a general meeting of the company nor any provision in the Articles of Association will enable a company, by issuing debentures, to create securities over property which would be effectual as against the general creditors of the company, though wanting the ordinary and essential requisites necessary at common law to confer a real preferable right over the property in question.[2] "It appears to me," said Lord Shand in the case referred to, "to be clear that without statutory authority a company cannot by its Articles of Association make a law for itself, contrary to the common law, for the creation of securities over its property which shall be effectual, though wanting the ordinary and essential requisites, such as possession in the case of moveables."[3]

Constitution of rights in security over property:

The common law of Scotland is in principle against the constitution of a right in security by a mere agreement between a debtor and a particular creditor or creditors, it being considered prejudicial to the general interests of trade that particular creditors should acquire a *jus in re* over property belonging to a debtor, without an overt act whereby third parties may be made aware of the preference so acquired.

(*a*) By simple contract;

Thus the only instances of conventional hypothecs, or real rights over the property of another created by simple contract, which are recognised at common law, are the contracts of bottomry and respondentia. In addition to these common-law instances, special statutory provision has been made by various Acts of Parliament for the creation by certain corporate bodies of a public character of preferential securities over their property by way of mortgage or debenture by means of simple contracts,[4] and special modes and

of future debts there is of course frequently a difficulty in completing the title by intimation. As to this, see *infra*, Chapter XIV.

[1] As to debentures and mortgages granted under this Statute, see *infra*, Chapter XVIII.

[2] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[3] Per Lord Shand in *Clark*, *supra*, at p. 1034.

[4] The Companies Clauses Acts are the most conspicuous instance.

forms have been established for giving the holders of such securities an effectual *nexus* over the whole, or some particular part, of the property belonging to the public body.

(*b*) Implied by law in certain circumstances;

In addition to these special instances of real rights constituted by simple contract, there are a few cases, presumed to be known to everyone, in which tacit hypothecs, or real rights in security, in favour of certain parties, are constituted by implication of law without express contract between the parties. In the case of these tacit hypothecs, real rights in security are admitted in favour of certain classes of creditors—who stand in a particular relation to the debtor, or to the subjects over which the security extends. In other words, for the mutual advantage of both the parties, the law presumes that in these cases there exists, as by implied contract, a right in security in favour of one of the parties over the property, or some special property, belonging to the other. Mention may also be made here of the real rights of retention and lien which arise in certain cases by implication of law without express contract. The effect of a real right resulting from retention or lien, is that the debtor or his trustee in bankruptcy cannot recover the security-subject until he pays the debt or debts due to the creditor who has the right of retention or lien.

(*c*) In the ordinary case, by agreement between the parties followed by some overt act.

Apart from the above-mentioned special instances in which rights of security, created by simple contract or arising from implication of law, are recognised, all rights in security by the law of Scotland require for their constitution not only an agreement between the parties, but some overt act. As a general rule, in short, rights in security cannot be effectually constituted by the law of Scotland unless the agreement between the parties is clothed in some form prescribed and recognised by law, or is accompanied or followed by an act which renders it something more than a mere exchange of consent. The particular form or act appropriate and effectual to complete the creditor's right to the subject in a question with third parties, or, in other words, to give him a genuine *jus in re*, varies with the nature of the property which forms the subject of security. Concerning this we need say nothing further in this place, as it is a main purpose of this treatise to make clear what acts or steps are necessary and sufficient in any particular case, in addition to the contract between the parties, to make a right in security effectual to a creditor in a question with third parties, or, in other words, to confer on the grantee a preference over the general creditors of the granter.

Where a right is granted in disregard of the appropriate and requisite methods fixed by law for its completion, it is not neces-

sarily null to all purposes; but it constitutes nothing more than a mere personal obligation, and, like all mere personal obligations, cannot give a right in security. Even where the debtor is bound by an obligation *ad factum præstandum* to do the act necessary to complete the creditor's right,—as, for example, to give possession of the subject of security to the creditor,—yet, it is merely a personal obligation, and therefore is of no avail if bankruptcy takes place before the obligation is performed, *i.e.* before the act is done necessary to constitute the right a real right in security.[1]

Rights of parties where the legal requisites necessary to make a right in security effectual have not been completed.

In cases of this sort, in which a creditor holds an uncompleted right in security, and at the same time has a right to demand that the debtor shall do the act necessary to complete it, difficult questions arise under the Act 1696, c. 5, where the act necessary to complete the creditor's right is not done till within sixty days of the debtor's bankruptcy. This Act declares "all and whatsoever voluntar dispositions, assignations, or other deeds which shall be found to be made and granted, directly or indirectly, by the aforesaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of his creditor, either for his satisfaction or farder security, in preference to other creditors, to be void and null."

Effect of Act 1696, c. 5, on the rights of the parties to an uncompleted security.

It is now settled that this Act does not strike at the completion of any security within the sixty days, in cases where the debtor has done all that falls upon him to do before that time, and the further completion of the security rests entirely with the creditor.[2] Even where sequestration has actually occurred, the creditor is entitled to proceed to complete his title to the subject of his security, and will be preferable if his title to the subject is completed before that of the trustee. Thus if an incorporeal subject is assigned in security by an assignation intended to take effect at once, it rests with the assignee to complete his right by intimation; and he is entitled to do so even after the bankruptcy of the cedent.[3] In the same way, if a bond and disposition in security is granted and delivered to the grantee more than sixty days before the bankruptcy of the granter, he can complete his right by registering the bond at any time before the trustee in sequestration has completed a title to the subjects thereby dis-

Act does not strike at a security completed within the sixty days by some act of the creditor.

[1] See opinions in *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[2] Bell, *Com.* ii. 207; *Johnston* v. *Home*, 1751, M. 1130; *Mitchell* v. *Finlay*, 1799, M. App. *voce* Bankrupt, No. 10; *Fulton* v. *Lead*, 1825, 4 S. 157; *Scottish Provident Institution* v. *Cohen*, 1888, 16 R. 112; *Guild* (*Kettle's Tr.*) v. *Young*, 1884, 22 S. L. R. 520 (Outer House—Lord Kinnear).

[3] *Scottish Provident Institution* v. *Cohen* and *Guild* (*Kettle's Tr.*) v. *Young*, *supra*.

poned.[1] It is true that the above statements are apparently at variance with the provisions of sec. 6 of the Bankruptcy Act, 1856, which provides, in effect, that in all cases under the Act, or under the Act 1696, the date of a deed is the date of the proceeding, whether registration, delivery, or intimation, by which the deed is rendered completely effectual. But it has been decided, under a similar provision in the Act of 1696, and under this section, that the rule is not meant to apply to any case in which the completion of the deed depends upon an act which the grantee of the deed is entitled to perform without the aid of the bankrupt.[2]

Effect of the Act upon acts done by the debtor within the sixty days.

A more difficult question arises in cases where an obligation to grant security is given more than sixty days before the bankruptcy, but something requires to be done by the debtor in order to confer a real right upon the creditor. The Act 1696, c. 5, does not prevent the bankrupt from paying his debts or fulfilling an obligation, by granting a deed or delivering a subject, which he was under a binding contract to grant or deliver.[3] Therefore if the bankrupt was under a binding obligation to complete a specific security granted more than sixty days before his bankruptcy, any act done in pursuance of that obligation will be good, so long as he is not actually sequestrated. But if he was merely under a general obligation to give security, any security actually granted within the sixty days of constructive bankruptcy will be reducible.

Distinction between general obligation to give security and obligation to complete specific security.

There remains, however, a difficulty, which is increased by the conflict of decisions, in distinguishing between an obligation to complete a security already granted and a mere personal obligation to give a security; or, in other words, between an incomplete security and a personal obligation to grant one. The rule, as stated by Prof. Bell, and approved in more than one case, is as follows:—"Wherever money is paid or advanced, or property made over, in consideration of a general promise of security not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted; and in its true intention and meaning the rule of the Statute is understood to apply to the security, when it comes to be granted, as being truly

[1] *Bank of Scotland* v. *Stewart*, 7 Feb. 1811, F. C.; *Cormack* v. *Anderson*, 1829, 7 S. 868; *Young* v. *Leith*, 1847, 9 D. 932, per consulted judges, at p. 938.

[2] *Guild* (*Kettle's Tr.*) v. *Young*, 1884, 22 S. L. R. 520; *Scottish Provident Institution* v. *Cohen*, 1888, 16 R. 112.

[3] Bell, *Com.* ii. 211. Opinion of consulted judges in *Taylor* v. *Farrie*, 1855, 17 D. 639, at p. 649.

in security for a previous debt. But it has also been held that wherever there is stipulated a specific security over a particular subject, in consideration or on the faith of which an advance of money or a transfer of goods is made, the completion of that security, though after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act."[1] The statement that a deed or act will be saved from challenge under the Act 1696 because it is a fulfilment of a stipulation for a specific security over a particular subject, on the faith of which money has been advanced, is, however, inconsistent with most of the more recent cases. If cases in which delivery has been sanctioned, in implement of a contract of sale, are set aside,[2] it will be found that it is only in very exceptional circumstances that the completion of a security within sixty days of bankruptcy has been sustained. A brief examination of the cases will show the difficulties with which a security-holder in these circumstances has to contend.

Cases where security has been sustained though completed by an act of the debtor within sixty days of his bankruptcy.

Taking, first, the cases in which the security has been sustained. In *Taylor* v. *Farrie*,[3] A. had agreed to take B. into partnership on the occurrence of a certain event On the contingency being purified, B. paid the amount of capital which he had agreed to put into the business. A. then, instead of entering into the proposed partnership, sold to B. the stock-in-trade of the business. Three days afterwards, being within sixty days of the bankruptcy of A., B. entered into possession. His right was ineffectually challenged on the Act 1696. The case was held to be one of sale; but the ground of the decision—that wherever there was a binding obligation *ad factum præstandum*, the Act did not strike at deeds done in fulfilment of it—is wide enough to cover the case of its being merely a security. The law was laid down as follows by the consulted judges:—"Where an obligant in an obligation *ad factum præstandum* does the very thing which he is bound to do, the act is one which he is under a legal necessity to perform, and the performance of which the obligee must accept; and the Statute does not strike against such necessary deeds, but only against voluntary dispositions, assignations, and other deeds, made and granted by a bankrupt, within the period therein mentioned, in favour of a creditor for his satisfaction or further security."[4] It is submitted that this is expressed far too generally, as in every case of an obligation to give security the obligant would be bound to perform it, if it

Taylor v. *Farrie*.

[1] Bell, *Com.* ii. 211.
[2] *Gibson* v. *Forbes*, 1833, 11 S. 927.
[3] *Taylor* v. *Farrie*, 1855, 17 D. 639.
[4] *Ib.*, 17 D. at p. 749.

were not that his other creditors are entitled to insist that he shall not do so, and to reduce any act done in derogation of their right.[1]

Lindsay v. *Adamson.*

In *Lindsay* v. *Adamson*[1] an advance was made on the security of the freight to be earned by a ship, which was abroad at the time, on her home-coming vogage. The lender received a letter, by which the ship "was placed in his hands" for the purpose of "collecting the amount of the freight." All this was done more than sixty days before the bankruptcy of the borrowers. Afterwards, and within sixty days of their bankruptcy, the borrowers, acting on the instructions of the lender, collected the freight on the arrival of the ship and remitted it to the lender. He was found entitled to retain it on a question with the trustee in the bankruptcy of the borrowers. Here, it may be noted, the security-holder had been placed in a position to complete the security for himself, by collecting the freight, before the sixty days began, and therefore the mere fact that he chose to employ the borrower to do, as his agent, what he might have done for himself, was not sufficient to let in a challenge under the Act 1696.

Lindsay v. *Shield.*

A much stronger case for the application of the Act was made unsuccessfully in *Lindsay* v. *Shield*.[2] There the contract bore that A. had sold to B. one hundred tons of guano which he had lying in his shed. Payment was to be made by the buyer's acceptance at four months, and delivery was to be made as required; but the buyer reserved a right to repurchase the guano at the same price at any time during the currency of the acceptance. The guano was delivered within sixty days of the bankruptcy of A. The transaction was sustained in a challenge by his trustee, without deciding whether it was to be regarded as a sale or as a security. This case, however, it is submitted, is irreconcilable with a series of later cases, in which similar transactions have been reduced.[3]

Cases where security has been reduced. Where the obligation to give security was general.

In contrast to these cases, a reduction under the Act has been sustained in a large number of cases in which the obligation to give security has been more or less definite and specific. Thus it was held without any difficulty, where a loan of money was made by the lender drawing and endorsing an accommodation bill at three months, and the borrower promised to provide funds to meet it before it was due if he was able to do so, that a payment made in accordance with this promise, two months before the bill was due, and on the eve of bankruptcy, was reducible under the Act 1696.[4]

[1] 1880, 7 R. 1036.

[2] *Lindsay* (*Miller's Tr.*) v. *Shield*, 1862, 24 D. 821.

[3] *Stiven* v. *Scott & Simson*, and other cases cited in next paragraph.

[4] *Rose* v. *Falconer*, 1868, 6 Macp. 960.

Again, where the goods in a warehouse or shop, or the stock of pledges in a pawnbroker's business, have been assigned in security subject to a condition that the borrower was to be entitled to use them in his business as long as the creditor did not ask delivery, it has been held that this form of security cannot be completed by delivery within sixty days of the bankruptcy of the borrower, even although the latter has undertaken a definite obligation to deliver on demand.[1] And where A. received an advance of £500, and promised to give the lender, within a month of the advance, delivery-orders for grain to that amount, and fulfilled his obligation by purchasing delivery-orders in the open market and delivering them to the lender within sixty days of bankruptcy, it was held that this delivery could be reduced under the Act, as made in pursuance of a mere personal obligation to give security.[2]

The above cases may all be explained on the ground that the security which was in question was not specific, as the goods conveyed in security were not identified at the date when the advance was made, or, if identified, were still left at the disposal of the bankrupt in his business. This ground of judgment was adopted by Lord Ardmillan in *Gourlay* v. *Hodge*: "Where the obligation to deliver is general, not specially applicable to separate or identified goods, and where it is postponed, not capable of immediate enforcement, but leaving the goods in the interval at the disposal of the bankrupt, then the transaction cannot stand."[3] The succeeding cases, however, cannot be explained on this ground, and are authorities for the proposition that even a specific security over a particular subject cannot be completed by the debtor within sixty days of his bankruptcy.

Where the obligation was specific.

In *Inglis* v. *Mansfield*[4] money was advanced on the faith of a bond and disposition in security which was intended by both parties to cover an estate extending to ninety-five acres. By a mistake in drawing up the deeds, for which the debtor was responsible, sasine was taken on a much smaller estate of the same name. The error was not discovered until after the debtor was sequestrated, and he then granted a bond covering the estate as originally intended. It was held that the new bond was reducible. In the Court of Session this was held upon the Act 1696; and this decision was approved by the House of Lords mainly on the ground that the debtor had no power to grant any deed affecting his

[1] *Stiven* v. *Scott & Simson*, 1871, 9 Macp. 923; *Rhind's Tr.* v. *Robertson & Baxter*, 1891, 18 R. 623; *Paterson's Tr.* v. *Paterson's Trs.*, 1891, 19 R. 91.

[2] *Gourlay* v. *Hodge*, 1875, 2 R. 738.

[3] 2 R. p. 747.

[4] 1833, 11 S. 813; affd. 1 S. & M. 204.

estate after he was sequestrated, but in a judgment in which the reasoning in the Court below was expressly approved.

On the authority of this case *Moncreiff* v. *Hay*[1] was shortly afterwards decided. There a party advanced money on the deposit of an insurance policy, with an obligation on the part of the borrower to grant an assignation whenever he was required to do so. The assignation was granted, but not until within sixty days of the bankruptcy of the borrower, and it was reduced as a voluntary security made in favour of a prior creditor, contrary to the Act 1696.

Difficulty of reconciling these cases.

The last case which is necessary to narrate was decided in accordance with *Moncreiff* v. *Hay*. There, in security of a bill, one hundred shares in a company were handed over, and an obligation was given to transfer them at any time, should the creditor desire it. Transfers executed within sixty days of the bankruptcy of the debtor were reduced under the Act 1696.[2]

In all these three cases last mentioned the obligation was to give a specific security over a particular subject. In all three it was an obligation which the creditor could have instantly enforced, and yet, on bankruptcy supervening, acts done in fulfilment of such obligations were reduced. It would therefore appear that it is impossible, in the present state of the law, to lay down any rule as to what may be regarded as an incomplete security which the debtor may effectually complete within sixty days of his bankruptcy. The opinion may, however, be hazarded, that if the interval of time between the obligation to give the security and the act by which it was completed was so short that the two acts might fairly be considered as one, the security would be sustained, even if the completion was actually within the limit of sixty days.[3]

[1] 1851, 14 D. 200.

[2] *Gourlay* v. *Mackie*, 1887, 14 R. 403; contrast with *Guild (Kettle's Tr.)* v. *Young*, 1884, 22 S. L. R. 520, where the transfers were executed at once, but registered within sixty days of bankruptcy of transferor.

[3] *Cowdenbeath Coal Co.* v. *Clydesdale Bank*, 1895, 22 R. 682.

CHAPTER II

GENERAL LAW OF HERITABLE SECURITIES

Subject of chapter.
Capacity of grantee.
Title of granter.
The granter.
Stamp.
Delivery.
Insurance.
Incidence of heritable debt.
Diligence to attach interest of creditor.
International law.
Existing forms of security.
Obligation of creditor to assign.
Catholic and secondary securities.

Subject of this chapter.

HERITABLE property—land, and rights connected with land—formed, in the earlier history of the law of Scotland, the principal means of affording security for an advance of money, or for debt incurred, when something more than the personal obligation of the debtor, or of those whom he could induce to act as his cautioners, was required. The general use of securities over moveable property belongs to a later and more developed state of the law, when land had ceased to be the sole element of national wealth. Thus the methods by which securities can be constituted over heritable property date from a very early period, and the present forms have been gradually evolved from earlier types. By gradual changes in practice, and by the conveyancing legislation of the last fifty years, the older forms of heritable security have become obsolete, and have now little more than a historical interest. We may therefore pass over the wadset, proper and improper, and the bond of annualrent, and confine our attention to the methods by which heritable property is actually transferred in security at the present day, and the special uses of the various forms.[1]

Capacity to grant heritable security.

Subject to the ordinary rules as to capacity to contract, anyone who has a right of property in a heritable subject may grant a security over it. But the validity and the scope of a security may be affected either by the limited capacity of the granter, or by the restricted or incomplete nature of the title by which he holds the subject. It is proposed to consider in the ensuing

[1] As to the older forms of security, see Stair, ii. 5, and ii. 10; Ersk. ii. 8; Ross, *Lectures*, ii. 320.

pages, first, the capacity, and secondly, the title, which the granter of a heritable security requires to possess.

Capacity: (1) of pupil.

A pupil has no legal capacity to grant deeds, and therefore a bond granted by him is null.[1] Nor can his tutor grant a security over the heritable property of the pupil, unless the authority of the Court has first been obtained.[2] Thus where a father granted a bond, binding himself personally, and conveying in security heritage belonging to his son, who was in pupilarity, with a clause in the bond stating that the money borrowed was for the use of the son's estate, it was held that the bond gave the creditor no right over the estate of the son.[3]

(2) Of minor.

A minor, with curators, can burden his lands with their consent:[4] without curators, it is probable, though not decided, that he could do so himself.[5] In either case, however, he would be entitled to reduce the security during the *quadriennium utile, i.e.*, four years after he came of age, on proof of lesion; and therefore persons lending money to minors should be careful to preserve evidence of the beneficial expenditure of the money.[6]

(3) Of married women.

A married woman requires the consent of her husband to dispositions of her heritable property, unless his *jus administrationis* has been excluded.[7] The Married Women's Property Act, 1881 (44 & 45 Vict. c. 21, s. 2), makes no difference in this respect, because, while it removes the *jus mariti* and *jus administrationis* of the husband (in marriages contracted after the Act) from the rents and produce of the heritable estate, it leaves the estate itself subject to his *jus administrationis*. When a bond is granted with the consent of the husband, it is effectual as a real security over the wife's estate, even although it is granted in security of advances made to the husband.[8] And as the personal obligation of a married woman who has no separate estate is, except in a few special cases, null, the bond should be granted by the husband and wife together, and the personal obligation should be undertaken by the husband alone.[9] When the *jus mariti* and *jus administrationis* of the husband are excluded, a married woman

[1] Bell, *Prin.* s. 2067.

[2] Bell, *Com.* i. 128; *Scott's Trs.* v. *Scott*, 1887, 14 R. 1043.

[3] *Scott's Trs.*, *supra*.

[4] Bell, *Prin.* s. 2096.

[5] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68, per Lord Pres. Inglis, at p. 74.

[6] Bell, *Prin.* s. 2098; *Jurid. Styles*, i. 403.

[7] *Bayle* v. *Crawford*, 1822, 1 S. 372.

[8] Stair, i. 4. 16; Fraser, *Husband & Wife*, i. 809; *Ellis* v. *Keith*, 1665, M. 5987; *Brown* v. *Bedwell & Yates*, 1830, 9 S. 136.

[9] Bell, *Prin.* s. 1611–12; *Jurid. Styles*, i. 403, and form there given.

can deal with her separate estate as freely as if she were single, and can therefore grant heritable securities without the consent, and even against the will, of her husband.[1] And it would seem that, in the modern law, her personal obligation, incurred with reference to such separate estate, is binding upon her.[2] A husband, even in cases where his *jus mariti* and *jus administrationis* exist to their full extent, cannot alienate or burden his wife's heritable estate, except for the period of his own lifetime.[3]

(4) Of trustee.

A trustee may grant a heritable security over the trust estate in virtue of express power in the trust deed; or if he obtains the authority of the Court, which will be granted only if the proposed transaction be not inconsistent with the purposes of the trust; or if he obtains the consent of all the beneficiaries, and they are all of full age and capable of acting.[4]

(5) Of corporation.

The power of a corporation to grant a heritable security will depend upon whether the power to borrow is provided, or fairly implied, in the deed or charter by which the corporation is constituted, and whether its heritable property is held on a title which expresses or implies a power of alienation.

(*a*) Company under Companies Acts.

A company registered under the Companies Acts has power to grant heritable securities, if such an act is in the ordinary scope of its business, in the absence of any express limitation or prohibition in the Memorandum or Articles of Association.[5] Such a power will, as a rule, be exercised by the directors. But as the power of the directors to borrow is frequently subject to a limit, a lender on heritable security should invariably make inquiries. Where the company is not a trading company, the power to borrow money or to grant a heritable security is not so easily implied, the test being whether, on a fair construction of the Articles of Association, such a power was intended to be exercised.[6] If the power to borrow does not exist, a heritable security is *ultra vires*, not only of the directors, but of the company itself, and the sanction of a general meeting, whether before or after the bond is granted, would not make it valid.[7] Thus, even if debentures are

[1] More, *Notes to Stair*, p. 17; Fraser, *Husband & Wife*, i. 814.

[2] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470, per Lord Shand, at p. 481; *Burnett* v. *British Linen Co.*, 1888, 25 S. L. R. 356; *Henderson* v. *Dawson*, 1895, 22 R. 895.

[3] Fraser, i. 811.

[4] 30 & 31 Vict. c. 97, s. 3.

[5] See Buckley, *Comp. Acts*, 6th ed. p. 164. See also, on the general power of a corporation to borrow, *infra*, Chapter XVIII.

[6] *Ashbury Co.* v. *Riche*, 1875, L. R. 7 (H. L.) 653; *Wenlock* v. *River Dee Co.*, 1885, 10 App. Cas. 354.

[7] *Blackburn Society* v. *Brooks*, 1885, 29 Ch. Div. 902; *Ex. p. Watson*, 1888, 21 Q. B. D. 301.

issued in accordance with a resolution passed at a general meeting of the company, and heritable security is granted for them, their validity will nevertheless depend upon the power of the company to borrow money.[1] Further, the validity of the debentures, as a preferential right over the subject conveyed as a security for them, will depend upon that conveyance being properly carried out. It has been decided that an assignation of corporeal moveable subjects to a trustee for debenture holders was of no avail if not completed by delivery;[2] and there would seem no reason to doubt that the same rule would apply in heritable subjects, and therefore that the title of the trustee for debenture holders must be properly made up. In particular, it is presumed, though the question has never arisen, that a bond and disposition in security, granted by a company in security of its debentures, must be for a definite amount, and would secure those debentures only which were granted before infeftment was taken upon it.[3] By the Companies Act, 1862 (25 & 26 Vict. c. 89), it is provided (s. 43) that the company shall keep a register of all mortgages. On this section it has finally been decided in the House of Lords, after several conflicting decisions had been given in inferior courts in England, that a failure to register will subject the officials to penalties, but will not affect the validity of the mortgage.[4]

(*b*) Company under Private Act.

In the case of companies formed under private Acts of Parliament, the power of borrowing, and the nature of the security they can grant, depend upon the terms of the Private Act; as a company provided by Statute for public purposes has no power to borrow money unless the Legislature intended to confer that power.[5] Where the power to borrow is given, the provisions of the Companies Clauses Act, 1845 (8 & 9 Vict. c. 17), are usually incorporated. That Act provides for issue of perferential mortgages and bonds, on the security of the undertaking, the tolls, and the calls unpaid,[6] but has no provision for the issue of heritable securities. These must rest, if valid at all, on the express authority of the Private Act.[7] Such Acts are strictly construed. Thus where a

[1] *Blackburn Society, supra.*

[2] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[3] As to the general application of this rule, see *infra*, p. 69.

[4] *Wright* v. *Horton*, 1887, 12 App. Cas. 371. An unregistered mortgage, though held by a director, sustained.

[5] *Scottish Drainage and Improvement Co.* v. *Campbell*, 1887, 15 R. 108; affd. 1889, 16 R. (H. L.) 16; *Wenlock* v. *River Dee Co.*, 1885, 10 App. Cas. 354.

[6] Secs. 40, 48. As to such securities, see Chapter XVIII.

[7] Such a power must be exercised strictly. Thus where a specified form of assignment was provided, in an

Railway Company was authorised to borrow money on the security of the undertaking, and to "assign" the railway and works, it was held that a creditor under a bond in the statutory form had no power to sell the railway or works, as no power of sale was expressed or necessarily implied.[1] And where the heritable property of the company is of a nature dedicated to public uses, such as a harbour, or, probably, a railway, an assignation or conveyance thereof in security would seem to be of no effect whatever, as a private creditor could not sell or adjudge property intended for public uses. Thus where harbour trustees issued bonds in accordance with several private Acts of Parliament, and in some of these bonds "the works and property of the trust" were disponed in security, while others contained no such disposition, it was held that these words did not confer any special rights on the bondholders, and that the bonds which contained them had no preference over those which did not.[2]

(c) Royal burgh.

A royal burgh can alienate or feu the lands belonging to it, and can borrow money on the security of the common good, and therefore is probably entitled to grant a heritable security.[3] But the property of a royal burgh is of two classes—that which is set apart for public uses, such as council buildings, churches, and greens, links, or parks, dedicated, by charter or immemorial usage, for the general use and enjoyment of the inhabitants; and that which is used as a source of public revenue, but over which the inhabitants have no special rights.[4] A security over the former class of property would not entitle the creditor to attach it by diligence; and would not probably give him any preference over other creditors, because the magistrates, in relation to such property, are in the position of trustees for the inhabitants, and have no power to alienate it.[5] But when the burgh possesses heritable

Act establishing a harbour trust, and the trust became insolvent, it was held that a receipt and undertaking to grant an assignment did not form a good security — *Greenock Harbour Trustees*, 1888, 15 R. 343. And see Chapter XVIII.

[1] *Dundee Union Bank* v. *Dundee & Newtyle Rwy. Co.*, 1844, 6 D. 521.

[2] *Greenock Harbour Trustees*, 1888, 15 R. 343.

[3] Ross, *Lectures*, i. 85. 9. *Archbp. of St. Andrews* v. *Mags. of Glasgow*, 1685, M. 2496; *Royal Burgh of Renfrew* v. *Murdoch*, 1892, 19 R. 822. By the Municipal Corporation Act, 1835 (6 & 7 Will. IV. c. 104, s. 94), an English borough cannot "sell, mortgage, or alienate" its "lands, tenements, or hereditaments," unless in pursuance of an agreement made before 5th June 1835; but there is no corresponding provision in any Act applicable to Scotland.

[4] *Sanderson* v. *Lees*, 1859, 22 D. 24. Opinion of Lord Curriehill, p. 30.

[5] *Mags. of Kilmarnock*, 1776, 5 Brown's Supp. 406; *Beck* v. *Mags. of Lochmaben*, 1839, 1 D. 1212; *Sanderson* v. *Lees*, *supra*.

property which is let as a subject of revenue, and not specially dedicated to public uses, there seems no reason to doubt that the grantee of a bond and disposition in security over such subjects would obtain a security preferable to the ordinary creditors of the burgh; and would have the power to make his right effectual by real diligence or sale, or any other method competent to the grantee of a similar bond granted by a private individual.[1] But a security or bond of any kind, granted by the magistrates of a royal burgh, must, in order to affect the burgh or their successors, be preceded by an Act of Council made in that behalf; and any obligation undertaken without such an Act of Council will be void as against the common good of the burgh, without prejudice to the personal liability of the persons by whom it was granted.[2] And if a bond should be granted without adequate consideration, it would be reducible, as contrary to the fundamental rules relative to the administration of burgh property.[3]

(*d*) Burgh of regality or barony.

The magistrates of a burgh of regality or a burgh of barony have the same power of alienation as the magistrates of a royal burgh,[4] and, therefore, probably the same powers of granting heritable securities. The Act 3 Geo. IV. c. 91 does not apply to such burghs, and therefore it is not certain that an Act of Council would be necessary to the granting of a bond; but it would be prudent in a lender of money to insist upon such an Act.

(*e*) Local authority.

The various local authorities which have come into existence under modern legislation are usually authorised, in the Statutes by which they are founded, to borrow money on the security of the rates, but have no statutory power to grant heritable securities over any lands they may hold.[5] Thus a police burgh, a local authority under the Public Health Acts, a county council, or a parish council, would seem to have no power to burden any heritable property they may happen to possess.[6]

Title to grant heritable security.

So far the points discussed have related to individual or

[1] *Kerr* v. *Mags. of Linlithgow*, 1865, 3 Macp. 370. A royal burgh may be sequestrated under the Bankruptcy Act, 1856—see *Wotherspoon & Hope* v. *Mags. of Linlithgow*, 1863, 2 Macp. 348.

[2] Act 1693, c. 28; 3 Geo. IV. c. 91, s. 11.

[3] *Mags. of Selkirk* v. *Clapperton*, 1828, 6 S. 955, per L. J. C. Boyle, at p. 961.

[4] *Cathie* v. *Mags. of Musselburgh*, 1752, M. 2521; *Wilson* v. *Storry*, 1775, M. 2529.

[5] Local Authorities Loans Act, 1891 and 1893 (55 & 56 Vict. c. 34; 56 & 57 Vict. c. 8). See *infra*.

[6] 55 & 56 Vict. c. 55, ss. 374–6 (Police Burgh); 30 & 31 Vict. c. 101, s. 89; 38 & 39 Vict. c. 74, s. 3 (Local Authority); 52 & 53 Vict. c. 30, s. 67 (County Council); 57 & 58 Vict. c. 58, s. 28 (Parish Council.

corporate capacity to grant a heritable security. We proceed to consider the title of the granter of a security.

Generally, any form of heritable property may be conveyed in security.

It may be stated as a general rule, that any form of heritable property, unless it is *extra commercium*, like a title or a hereditary office, or is a liferent out of land duly declared alimentary, may be utilised by the owner as the subject of a security. But the nature of the right held by the granter, and the state of his title, may involve some specialty in the constitution of the security, or may place some difficulty in the way of the completion of the right of the security-holder. The cases which require special examination are those of a security granted by (1) the owner of a superiority, (2) the creditor in a bond and disposition in security, (3) an heir of entail, and (4) a person with an incomplete or personal title to land.

(1) Superior.

The owner of a superiority may convey it in security, either by a bond and disposition or by a disposition *ex facie* absolute. In either case such a security will give the person in right thereof a good title to uplift the feu duties;[1] but the latter form of security alone, by investing the creditor with the title of the proprietor, will confer upon him the right to raise a declarator of irritancy *ob non solutum canonem* against the vassal.[2] In questions with the vassal, the security holder is simply the assignee of the superior, and any defence good against the superior will be good against him.[3]

(2) Creditor in heritable security.

The creditor in a bond and disposition in security, or in a real burden which consists of a pecuniary obligation, or in an *ex facie* absolute disposition with a back-bond, may grant a heritable security over the right thus vested in him. He is, of course, also entitled to assign his right. But if, instead of an assignation, he grants a disposition in security, the deed will be subject to the same rules as an ordinary security over land. In particular, the sum for which it is granted must be specifically stated, on pain of nullity.[4]

(3) Heir of entail.

The powers of an heir of entail to grant heritable securities require more particular consideration. It would appear most conducive to clearness to treat the matter historically, commencing with the Act 1685, c. 22. Before the passing of that

[1] *Home* v. *Smith*, 1794, M. 15077. He is not, however, entitled to bring an action of maills and duties against the tenants of the subjects—*Prudential Assurance Co.* v. *Cheyne*, 1884, 11 R. 871.

[2] *Campbell* v. *Bertram*, 1865, 4 Macp. 23.

[3] *Arnott's Tr.* v. *Forbes*, 1881, 9 R. 89.

[4] *Stein's Crs.* v. *Newnham, Everitt, & Co.*, 1793, M. 14127.

Act many attempts had been made, in granting dispositions, to protect the lands from the diligence of the creditors of the disponee, and to preserve them in a particular order of succession. Into these attempts it is not necessary to enter, as the modern law of entail practically dates from the Act. It was thereby provided, in effect, that the requisites of a valid entail were, that a conveyance of lands or other heritages, containing irritant and resolutive clauses, whereby the disponee and the succeeding heirs should be forbidden to sell or dispone such land, to alter the order of succession, or to contract debt whereby the lands might be apprised, adjudged, or evicted from the other substitutes, should be judicially produced before the Lords of Session, and recorded in a register to be kept for that purpose; and that the prohibitions and irritant and resolutive clauses should be inserted in all procuratories of resignation, charters, precepts, and instruments of sasine relating to the lands. The effect of such an entail being so recorded was declared to be that, on any contravention of the prohibitions, the next heir might, immediately upon contravention, pursue declarator thereof, and serve himself heir to him who died last infeft, and did not contravene, without necessity, any ways to represent the contravener.

Security over life interest of heir of entail.

Under this Statute an heir of entail, having only an interest in the estate during his life, and no power to dispose of the fee, had in general no means of granting effectual heritable securities; as the granting of securities affecting the fee would have been a contravention of the fetters of the entail, and they would not have been effectual against the next heir irritating the granter's right.[1] But it was held that it was not a contravention for an heir of entail to grant a heritable security over his own interest, which would entitle the creditor therein to enter into possession and uplift the rents during the lifetime of the granter, but would not give him any right over the fee.[2] Such a security is still not uncommonly granted by heirs of entail, and is usually combined with an assignation of policies of insurance on the life of the granter.

Security under express powers in particular entail.

Again, in many entails the prohibition against contracting debt was modified by a clause giving power to the heir in possession to charge the fee of the estate with provisions for his wife or younger children. In order to be effectual, such a power must, apart from recent Statutes, appear in the original deed of entail; but if it is inserted there, its exercise is not considered a contravention of the fetters of the entail. Such provisions were commonly restricted

[1] Bell, *Prin.* ss. 1731, 1761.

[2] *Nairne* v. *Gray*, 15 Feb. 1810, F. C. See form of bond in *Jurid. Styles*, i. 469.

to a rent charge, but where no such restriction on their exercise appeared, they might be secured by a bond and disposition in security, which would entitle the creditor to attach the fee of the estate.[1]

Security by entailer, if himself institute.

If the maker of the entail is himself the institute, and as such possesses the estate under the entail, it is conceived that he can grant heritable securities affecting the fee, provided that the making of the entail was a gratuitous act on his part. For in such a case the fee of the estate may be attached for his debts, though contracted after the date of the entail, on the principle that the owner of an estate cannot gratuitously tie it up, so as to hold the fee of the estate and yet exclude it from the diligence of his creditors.[2] It is doubtful, however, whether this would apply to a formal bond and disposition in security granted after the entail, as the creditor therein has notice from the records of the existence of the entail, and might be barred from maintaining that his bond affected the fee; and it is only where the entail is gratuitous that the lands remain subject to the diligence of the posterior creditors of the entailer. If the entail is granted for onerous causes, for instance in fulfilment of an obligation contained in a contract of marriage,[3] the restrictions will affect the entailer, and debts contracted by him, after the entail is recorded and infeftment taken upon it, cannot affect the fee.[4] Again, if the maker of the entail disposes of the fee, and possesses the estate on a reserved liferent, debts afterwards contracted by him will not affect the fee.[5] But until infeftment is taken on the entail, the fee of the estate may be attached for debts of the entailer, the preference of such debts depending on their being made real before infeftment is taken on the entail.[6] Before such infeftment the entailer holds under the old fee simple investiture.

Securities under statutory powers.

The practical inconveniences caused by the strict fetters of the law of entail as contained in the Act 1685, c. 22, have led to the passing of a long series of Statutes, all tending to enlarge the

[1] See the cases on such powers in Rankine, *Landownership*, 3rd ed., p. 618–23; *Duchess of Richmond* v. *Duke of Richmond*, 1837, 16 S. 172; *Jurid. Styles*, i. 405.

[2] *Dickson* v. *Cunninghame*, 1786, M. 15534; 1829, 7 S. 503; affd. 1831, 5 W. & S. 657.

[3] *Houston* v. *Schaw*, 1715, M. 15572; Robertson's Appeals, 203.

[4] *Vans Agnew* v. *Stewart* (*Sheuchan* case), 1784, M. 15435, revd. 1822, 1 Sh. App. 320. The distinction between this case and *Dickson* v. *Cunninghame* (*supra*) is elaborately drawn in the opinion of the Lord Chancellor.

[5] *Gordon* v. *Dewar*, 1771, M. 15579. Opinion of Lord Braxfield quoted by Lord Chancellor (Eldon) in *Agnew* v. *Earl of Stair*, 1822, 1 Sh. App. 333, at p. 351.

[6] *Vans Agnew* v. *Stewart*, 1784, M. 15435; revd. 1822, 1 Sh. App. 320.

powers of an heir of entail in possession.[1] The general effect of these Statutes has been to confer upon almost every heir of entail in possession, if of full age, and not subject to any legal incapacity, the power to acquire the estate in fee simple, by application to the Court for authority to disentail, and, in certain cases, by payment of the value of the interest of those other heirs whose consent is necessary. But, regarded from the point of view of the power of the heir of entail to grant heritable securities, the relaxations contained in these Statutes may be considered under three heads—

Summary of power to grant security:

(1) The power to burden the estate by granting bonds for certain specified purposes, such as entailer's debts, or provisions for the widow or younger children of the heir in possession.

(2) The power to burden the estate for improvement expenditure.

(3) The general power to burden the estate, on obtaining, or valuing, the consents which would be necessary to a disentail.

(1) As provisions for wife and children.

(1) The power to grant provisions for the wife and children of the heir in possession was first conferred by the Aberdeen Act,[2] which is held to be incorporated in all subsequent entails.[3] By that Act an heir of entail in possession is entitled to grant to his wife a provision amounting to a liferent of a third of the free rent,[4] or an heiress to her husband, a liferent annuity of one-half of the free rent.[5] Provisions to younger children may be granted, to an extent not exceeding one year's free rent for one child, two years' free rent for two children, and three years' free rent for three or more children.[6] These have remained the limits of the amount which may be granted; but the right of granting these provisions for wife and children has been extended to the heir-apparent, with consent of the heir in possession,[7] and the children of predeceasing children have been rendered entitled to their parent's provision.[8] The methods by which these provisions can be secured have, however, been considerably altered. By the Aberdeen Act the succeeding heir was bound to pay provisions granted by his predecessor within one year of the death of the granter. If thereafter such provisions were not paid

[1] The Entail Statutes are printed, with notes, in the Appendix to Rankine on *Landownership*, 2nd ed.

[2] 5 Geo. IV. c. 87.

[3] *Callendar* v. *Callendar*, 1869, 7 Macp. p. 786, per Lord Pres. p. 787, and Lord Deas, p. 788; Entail Amend. Act, 1868 (31 & 32 Vict. c. 84, s. 8).

[4] Aberdeen Act, s. 1.

[5] *Ib.* s. 2.

[6] *Ib.* s. 4.

[7] 31 & 32 Vict. c. 84, s. 6.

[8] 38 & 39 Vict. c. 61, s. 10; and 41 & 42 Vict. c. 28, s. 3.

within three months after a demand had been made for them, the person in right thereof might institute an action in the Court of Session to compel payment; and on decree being given in such an action, might use any diligence competent to an ordinary creditor, with the exception of adjudication.[1] This method is still competent, but is obsolete in practice. By the Rutherfurd Act, provisions to children may be made charges on the estate (except the mansion-house, offices, and policies) by granting, under the authority of the Court, a bond and disposition in security, with a power of sale in ordinary form.[2] Such a bond may, under a provision in a later Act, be granted to anyone who advances the money.[3] But as it is the duty of each heir to pay the interest on the debts affecting the estate as it falls due, the creditor in a bond of this kind cannot attach the estate for more than the principal sum and two years' arrears of interest, though he has recourse against the heir in possession personally for any further arrears.[4]

Entailer's debts.

Entailer's debts, *i.e.* debts contracted by the entailer, for which the estate is liable to be adjudged, may, under the authority of the Court, be charged on the estate by an heir in possession in the same way as children's provisions.[5]

(2) For improvement expenditure: (*a*) Under Montgomery Act.

(2) The first relaxation of the fetters of an entail was devised in order to enable an heir of entail in possession to lay upon succeeding heirs some part of the expense incurred by him in executing improvements on the estate. By the Montgomery Act, 1770, an heir of entail in possession, who has executed certain improvements (commonly called Montgomery improvements) on the estate, is declared to be a creditor of succeeding heirs of entail for three-fourths of the sum so expended,[6] provided that that amount does not exceed four years' free rent of the estate, and that certain specified notices are given.[7] Similarly, an heir of entail in possession who lays out money in building or repairing a mansion-house and offices on the estate, is declared to be a creditor for three-fourths of the amount so expended, if that does not exceed two years' free rent.[8] These

[1] Aberdeen Act, s. 9.

[2] 11 & 12 Vict. c. 36, ss. 21, 23, 33; and 16 & 17 Vict. c. 94, s. 23 (power of sale). Form in *Jurid. Styles*, i. 443.

[3] 16 & 17 Vict. c. 94, s. 7.

[4] Rutherfurd Act (11 & 12 Vict. c. 36, s. 22).

[5] 31 & 32 Vict. c. 84, s. 11. As to what are entailer's debts, see *Fraser* v. *Lord Lovat*, 1875, 12 S. L. R. 399.

[6] 10 Geo. III. c. 51, ss. 9, 10. As to what are "Montgomery Improvements," see Rankine, *Landownership*, p. 939, and cases there cited.

[7] *Ib.* ss. 10, 11, 12, 14.

[8] *Ib.* ss. 27, 28.

debts may be constituted against the succeeding heirs by an action of declarator brought by the heir in possession, after making such improvements. Alternatively, on the expiry of a year after the death of the heir who has made the improvements, the person who has right to the claim, by succession, gift, or bequest, may demand payment from the next heir in possession, and, if he fails to obtain payment within three months, may bring an action in the Court of Session, decree in which shall entitle the pursuer to use any ordinary diligence except adjudication, and shall give him a special right over the rents, preferable to that of any creditor of the heir in possession.[1]

(*b*) Under recent Statutes.

The list of improvements which may be made a charge against succeeding heirs has been enlarged by the Acts of 1848 and 1875, and a simpler form of charging the estate has been provided in proceedings under these Acts. As the law now stands, an heir of entail in possession who has executed improvements on the estate may, under the authority of the Court of Session or Sheriff Court,[2] execute either (1) a bond of annual-rent for the whole sum expended, binding himself and succeeding heirs of entail to pay, for twenty-five years, interest at a rate not exceeding £7, 2s. per cent. per annum;[3] or (2) a bond and disposition in security for three-fourths of the sum so expended.[4] Where money has been borrowed for improvements upon a terminable rent charge, and the heir in possession has defrayed one-fourth of the capital sum of such rent charge, he may, with the consent of the creditor, substitute a bond and disposition in security for the remainder of such capital sum.[5]

(*c*) With consents of next heirs. Heir may now burden on obtaining the consents requisite for disentail.

(3) By the Rutherfurd Act, 1848 (11 & 12 Vict. c. 36, s. 4), and the Entail Act, 1882 (45 & 46 Vict. c. 53, s. 4), power has been conferred on an heir of entail in possession, if of full age, to burden his estate by application to the Court, on the same conditions which would entitle him to disentail. These conditions, depending as they do on these and several other supplementary Statutes, are somewhat complicated. The leading practical distinction is between those cases where nothing but the formal authority of the Court is required, and those cases where the consent of the nearest heir or heirs must be obtained, or

[1] 10 Geo. III. c. 51, ss. 15, 30.

[2] Entail Act, 1882 (45 & 46 Vict. c. 53, s. 5).

[3] 38 & 39 Vict. c. 61, s. 8; and 41 & 42 Vict. c. 28, s. 3.

[4] Entail Amendment Act, 1875 (38 & 39 Vict. c. 61), ss. 7, 8. Form in *Jurid. Styles*, i. 440.

[5] Entail Amendment Act, 1875 (38 & 39 Vict. c. 61), s. 7, amended by Entail Act, 1882, s. 6, subs. 1. Form in *Jurid. Styles*, i. 436 and 464.

valued and dispensed with. This depends on whether the heir in possession was or was not born before the date of the entail; or, in the case of what are known as "old entails," *i.e.* entails dated before 1st August 1848, on whether the heir was or was not born before that date.

Power to disentail. Heir born after 1st Aug. 1848, or after date of entail.

Where an entail is dated before 1st August 1848, and the heir in possession was born after that date, he may disentail, on application to the Court of Session, without the consent of any other heir, provided that he is of full age and not subject to any legal incapacity.[1] Where the entail is dated after 1st August 1848, the heir in possession has the same unrestricted right to disentail, if he was born after the date of the entail.[2]

Heir born before 1st Aug. 1848, or before date of entail.

If the heir in possession under an old entail (*i.e.* one dated before 1st August 1848) was born before that date,[3] or if an heir in possession under a new entail (*i.e.* one dated after 1st August 1848) was born before the date of the entail,[4] the consents of the nearest heirs are required to enable him to disentail. These consents, any of which suffice, are: (1) The consent of the heir-apparent, if born after 1st August 1848 (old entails), or after the date of the entail (new entails). (2) The consent of all the other heirs in existence. (3) The consent of the three nearest heirs. (4) The consent of the heir-apparent, and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heir-apparent.[5] In order to give consent the nearest heir, in each of these three cases, must be twenty-one years of age, and not subject to any legal incapacity.[6] But in every case it is lawful for the Court, on the petitioner's motion, to value the interest of any heir whose consent is necessary, and to dispense with his consent on payment of his interest as thus valued; and this is, in practice, the method usually adopted, especially where the next heirs are minors represented by curators *ad litem*, who do not wish to incur the responsibility of consenting.[7] Thus the result of these Statutes is that any heir in possession, who is of full age and not subject

[1] Rutherfurd Act, 11 & 12 Vict. c. 36, ss. 1 and 2.

[2] *Ib.* s. 2.

[3] *Ib.* s. 3.

[4] Entail Act, 1882 (45 & 46 Vict. c. 53, s. 3).

[5] 11 & 12 Vict. c. 36, ss. 1 and 3; 45 & 46 Vict. c. 53, s. 3. An heir-apparent is defined as "the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." In all ordinary cases, therefore, it means the eldest son of the heir in possession (Rutherfurd Act, s. 52).

[6] 11 & 12 Vict. c. 36, s. 3; 38 & 39 Vict. c. 61, s. 4.

[7] 38 & 39 Vict. c. 61, ss. 5 and 6; 45 & 46 Vict. c. 53, s. 13.

to any legal incapacity, may, on application to the Court, burden his estate by granting heritable securities, though in certain cases it may be necessary for him to compensate the expectant interest of other heirs of entail before he can obtain authority to do so.[1]

Securities by heir of entail not challengable after two years.

The validity of any bond and disposition in security, or bond of annualrent, granted under the provisions of the Entail Acts, depends on the granter having a proper right to grant it, and upon the necessary procedure being strictly carried out. But it is provided that any judgment of the Court allowing any instrument of disentail, disposition, bond and disposition in security, or other deed, granted under the authority of the Court in terms of the Act of 1882, where the judgment of the Court allowing it has not been brought under review by an appeal to the House of Lords, or an action of reduction has not been brought within the time allowed for such appeal (two years), shall no longer, as regards third parties dealing *bonâ fide* on the faith thereof, be reducible in respect of any irregularity or non-compliance with the provisions of the Act.[2]

Powers of creditors to affect entailed estate.

Provision is made by the Entail Acts to enable creditors of an heir in possession, whether their debts are heritable or personal, to render the estate available for their payment, whenever the heir in possession is entitled to disentail. Where the heir is entitled to disentail without any consents, his creditors may affect the estate for payment of debts, and have the same right therein, as if an instrument of disentail had been duly executed and recorded.[3] In the case where consents are necessary, any creditor, whose debt has been incurred after 18th August 1882, may, after having obtained decree for his debt, and charged for payment, apply to the Court of Session, on the expiry of six months without payment. The Court, if such debt is not paid within three months after the application, shall order intimation

[1] An heir of entail is restricted from disentailing if he is married and has secured the descent of the estate to his children by provisions in his marriage contract, until a child of the marriage capable of taking the estate under these provisions is born, or until the marriage is dissolved, unless the marriage contract trustees shall consent (Rutherfurd Act, s. 8; Entail Act, 1882, s. 17). This restriction does not in terms apply to burdening the estate with debt, but this may be implied.

[2] Entail Act, 1882 (45 & 46 Vict. c. 53, s. 29. A similar provision is made regarding deeds granted under the Rutherfurd Act and the Act of 1853, by 16 & 17 Vict. c. 94, s. 24. It is liberally construed *Viscount Fincastle* v. *Earl of Dunmore*, 1876, 3 R. 345.

[3] Rutherfurd Act (11 & 12 Vict. c. 36, s. 11); Entail Act, 1882 (45 & 46 Vict. c. 53, s. 3).

to those heirs whose consent to a disentail would be necessary, obtain or value and dispense with their consents, ordain the heir in possession to grant a bond and disposition in security over the estate for the value of the interest or expectancy, and, if he refuses or fails to do so, authorise the Clerk of Court to grant such a bond; and thereafter ordain the heir in possession to execute an instrument of disentail, or if he refuses or fails to do so, shall grant authority to the Clerk of Court to execute such instrument. Thereupon, after provision is made for those creditors whose debts are secured upon the estate, the creditor aforesaid shall be entitled to attach the estate for his debt, and shall have the same right therein as if an instrument of disentail had been executed and recorded by the heir in possession.[1] The trustee in the sequestration of the heir in possession, if he is sequestrated for debts incurred after 18th August 1882, may force a disentail by the same procedure. It is an undecided point whether a creditor is entitled, without this procedure, and without regard to the date at which his debt was incurred, to compel an heir of entail to take steps to disentail the estate, on the ground that the fee of an entailed estate is a lucrative subject, which the heir has the option or faculty of making available to his creditors, and which, therefore, the creditors are entitled to insist on being brought within their diligence.

(4) Person with incomplete title.

Finally, a security may be granted by a person who has a right to lands in fee simple, and is, in every ordinary sense of the word, their owner, but who has not completed a feudal title. The want of such a title does not, indeed, limit the right of the owner to convey the lands in security, but it renders it necessary for the security-holder to adopt exceptional methods of completing his title. In this connection two cases must be distinguished: (1) Where the title of the granter is merely a *jus crediti*, or right to demand a conveyance from a third party; and (2) where the granter has a complete personal title to the lands, but is not infeft. The distinguishing point would seem to be that in the first case the intervention of a third party is necessary before the title of the granter can be completed; in the second case he has it in his power to complete his title without the intervention of anyone else.[2]

(*a*) Where right of granter is merely *jus crediti*.

(1) Cases of the former class occur where a security is granted by a person whose right stands on missives of sale, not followed

[1] Entail Act, 1882 (45 & 46 Vict. c. 53, s. 18).

[2] See opinion of Lord Cranworth in *Edmond* v. *Mags. of Aberdeen*, *infra*, 3 Macq., at p. 122.

by any conveyance;[1] or by one whose feudal title is open to some fatal objection;[2] or by a beneficiary who has a right to demand a conveyance from trustees.[3] In all these cases the right of the granter of the security is a mere *jus crediti*, or right to demand a conveyance from some third party: in the first case, from the seller; in the second case, from the author of the defective title; in the third case, from the trustees. Therefore a heritable security granted in such a state of the title can only place the security-holder in the position of an assignee of a *jus crediti*. It cannot give him a real right over the lands, for the granter has none to bestow. But if the security-holder records the bond in the appropriate Register of Sasines, he will obtain an effectual preference on a question with the granter, his personal creditors, trustee in bankruptcy, or anyone deriving right from him.[4] For as the right conveyed in security is only a *jus crediti*, the right of the security-holder may be completed, as in other assignations of incorporeal subjects, by intimation. It has been held that, in this connection at least, registration in the Register of Sasines is equivalent to intimation;[5] and therefore, on recording his bond, the security-holder, although he has no real right, or *jus in re*, in the subjects, has yet completed a preferable claim over the right of the granter to obtain such a *jus in re*. The same result would follow if the security-holder should intimate his right to the debtor in the obligation conveyed to him, *i.e.* to the person who is bound to grant the conveyance. Thus in *Edmond* v. *Mags. of Aberdeen*, A. was infeft in lands on a title which was admitted to be bad, and to create no more than a right to demand a valid conveyance from the superior. He granted a bond and disposition in security to B., which was duly recorded in the Register of Sasines. Thereafter he was sequestrated, and the trustee brought an action of implement against the superior, concluding that he should be ordained to grant a valid and feudal title to him as trustee. B., the bondholder, compeared, and objected to any such title being granted, except under the reservation of the preferable right of his bond and disposition in security. It was held that the right vested in A. was a mere *jus*

[1] *Strachan* v. *Whiteford*, 1776, M. App. *voce* Adjud. No. 7.

[2] *Edmond* v. *Mags. of Aberdeen*, 1855, 18 D. 47; affd. 1858, 3 Macq. 116.

[3] *Watson* v. *Wilson*, 1868, 6 Macp. 258; *Paul* v. *Boyd's Tr.*, 1835, 13 S. 818.

[4] *Gillespie's Real Creditors* v. *Personal Creditors*, 1764, M. 2860; *Edmond* v. *Mags. of Aberdeen*, 1855, 18 D. 47; affd. 1858, 3 Macq. 116.

[5] Bell, *Prin.* s. 1465; *Paul* v. *Boyd's Trs.*, 1835, 13 S. 818; *Edmond* v. *Mags. of Aberdeen*, *supra*.

crediti, and not the *jus ad rem* which is known as a personal right to lands; that this *jus crediti* was transmissible by assignation; that the bond and disposition in security duly recorded in the Register of Sasines was equivalent to an intimated assignation; and therefore that B., the creditor in that bond, was preferable to the trustee in sequestration.[1] It may be inferred as a corollary from this case, that if the creditor in a bond and disposition in security granted in such a state of the title failed to record it, or to intimate to the superior (which he would be unlikely to do), he would be in the position of the holder of an unintimated assignation, and would therefore have no preference in the sequestration of the granter.

Means by which grantee may then complete his title.

Although the grantee of a bond and disposition in security granted by a person who has a mere *jus crediti* in lands may thus secure himself from the danger of being cut out by any posterior act of the granter, he has, nevertheless, a very imperfect security. As he has no real right in the lands, he cannot use real diligence, nor could he, in selling, grant a title which any purchaser would accept. And he is exposed to the risk of having his right defeated by any subsequent disposition granted by the person who is infeft in the lands, and who therefore has the right, feudally speaking, to dispose of them, though as a matter of contract he may be bound to convey them to the granter of the security. It is a principle essential to the maintenance of the system of recorded titles to land that a purchaser, buying in good faith and in reliance on the records, has no concern with any personal right granted by the seller which does not appear on the record, and takes a title free from any such personal right. Thus if A., whose rights stand on missives of sale granted by B., should grant a heritable security, that security would be subject to any posterior right granted by B. to an onerous and *bonâ fide* third party, and duly made real; because that third party would be preferable to his author, A.

Adjudication in implement.

It is therefore important for a security-holder, who has accepted a bond from a person who has only a *jus crediti* in lands, to take steps to render his right real, by completing his own or his author's title. If the title of the granter of the security is afterwards completed, the defect in the title of the grantee will be cured by accretion. It is now settled that accretion takes place even where the granter of a disposition of lands had no right to the lands at all at the date of granting; *à fortiori*, it will take

[1] *Edmond* v. *Mags. of Aberdeen*, 1855, 18 D. 47; affd. 1858, 3 Macq. 116.

place where his right stands upon a *jus crediti*.[1] But if, from the death of the granter, or from any other reason, it is impossible that his title should be completed, the grantee of the security can complete his own title by an action of adjudication in implement directed against the person last infeft in the lands.[2] A bond and disposition, or other security, invariably contains an assignation to writs, which entitles the creditor therein to enforce the *jus crediti* which the granter possessed. The case of *Strachan* v. *Whitefoord*[3] at first sight appears to contradict this statement. There the grantee of a bond of annualrent, granted by one whose right stood upon missives of sale, attempted to complete his title by an action of adjudication in implement directed against the person who had granted the missives of sale, and was still infeft in the lands. This was held to be inept; but it has since been explained that the only ground upon which the judgment can be supported is that the bond of annualrent was a form of security which contained no disposition of the lands, and therefore no right to adjudge them.[4] So, notwithstanding this decision, it is now clear that an adjudication in implement directed against the person last infeft, or his heirs, is the proper means by which the creditor may complete his title. Such an adjudication is competent, even where the title of the pursuer is only a right in security. The conclusions of the summons, however, should be that the lands be conveyed heritably and irredeemably to the adjudger; that is, that they should be conveyed irredeemably from the person against whom the action is brought. They continue to be redeemable by the person who granted the security. In the case of *Macgregor* v. *Macdonald*,[5] indeed, it was sought to have the lands conveyed heritably but redeemably to the security-holder. But this was due to the specialty that the heir of the person last infeft, against whom the action was therefore brought, happened also to be the representative of the granter of the security. In a later case, where this specialty did not occur, the conclusions were for adjudication heritably and irredeemably. There trustees were directed to convey lands to A. upon the death of a liferenter. A. predeceased the liferenter, but it was not disputed that the right had vested in him. A creditor of his, B., adjudged the *jus crediti* from his heir,

[1] *Swan* v. *Western Bank*, 1866, 4 Macp. 663; *Smith* v. *Wallace*, 1869, 8 Macp. 204.

[2] *Macgregor* v. *Macdonald*, 1843, 5 D. 888, 2 Ross's L. C. 489; *Watson* v. *Wilson*, 1868, 6 Macp. 258.

[3] 1776, M. App. *voce* Adjudication, No. 7.

[4] *Watson* v. *Wilson*, 1868, 6 Macp. 258.

[5] 1843, 5 D. 888, 2 Ross's L. C. 489.

and brought an adjudication in implement against the trustees. They objected that B., as an adjudger, had only a redeemable right, while the conclusions of the summons were for adjudication heritable and irredeemable. It was held that the conclusions of the action were rightly laid, and that the result of decree would be to convey the lands irredeemably from the trustees, but to leave them redeemable by the person having the ultimate right to them.[1] When decree in an adjudication in implement is obtained, the security-holder can make up his title by recording either the abbreviate of adjudication or an extract of the decree in the Register of Sasines.[2]

(*b*) Where granter has a personal right to land.

(2) A personal right to lands may be described as the status of one who is in a position to take infeftment, but who has not done so. It is the right of a man who has a disposition in his favour which he has not recorded, or of an heir who has not served. Beyond the general statement that it constitutes a *jus ad rem*, and not a *jus in re*, and yet is more than a mere *jus actionis*, it would be difficult to define it. If a person with a title of this order should grant a heritable security, the creditor cannot obtain infeftment by simply recording his bond. He will still be exposed to the risk of having his right defeated by, or postponed to, rights subsequently granted, but first made real. This may happen in two ways. First, the person who is infeft in the lands may grant a right over them in favour of a third party, who takes in good faith and for onerous causes; and if that right, though subsequent to the right of the granter of the security, is made real before it, it will be preferred to the right of the granter of the security, and therefore to the right of the grantee.[3] This is the ordinary risk to which all persons holding land on personal titles are exposed. Secondly, the granter of the bond, while his title is still personal, may grant a conveyance of the lands, or another heritable security over them; and it has been decided that if a person possessing lands on a complete personal title should grant two rights thereover, of which the latter is made real and the former is not, the latter will be preferred, as the criterion of preference is not the date of granting, nor of intimation, but the date at which the right is first made real.[4] In the same way it has been held that

[1] *Watson* v. *Wilson*, 1868, 6 Macp. 258.

[2] Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 65).

[3] Bell, *Prin.* s. 772; Menzies, *Conveyancing*, p. 654; Mont. Bell, *Conveyancing*, ii. 770; *Calder* v. *Stewart*, 1806, Hume, 440.

[4] Bell, *Prin.* s. 853; Menzies, *Conveyancing*, p. 654; cases *infra*; cf. *Auchincloss* v. *Duncan*, 1894, 21 R. 1091.

personal creditors obtaining a real right by adjudication, will be preferable to a heritable creditor while his right remains merely personal.[1] This was decided in the case of *Bell* v. *Gartshore*. There A. obtained decree in a judicial sale, but did not take infeftment. He granted a disposition and assignation to B., disponing the lands, and assigning the decree of sale. B., however, did not take infeftment. Thereafter a creditor of A. adjudged his right, and was infeft, by a charter of sale from the superior, and sasine thereon. It was held that he was preferable to B. It would seem doubtful whether, if the granter of the security, while his title was still personal, should be sequestrated, his trustee, by making up a feudal title, would be preferable to the security-holder whose right is still personal. It might be held that, as an adjudger, he had completed a preferable right; but an opinion in the negative has been given by Lord Cranworth, though unfortunately in terms which leave it open to question whether he had in view the case of a personal right or of a mere *jus crediti*.[2] Should the trustee, instead of completing a title in his own person, complete that of the bankrupt, it is clear that the title of the security-holder would thereby be validated by accretion, and would therefore be preferable.[3]

Means by which grantee may make up his title.

The title of a creditor whose bond is granted by a party holding merely a personal right may be cured by accretion if the granter is afterwards infeft, or by the creditor adopting the proper steps to procure his own infeftment. Should the title of the granter of the security be completed, the real right thus acquired will accresce to the holder of the security, in accordance with the brocard *jus superveniens auctori accrescit successori*.[4] Thus if a disposition were granted by an heir who had made up no title, and possessed on mere apparency, it would be held that on his subsequently making up his title the defect in the title of the disponee was cured.[5] And if two securities are granted by a person who is not infeft, and he afterwards takes infeftment, the right thus acquired accresces to both, and they are preferred *inter se* according to the dates of their own infeftment.[6] Thus in

[1] Mont. Bell, *Conveyancing*, ii. 770; *Bell* v. *Gartshore*, 1737, M. 2848, 2 Ross's L. C. 410; cf. *Laurie* v. *Laurie*, 1854, 16 D. 860.

[2] *Edmond* v. *Mags. of Aberdeen*, narrated *ante*, p. 30, per Lord Cranworth, at 3 Macq. p. 126.

[3] *Paterson* v. *Kelly*, 1742, M. 7775; 3 Ross's L. C. 304.

[4] Menzies, *Conveyancing*, p. 660; Bell, *Prin.* s. 882.

[5] *Glassford's Executors* v. *Scott*, 1850, 12 D. 893; *Smith* v. *Wallace*, 1869, 8 Macp. 204.

[6] *Paterson* v. *Kelly*, 1742, M. 7775; 3 Ross's L. C. 304; *Neilson* v. *Murray*, 1738, M. 7773.

Paterson v. *Kelly*, A., who was not infeft, granted a bond to B., and a subsequent bond to C. The latter took infeftment on his bond, but took no steps to procure the infeftment of A. Afterwards B. obtained another bond, and not only took infeftment on both bonds, but also procured the infeftment of A. The result of this procedure was held to be that the bonds both of B. and C. were made real by accretion, and that C., having the prior infeftment, was preferable to the postponed bond held by B. But accretion can only take place during the lifetime of the granter of the imperfect right, as infeftment taken by an heir would not accresce to the holder of a disposition granted by the ancestor.[1]

In considering the means by which the creditor in a heritable security granted by a party holding a personal right to lands can make up his own title, if it is impossible or inexpedient to make up that of the granter, a distinction must be drawn between a security granted by an heir who has made up no title, and one granted by a person who has a disposition in his favour, upon which he has not taken infeftment.

Where granter possesses as heir without service.

By the Conveyancing Act, 1874,[2] it is provided (s. 9): "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided that the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date; and such personal right shall, subject to the provisions of this Act, be of the like nature, and be attended with the like consequences, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance, according to the existing law and practice." Before this Act an heir took no vested or transmissible right by the death of his ancestor,[3] and the lands were not liable for his debts unless he was in possession for three years on apparency.[4] By this Act a right is created in the heir which he can undoubtedly convey in security, but it is not very clear how the title of the security-holder can be made up. Provision is indeed made in the Act for the completion of the title of a disponee from an heir in this position, by a petition to the Sheriff of Chancery, or to the Sheriff of the county in which the lands are situated, in the form of Schedule E; but this seems

[1] *Keith* v. *Grant*, 1792, M. 2933.
[2] 37 & 38 Vict. c. 94.
[3] Bell, *Prin.* preface to s. 1817.
[4] Act 1695, c. 24; Bell, *Prin.* s. 1929.

only to apply to the case of an absolute disposition granted by the heir, and not to a right in security. It would therefore, probably, be advisable for the security-holder, if the granter of the security were dead, to resort to an action of adjudication in implement directed against the heir of the person last infeft, and, on obtaining decree, to record an abbreviate of adjudication or an extract of the decree.[1]

Where granter is in right of unfeudalised conveyance.

Where a security is granted by a person in right of an unfeudalised conveyance, the security-holder may complete his title by the methods provided by the Consolidation Act, 1868. To enable him to do so he must have an assignation to writs; but as such an assignation is invariably inserted in every right in security, it seems hardly necessary to inquire how he should proceed without one. Assuming such an assignation, the security-holder, if the right of the granter is of the nature of a general disposition in his favour, may expede a notarial instrument in the form of Schedule L, setting forth the title of the granter and the title, or series of titles, by which he acquired right to it. The recording of this instrument in the Register of Sasines will complete his title.[2] If the right of the granter is an ordinary or specific disposition, it would then be proper to proceed under the 23rd sec. of the Act. Under this section the security-holder may either record the deed or conveyance in favour of the granter of the security, together with a notarial instrument in form of Schedule N, setting forth the deed or conveyance and the title, or series of titles, by which he acquired right to it; or he may expede and record a notarial instrument in the form of Schedule J, which should state generally the nature of the deed or conveyance, set forth fully those portions thereof containing real burdens or conditions, and recite the title, or series of titles, by which the security-holder acquired right to it.[3]

If for any special reason these methods should not be expedient or possible, the bondholder, it is conceived, should have recourse to an adjudication in implement directed against the person last infeft in the lands, or his heirs.

Effect on security of reduction of title of granter: Where title *ex facie* valid

It is not necessary to contemplate the case of a heritable security granted by a party without any title to the lands thereby conveyed, as such a case can hardly arise. But a heritable security may be granted by a person whose title is subject to some fatal defect, or is subsequently reduced. If the title of the granter of the security was good on the face of the records, and was not intrinsically null, it would seem that a heritable security

[1] See *ante*, p. 32.

[2] 31 & 32 Vict. c. 101, s. 19.

[3] *Ib.* s. 23.

would validly affect the lands even although the granter's title was reduced, provided that the security was granted for onerous causes, and was duly made real.[1] Thus in *Heron* v. *Stewart*, A., in his contract of marriage executed in 1668, agreed to provide the fee of all lands that he then had, or that he should acquire during the subsistence of the marriage, to the heirs of the marriage. In 1703 he was infeft in the estate of X. In 1719 he executed an entail of that estate in favour of himself and the heirs-male of his body, whom failing, the heirs-male of their bodies; whom failing, the heirs-female, and the heir-male of their bodies. On this entail he was infeft. In 1734 the heir, under the destination in the entail, who was infeft in the lands of X., granted a right in security over these lands, in pursuance of a prior onerous obligation. His title was afterwards reduced in an action at the instance of the heir under the contract of marriage. In a question with this latter heir, it was held that the security formed a real right over the lands, because the granter had, at the date of granting, a title which was valid on the face of the registers, and was only subject to the latent objection contained in the obligation in the contract of marriage.[2] On the same principle, a real right to lands granted by a person infeft on an *ex facie* absolute title is not affected by a latent back-bond of trust. If, however, the security was granted by a party who had a title good on the face of the records, but at the date of granting that title was under challenge by an action of declarator or other similar proceeding, the security would not be good in the event of the challenge of the granter's title being successful.[3]

Where title of granter is defective *ex facie* of the records.

When the defect in the granter's title is of such a character that a search in the registers would have revealed it, or where the title is *ex facie* limited, the security will not be good as a real right over the lands in the event of the title of the granter being reduced. Thus a testator disponed the lands of X. to A., under a provision whereby he declared that "in the event of A. dying without leaving any heir-male of his body" the lands were to "revert back to B." During the lifetime of A., B. made up a title by a notarial instrument proceeding on this disposition, which was registered on his behalf "in eventual fee." This title was ultimately reduced in an action at the instance of the testamentary trustees of A. In a question as to the obligations of a lessee in

[1] *Heron* v. *Stewart*, 1749, 3 Ross's L. C. 243; *Calder* v. *Stewart*, 1806, Hume, 440, 3 Ross's L. C. 248.

[2] *Heron* v. *Stewart*, 1749, 3 Ross's L. C. 243.

[3] *Wauchope* v. *Ferrier*, 1817, 3 Ross's L. C. 259.

a lease granted by B. while in possession under this title, Lord Trayner laid down that a person obtaining a real right from B. could not plead that he had obtained it from one having an *ex facie* good title, because the defect in B.'s title was patent on the face of it.[1]

Where title a nullity.

Again, if the title of the granter of a security, though *ex facie* valid, were afterwards reduced as fundamentally null,—if, for instance, it were founded on a deed which proved to be a forgery, or had been obtained by fraud, or extorted by force,—it is probable that the brocard *resoluto jure dantis jus accipientis resolvitur* would be held to be applicable, and that the security would not form a real right to the lands.[2] That maxim, according to Lord Kilkerran, holds only in three cases: (1) in extinguishable rights; (2) where the third party prevailing against the author has the preferable feudal right; or (3) where the author's right is intrinsically null, against which the records cannot save, as when his service happens to be erroneous.[3]

Form of security where granter acts in a representative capacity.

Certain specialties in the form of a heritable security may arise from the character in which the party in whose favour it is granted is acting. Thus if money is advanced on heritable security by testamentary trustees, the bond should set forth that the money has been advanced by them, and the obligation should be in their favour, as trustees.[4] If the bond is granted to a judicial factor, it should be in favour of the judicial factor and his successors in office, and his or their assignees;[5] if to a tutor, nominate or dative, it should be in favour of the ward, and his executors and assignees whomsoever, or to his heirs, excluding executors, as may be desired;[6] if to a *curator bonis* to a lunatic, it should be in favour of the lunatic and his executors and assignees whomsoever, or to his heirs, excluding executors.[7] And wherever a bond is granted to trustees or guardians, or other persons acting in a representative capacity, a clause should be inserted declaring that the borrower, on payment, should be fully exonered and discharged by a discharge granted by the trustees, guardians, or others, and should not be responsible for their application of the money.[8] And where money is advanced on heritable

[1] *Reid's Trs.* v. *Watson's Trs.*, 1896, 33 S. L. R. 443.

[2] See Baron Hume's note to *Calder* v. *Stewart*, 1806, Hume, 440, at p. 446.

[3] Note by Lord Kilkerran to *Heron* v. *Stewart*, 1749, quoted in 3 Ross's L. C. 248.

[4] Mowbray's *Hendry's Styles.*

[5] *Ib.*

[6] *Jurid. Styles*, 5th ed., i. 408.

[7] *Ib.*

[8] *Ib.* p. 407, and form there given.

security by a *curator bonis*, it would seem desirable to insert a clause declaring that the rights of succession to the ward shall not be affected thereby.[1]

Stamp.

The provisions of the Stamp Act are of importance in the constitution, transmission, and discharge of heritable securities. A heritable security, by whatever form it is constituted, falls within the definition of the word "mortgage" given in the Stamp Act, 1891 (54 & 55 Vict. c. 39),[2] and therefore is subject to the duties which by that Act are chargeable on mortgages.

Effect of want of stamp.

It is declared generally, that "an instrument executed in the United Kingdom, or relating, wheresoever executed, to property situated, or to any matter or thing done or to be done, in the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."[3] It is further provided that in any civil proceedings it is *pars judicis* to notice that any instrument produced in evidence is unstamped or insufficiently stamped;[4] that any person executing, or employed in the preparation of, any instrument, who neglects or omits to set forth truly and fully circumstances affecting the liability of the instrument to stamp duty, or the amount of the duty, with intent to defraud the Revenue, shall incur a fine of ten pounds;[5] and that any registrar or keeper of records who enrols or records an instrument chargeable with duty and not duly stamped, shall incur a fine of ten pounds.[6]

Time allowed for stamping.

An instrument chargeable with *ad valorem* duty, if not written on duty stamped material, must be stamped within thirty days after it is executed, or after it is first received in the United Kingdom, if executed abroad,[7] unless the opinion of the Commissioners has been requested with regard to the duty exigible upon it, in which case it must be stamped within fourteen days after notice of their assessment.[8] An instrument by which a heritable security is constituted, discharged,

[1] *Jurid. Styles*, 5th ed., i. 408, and form.

[2] Sec. 86.

[3] Sec. 14, subs. 4. The former Stamp Acts (so far as relating to heritable securities) were: 55 Geo. III. c. 184 (from 31st Aug. 1815 to 10th Oct. 1850); 13 & 14 Vict. c. 97 (from 10th Oct. 1850 to 1st Jan. 1871); 33 & 34 Vict. c. 97 (from 1st Jan. 1871 to 1st Jan. 1892). See also, as to transfer of mortgage, 28 & 29 Vict. c. 96, s. 17 (from 5th July 1865 to 1st Jan. 1871.

[4] Sec. 14, subs. 1.

[5] Sec. 5.

[6] Sec. 17.

[7] Sec. 15, subs. 2 (a).

[8] Sec. 15, subs. 2 (b).

or transferred is, as will be shown presently, chargeable with an *ad valorem* stamp, and therefore falls under this head. With regard to instruments relating to heritable securities, but chargeable with a fixed stamp, the same period for stamping is allowed by the Commissioners, though there is no statutory provision to that effect, unless the stamp duty chargeable is an agreement stamp of 6d., when only fourteen days are allowed.

After-stamping.

It is not the policy of the Stamp Acts to nullify instruments which are not duly stamped within the period allowed for stamping, and provision is therefore made for after-stamping, except in the case of certain specified instruments. With these exceptions, the general rule is that any instrument unstamped or insufficiently stamped may be after-stamped on payment of the duty, a penalty of ten pounds, and, in the case where the unpaid duty amounts to ten pounds, interest at five per cent. per annum on the unpaid duty from the date when the instrument was executed up to the time when the amount of interest is equal to the unpaid duty.[1] In the case of instruments chargeable with *ad valorem* duty, and not stamped according to the provisions above stated, further penalties are provided. Taking the case of a mortgage, the mortgagee is liable to a fine of ten pounds, and a further penalty equal to the amount of stamp duty payable, unless a reasonable excuse for the omission or insufficiency of the stamp be afforded to the Commissioners, or to the Court before which the instrument is produced.[2] Where the instrument is produced in court unstamped or insufficiently stamped, it may be after-stamped and produced in evidence, on payment, to the officer of court whose duty it is to read the instrument, of the unpaid duty and penalty, with the further sum of one pound.[3] The payment of any penalty payable on stamping is to be denoted by a particular stamp.[4] The Commissioners of Inland Revenue have power at any time to mitigate or remit any penalty payable on stamping.[5]

Adjudication stamp.

Where there is any doubt as to whether a particular instrument is chargeable with duty, or as to what amount of duty is chargeable upon it, the question should be submitted to the Commissioners of Inland Revenue, under the provisions of sec. 12

[1] Sec. 15, subs. 1.

[2] Sec. 15, subs. 2 (c), (d). In the case of a transfer of a mortgage, the transferee, and, in the case of a discharge, the person redeeming the security, is liable to this fine.

[3] Sec. 14, subs. 1.

[4] Sec. 15, subs. 4.

[5] Sec. 15, subs. 3 (b). Amended by Finance Act, 1895 (58 Vict. c. 16), s. 15.

of the Stamp Act, 1891. If the Commissioners decide that the instrument is not chargeable with any duty, it may be stamped with a particular stamp (known as an adjudication stamp), denoting that no duty is required.[1] If duty is exigible, the Commissioners are bound to assess the amount, and, when the instrument is stamped in accordance with their assessment, it may be stamped with an adjudication stamp, denoting that it is duly stamped.[2] Every instrument stamped, in accordance with these provisions, with an adjudication stamp, shall be admissible in evidence and available for all purposes, notwithstanding any objection relating to duty.[3] But it is declared that nothing in this section (12) "shall extend to any instrument chargeable with *ad valorem* duty, and made as a security for money or stock without limit; or shall authorise the stamping after the execution thereof of any instrument which by law cannot be stamped after execution."[4] On similar provisions in former Stamp Acts, it was held that where a security stamped to a certain amount was also stamped with an adjudication stamp, it would not cover any advances in excess of the amount for which it was stamped.[5] And where an instrument was submitted to the Commissioners, and stamped by them with an agreement stamp and an adjudication stamp, the Court, holding that the instrument was in reality a promissory note, which could not be after-stamped, decided that the adjudication stamp was ineffectual, and that the instrument could not be received in evidence.[6]

Appeal from assessment by Commissioners.

Any person who is dissatisfied with the decision of the Commissioners, as to the amount of duty chargeable on an instrument submitted for their consideration, may appeal to the High Court of the part of the United Kingdom in which the question has arisen (in Scotland, to the Court of Session sitting as Court of Exchequer), and may require the Commissioners to state and sign a case, setting forth the question upon which their opinion was required, and the assessment made by them.[7] This appeal must be taken within twenty-one days after the date of the assessment, and the duty as assessed must first be paid.[8] If the appeal is successful, the appellant will recover the balance of the duty paid in excess, with any penalty he may have paid, with or without

[1] Sec. 12, subs. 3.
[2] Sec. 12, subs. 4.
[3] Sec. 12, subs. 5.
[4] Sec. 12, subs. 6 (b); see also sec. 88.
[5] *Morgan* v. *Pike*, 1854, 14 C. B. 473.
[6] *Vallance* v. *Forbes*, 1879, 6 R. 1099.
[7] Stamp Act, 1891, s. 13, subsecs. 1, 2.
[8] Sec. 13, subs. 1.

expenses, as the Court may decide; if unsuccessful, he may be found liable in expenses.[1]

Substantial character of transaction rules the stamp.

In considering under what head a particular instrument falls to be stamped, the substantial character of the instrument, and not the mere form, is to be considered.[2] Thus instruments framed as agreements have been held subject to stamp duty as promissory notes.[3]

Heritable securities are comprised under "Mortgage."

The term "mortgage" is defined in the Stamp Act, 1891, as meaning "a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be."[4] A list of the particular instruments included in this general definition follows, which appears to include all those forms of heritable security which are treated of in the following pages. It is therefore assumed that a heritable security is chargeable in all cases with the *ad valorem* duty provided in the schedule of the Act as applicable to mortgages.[5]

Securities for future advances.

The case of a security for future advances is dealt with in the Act to the following effect. A security for payment of money to be advanced or lent, or which may become due on an account current, when the total amount secured, or to be ultimately recoverable, is in any way limited, is to be charged with the same duty as a security for the amount so limited.[6] Where by a deed a loan is secured in addition to a loan already secured, and additional subjects are conveyed in security of the old loan and of the new, the sole duty is mortgage duty on the amount of the additional loan.[7] Where the amount is unlimited, the security is available only for such an amount as the *ad valorem* duty impressed thereon will cover; but where any further advance is made beyond that amount, the security shall, for the purpose of stamp duty, be deemed to be a new and separate instrument, bearing date on the day on which the further advance or loan is made.[8] Thus stamps for the further amount may be affixed at the date of the further advance, and should the instrument after-

[1] Sec. 13, subsecs. 4, 5.

[2] *Wale* v. *Commissioners of Inland Revenue*, 1879, 4 Ex. D. 270.

[3] *Vallance* v. *Forbes*, 1879, 6 R. 1099; *Blyth* v. *Forbes*, 1879, 6 R. 1102.

[4] Sec. 86.

[5] Sched. I., *s.v.* Mortgage (1).

[6] Sec. 88, subs. 1.

[7] Sec. 87, subs. 3.

[8] Sec. 88, subs. 2.

wards require to be after-stamped, interest on the unpaid duty (if above ten pounds) will only run from the date at which the further advance was made.

Stamp on constitution of security: (*a*) Bond and disposition in security.

In deciding upon the amount of stamp required in the constitution of a security, no difficulty should be experienced if the method of security adopted is a bond and disposition in security. If the amount advanced is fixed, as it usually will be, the security should be written on a stamp impressed with the *ad valorem* duty on that amount.[1] Money advanced for the insurance of any property included in the security against fire, or for keeping up insurance policies, is not to be reckoned in the amount on which *ad valorem* duty is chargeable.[2] If the security is for the transfer of stock, it should be stamped with the same duty as a similar security for a sum of money equal in amount to the value of the stock.[3] If the security is granted for the payment of any rent-charge, annuity, or periodical payments, by which a sum advanced is intended to be repaid, the duty chargeable is the duty upon the sum advanced.[4] Where a bond and disposition in security is granted for a cash-credit bond, under 19 & 20 Vict. c. 91, it is intended to be available for advances made on the cash credit up to a certain fixed amount, with three years' interest thereon at five per cent. In such a case it is presumed that the stamp, under the provisions of sec. 88, subs. 1, should be for the utmost amount that may be covered by the bond.

(*b*) *Ex facie* absolute disposition with back-bond.

Where the security is granted by an *ex facie* absolute disposition with back-bond, the disposition should be stamped with the fixed duty of ten shillings, and the back-bond with the *ad valorem* duty for the amount which it is intended to cover.[5] If advances are made beyond that amount, the back-bond should be additionally stamped.[6]

(*c*) Real burden.

A security by real burden forms part of a conveyance for other purposes. It therefore falls under the rule, that an instrument containing or relating to several distinct matters must be separately and distinctly stamped for each matter, as if it were a separate instrument.[7] Therefore whatever may be the duty chargeable upon the conveyance for its main purposes, it must be stamped in addition with an *ad valorem* stamp as a mortgage. When a real burden is created by reservation in the sale of a subject, and the amount of the real burden is therefore deducted

[1] Sec. 86, subs. 1 (a). Sched. *voce* Mortgage.
[2] Sec. 88, subs. 3.
[3] Sec. 87, subs. 1.
[4] Sec. 87, subs. 2.
[5] Sec. 86, subs. 1 (d).
[6] Sec. 88, subs. 2.
[7] Sec. 4 (a).

from the price, it would appear that duty is chargeable upon the instrument as a "conveyance on sale" for the full price, without deduction of the amount secured by the real burden, while mortgage duty is also chargeable upon the amount of the real burden. Thus a contributory in the liquidation of a bank conveyed to the liquidators certain heritable property, in pursuance of a compromise he had made with them. The property was burdened with a bond for £2400, and was held to be worth £2350 in addition to the bond. In a case stated by the Commissioners, it was held that sale duty was chargeable on £4750, *i.e.* on the whole value of the subjects without deduction of the bond.[1]

Transfer of security.

The transfer, disposition, or assignation of a heritable security, or of any money or stock secured by such security, is subject to an *ad valorem* duty of sixpence for every £100, or fraction of £100, transferred, exclusive of interest which is not in arrear.[2] Where the deed transferring the security conveys additional security-subjects for the debt, transfer duty is the sole duty chargeable.[3] Where any further sum is added to the amount already secured, mortgage duty is payable on such additional sum.[4] The substance of the transaction is to be looked at; and therefore where a deed discharged an existing mortgage for £350, and constituted, in favour of the party who had advanced the £350, a mortgage over the same lands for that sum, and for an additional £120, which he had advanced to the mortgagor, it was held that the deed should be stamped as a transfer of a mortgage to the extent of £350, and as a new mortgage to the extent of £120.[5] Transfers of mortgages *mortis causa* are not subject to stamp duty.[6]

Discharge of security.

The discharge, or release, or renunciation of any security, or the reconveyance of the property conveyed in security, is subject to an *ad valorem* duty of sixpence for every £100, or fractional part of £100, "of the total amount or value of the money at any time secured."[7] These latter words have given rise to some difficulty as to the stamps required in the case where a bond is paid off by several partial discharges. It has, however, now been settled that *ad valorem* duty is only chargeable on the final discharge, whereby the security is extinguished, and that each

[1] *Commissioners of Inland Revenue* v. *Liquidators of City of Glasgow Bank*, 1881, 8 R. 389.

[2] Stamp Act, 1891, Sched. I., *s.v.* Mortgage (4).

[3] *Ib.* s. 87, subs. 3.

[4] *Ib.* Sched. I., *s.v.* Mortgage (4).

[5] *Wale* v. *Commissioners of Inland Revenue*, 1879, 4 Ex. Div. 270.

[6] Stamp Act, 1891, Schedule I. General exemptions at end of schedule.

[7] Stamp Act, 1891, Sched. I., *s.v.* Mortgage (5).

partial discharge on the payment of an instalment of the loan is subject to a fixed duty of ten shillings as a deed.[1] The Commissioners are, however, prepared to accept *ad valorem* duty on the whole sum due as a sufficient stamp for a partial discharge, in cases where that sum does not exceed £2000. In these cases, therefore, the stamp on a partial and on a final discharge will be the same.[2] Where several creditors are interested in a security in separate amounts, and several discharges are therefore given, one of these discharges should be stamped with *ad valorem* duty on the whole amount covered by the security, and the others with deed stamps for ten shillings.[3] Where the debtor in a bond was sequestrated, and the trustee, under sec. 176 of the Bankruptcy Act, 1856, transferred the subjects of the security to the creditor at the value put upon them by him in making his claim on the bankrupt estate, it was held that this transfer was not a discharge of the security, but a "conveyance on sale" by the trustee to the creditor at the price at which the subjects had been valued, and was therefore chargeable with sale duty on that amount.[4]

There is no provision for *ad valorem* duty on a restriction of a heritable security, *i.e.* on an instrument by which the amount of land covered by the security is restricted. Such a deed should be stamped with a deed stamp for ten shillings, unless the total amount of the sum secured is under £2000, when *ad valorem* duty of sixpence for every £100, or fraction of £100, will be accepted.

Delivery of conveyance in security.

In order to complete the constitution of a right in security over a heritable subject the deed by which it is constituted must, in most cases, be delivered to the grantee. But where the granter had come under an obligation, by previous mutual contract, to grant the bond, it was held that proof of delivery was not indispensable. Thus where A. granted a bond and disposition in security, which he was unconditionally bound to grant, but kept it in his own hands until after his bankruptcy, it was held that it must be considered to have been delivered at the date of granting, and therefore was not reducible under the Act 1696, as a security for prior debts granted within sixty days of bankruptcy.[5] But the case was of a very special nature.

[1] *M'Kimmie's Trs.* v. *Commissioners of Inland Revenue*, 1895, 23 R. 232.

[2] This is stated as a note to *M'Kimmie's Trs.*

[3] See letter by the late Solicitor of Inland Revenue (Mr. Crole), in *Scottish Law Review*, vol. viii. p. 77.

[4] *Scottish Equitable Life Assur. Soc.* v. *Commissioners of Inland Revenue*, 1894, 22 R. 85.

[5] *Cormack* v. *Anderson*, 1829, 7 S. 868.

What is held to be delivery.

In the ordinary case the question whether a deed has been delivered is usually one of fact, to be decided upon the particular circumstances of each case.[1] There are, however, a few points of special importance in questions regarding heritable securities.

Registration in Register of Sasines usually implies delivery.

The registration of the bond or other disposition in security in the Register of Sasines, on a warrant of registration on behalf of the grantee, would seem, in almost all conceivable circumstances, to imply delivery to him. Registration of the bond in the Register of Sasines on behalf of the grantee is not conclusive evidence of delivery, but it will lay a very heavy *onus* upon the granter, to prove that delivery has not taken place.[2] And where an *ex facie* absolute trust conveyance was recorded in the Books of Council and Session, and an extract was transmitted to the trustee, with writs and securities affecting the property, it was held to be a duly delivered and irrevocable deed, although the granter afterwards executed a revocation declaring that the deed was intended to be revocable and had been registered for preservation only.[3]

Question of delivery when bond deposited with third party.

Where a bond has been deposited with a third party, the object of the deposit may be proved. This becomes of importance in cases where the parties to a loan are represented by the same agent, and the agent misappropriates part of the money paid by the creditor. In such cases it would seem to be a question of circumstances whether the bond, if found in the agent's repositories on his death or bankruptcy, should be held as delivered or undelivered, or delivered as to a part of the sum secured and undelivered as to the rest.[4] The ordinary presumption would seem to be that the deed, if onerous, is held by the agent for the benefit of the grantee; but this, at most, regulates the *onus* of proof.[5] In the somewhat special case of *Mair & Son* v. *Thom's Trs.*,[6] an agent acted both for borrower and lender in arranging a loan over a building property. He obtained a bond for the whole sum from the borrower, and received the whole sum from the lender. He, however, paid the borrower only a part, and granted him a letter stating that, notwithstanding the terms of the bond, only a part of the sum had been actually advanced. On the death of the agent in bankrupt circumstances, it was held that the bond was delivered

[1] As to the general rules of delivery, see Mont. Bell, *Conveyancing*, i. 102; Menzies, *Conveyancing*, p. 176.

[2] *Burnet* v. *Morrow*, 1864, 2 Macp. 929, per Lords Deas and Ardmillan.

[3] *Tennent* v. *Tennent's Trs.*, 1869, 7 Macp. 936.

[4] *Ramsay* v. *Maule*, 1828, 6 S. 343; affd. 1830, 4 W. & S. 58; *Maiklem* v. *M'Gruthar*, 1842, 4 D. 1182; *Mair & Son* v. *Thom's Trs.*, 1850, 12 D. 748; *Mackintosh* v. *Pitcairn*, 1851, 14 D. 187.

[5] Ersk. iii. ii. 43.

[6] 1850, 12 D. 748.

to him, in the capacity of agent for the lender, only to the extent of the amount which the borrower had actually received, and that, *quoad* the balance, he still held the bond as agent for the borrower. The loss due to the agent's defalcation was thus laid upon the lender. This case may be contrasted with a later case, where the mutual agent, having obtained the bond, actually delivered it to the lender. He received from him the whole amount of the loan, but misappropriated part of it. In this case the Court laid the loss upon the borrower, on the ground that, by giving the bond to the agent before he had received the full amount of the loan, he had given occasion to the agent's fraud.[1]

Mode of Insurance.

Where the subjects of a security consist, to any large extent, of buildings, it is important to the creditor to maintain or effect policies of insurance against fire. By sec. 119 of the Consolidation Act, 1868, it is declared that the assignation to rents contained in the statutory form of bond and disposition in security, or in any similar bond, shall include a power to the creditor to insure all buildings against loss by fire; and by sec. 122, the creditor, in accounting for the surplus of the price on a sale under the power of sale in his bond, is entitled to take credit for the expense of insurance.[2] It is, however, usual to insert a fuller clause, a form of which is given in the *Juridical Styles*, and which is also applicable in cases where the statutory form of bond is not followed.[3] The creditor in a security has an obvious insurable interest in the subjects thereby covered, in respect of the diminution in the value of his security that would be occasioned by a fire. Where the debtor has already insured the subjects, the policies of insurance may be assigned to the creditor; where he has not, the creditor may himself effect policies in favour of himself and of the debtor in reversion. It is usual to arrange for the payment of the premiums by the debtor; but if the creditor pays them, he is entitled to take credit for them in accounting for his intromissions while in possession, or for the surplus of the price on a sale.[4]

Policies insure the subjects, not the debt.

Policies effected in this way by the creditor are not insurances of the debt, but of the interest of the creditor in the buildings on which it is secured, and they are therefore payable on the occurrence

[1] *Mackintosh* v. *Pitcairn*, 1851, 14 D. 187. See the same rule, *i.e.* that the party who gave occasion to the fraud of the agent must bear the loss, applied to a complicated case of fraud in *Rose* v. *Spavens*, 1880, 7 R. 925.

[2] 31 & 32 Vict. c. 101, ss. 119, 122, Sched. FF.

[3] *Jurid. Styles*, 5th ed., i. 412.

[4] 31 & 32 Vict. ss. 119, 122.

of a fire by which the heritable security is injured, even although the financial position of the debtor renders payment a certainty.[1] The question as to the liability of an insurance office in the case where a certain amount of damage has been caused by a fire, but the debt is still fully secured by the property still remaining uninjured, does not seem to have arisen. On the principle that the interest of the creditor in the buildings is insured by the policy, it would appear that no payment would be due under it if no injury to the security had been sustained.

Where several bondholders insure, their interests are separate.

Where there are several bondholders over the same subjects, and each insures, their respective interests are considered as separate properties. There is therefore no contribution between the company insuring a prior, and the company insuring a postponed, bondholder. Each company is liable to the bondholder with whom it has contracted, if the interest of that bondholder has been injured by the fire.[2] It follows that the total amount paid on a fire may exceed the amount of the damage done. Thus where a prior bondholder received, under his policy, a sum equal to the whole amount of the loss, and applied it in reduction of his debt, it was held that a postponed bondholder might also recover under his own policy, on the ground that while the subjects, before the fire, covered the two debts in full, they were, after the fire, inadequate to meet the balance of the prior bond and the postponed bond.[3] The insurance company have, however, invariably the option of restoring the subjects instead of paying the loss. If in this case the company which insured the first bond had elected to do so, and if the result had been that the subjects became as valuable as before, it would seem clear that the second bondholder would have suffered no loss by the fire, and would not have been entitled to recover under his policy.

Effect where both debtor and creditor insure.

If both the debtor and the creditor insure, it is a question of construction whether the policy effected by the creditor covers his own interest only, or that of the debtor as well. Where the debtor pays the premiums of the policy effected by the creditor, there is a presumption that it is intended to cover his interest as well as that of the creditor. The question of contribution between the insurance companies depends upon whether the two policies cover the same interest or not. Both are obviously for the

[1] *Nichols & Co.* v. *Scottish Union and National Insur. Co.*, 1885, 14 R. 1094 (an English case, printed as an appendix to 14 R.).

[2] *Scottish Amicable Herit. Secur. Assoc.* v. *Northern Assur. Co.*, 1883, 11 R. 287.

[3] *Glasgow Prov. Invest. Soc.* v. *Westminster Fire Office*, 1887, 14 R. 987; affd. 1888, 15 R. (H. L.) 89.

interest of the creditor, as his interest is to have the subjects insured as fully as possible. Therefore if it is held that the policy effected by the creditor covers also the interest of the debtor, there will be contribution between the two insurance companies.[1]

Right of insurance company to assignation of the security.

Where a bondholder receives a payment under a policy of fire insurance, it is clear that he cannot be entitled to retain it and yet demand the whole amount of his debt from the granter of the bond. In the very exceptional case in which the creditor is insured for his own benefit only, the insurance company, on payment of the sum due under the policy, would be entitled to an assignation *pro tanto* of the security, which they could use in order to obtain relief against the debtor.[2] In ordinary practice the insurance is for the benefit of the creditor, and of the debtor in reversion. In that case the debtor would obtain the benefit of the amount paid under the policy, because it would be applied in reduction of the debt due by him under the bond. If, however, the debtor were fully indemnified for the loss caused by the fire under other policies, the insurance company would be entitled to obtain and enforce an assignation *pro tanto* of the creditor's security.[3]

Incidence of heritable debt:

The incidence of heritable debt in the succession to the debtor may be considered (1) in questions with the creditor, and (2) in questions between the representatives of the debtor.

In questions with the creditor.

To the creditor in a heritable security the whole estate of his debtor, moveable as well as heritable, is liable, provided that a personal obligation has been undertaken in addition to the heritable security. If the estate of the debtor is insolvent, the creditor may petition for its sequestration at any time after the death of the debtor.[4] Where the heir renounces the succession, the creditor may attach the heritable property of the deceased by adjudication *contra hereditatem jacentem*.[5] Where no executor nominate or dative applies for confirmation, the creditor may attach the executry by confirmation as executor-creditor.[6] Where the succession to the debtor is taken up by heir and executor, the creditor may proceed against either of them, and is not bound to discuss the heir before coming upon the executor.[7] An executor is, however, only liable

[1] *Nichols & Co.* v. *Scottish Union and National Insur. Co.*, 1885, 14 R. 1094 (an English case, printed as an appendix to 14 R.).

[2] *Glasgow Prov. Invest. Soc.* v. *Westminster Fire Office*, 1887, 14 R. 947; affd. 1888, 15 R. (H. L.) 89; per consulted judges in 14 R. p. 966–7.

[3] *Ib.* p. 967.

[4] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 15; Goudy on *Bankruptcy*, 2nd ed., p. 126.

[5] See Bell, *Com.* i. 749.

[6] Bell, *Prin.* s. 1895.

[7] M'Laren, *Wills and Succession*, 3rd ed., ii. 1305; *M'Gillivray's Exrs.* v. *Masson*, 1857, 19 D. 1099.

to the extent of the estate to which he has confirmed,[1] and is not bound to pay debts of the defunct until after the expiry of six months from the date of death.[2] Creditors of the defunct have a preference over creditors of the executor as long as the executry funds are extant and distinguishable in the hands of the executor.[3] At common law, the heir, on taking up the succession by special or general service, incurred liability for the whole of the ancestor's debts, without regard to the value of the succession.[4] But by the Act 1695, c. 24, the heir might limit his liability to the value of the estate to which he succeeded, by service *cum beneficio inventarii*. This procedure has been superseded by sec. 12 of the Conveyancing Act, 1874, which provides that an heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds. If an heir renounces the succession, creditors of the ancestor are declared to have the same rights against the estate as upon a renunciation according to the law before the commencement of the Act, *i.e.* they can adjudge the estate. Where an heir has intromitted with the ancestor's estate before renunciation, he is liable for the ancestor's debts to the extent of his intromissions, but no further.[5] Creditors of the ancestor, completing diligence against the heritable estate within three years of his death, are preferable to creditors of the heir.[6]

Sec. 47 of Conveyancing Act, 1874.

Prior to the Conveyancing Act, 1874, the personal obligation in a heritable security did not transmit against the heir of the debtor by the mere fact that he had taken up the succession, but required to be constituted against him by action, or by taking from him a bond of corroboration.[7] But by sec. 47 of that Statute it is declared that a heritable security[8] duly constituted on an estate in land shall (subject to the limitation already stated, whereby an heir is only liable to the extent of the estate to which he succeeds), together with any personal obligation to pay principal, interest, or penalty, transmit against any person taking such estate by succession, gift, or bequest, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, with-

[1] Bell, *Prin.* s. 1922; *Renton* v. *Renton*, 1851, 14 D. 35.

[2] Ersk. iii. 9. 45.

[3] Bell, *Com.* ii. 81 and 85; *Tait* v. *Kay*, 1779 M. 3142.

[4] Bell, *Com.* i. 702.

[5] Conveyancing Act, 1874, s. 12.

[6] Act 1661, c. 24; Ersk. iii. 8. 101.

[7] Ersk. iii. 8. 54.

[8] A heritable security is defined by sec. 3 of the Conveyancing Act, 1874, and sec. 3 of the Consolidation Act, 1868. It does not include an *ex facie* absolute disposition with back-bond, and it is not yet settled whether it includes a security over a registered lease. See *Stroyan* v. *Murray*, 1890, 17 R. 1170.

out the necessity of a bond of corroboration or other procedure.[1] The personal obligation may be enforced by summary diligence against the person so taking the estate, on application in the Bill Chamber or in a Sheriff Court for a warrant to charge in the form of Schedule K of the Act. But although a transmissible interest in the ancestor's estate now vests in the heir by mere survivance,[2] the personal obligation does not transmit against him unless he accepts the inheritance. Thus where an heir uplifted the rents of his ancestor's estate for three years, and therewith paid the interest on the bonds and other charges, but afterwards renounced the succession without having made up any title, it was held that he was not liable for a bond affecting the estate to any extent beyond his intromissions, as he had not taken the estate by succession.[3] Where a universal disponee had made up a title to the heritable and moveable estate, it was held that a personal obligation contained in a bond affecting the estate transmitted against him, on the ground that he had taken the estate by bequest. But although he was not heir-at-law, it was held that the provisions of sec. 12 of the Conveyancing Act, 1874, were applicable to his case, and that his liability was therefore limited to the value of the estate to which he succeeded.[4] On the principle of this case, it would no doubt be held that the personal obligation in a heritable security would transmit against anyone taking the estate over which it was secured by a lucrative title. Such a disponee is only liable to the extent of the estate to which he succeeds.[5]

Discussion of heirs of debtor.

Although the creditor in a heritable security is entitled to demand payment from the executor of his debtor without discussing the heir, yet, if he elect to proceed against heirs, he must discuss them in a certain order. The heir who succeeds to the subject burdened with the security is primarily liable, to the extent of the estate to which he succeeds, and must be discussed before calling on the heir-at-law. And where any particular heir is burdened with the obligation, he must be first discussed.[6] Under the law prior to the Conveyancing Act, 1874 (by sec. 37 of which the distinction between heritage and conquest was

[1] The section also applies to persons taking the estate by conveyance. See *infra*, p. 94.

[2] Conveyancing Act, 1874, s. 9.

[3] *Lamb* v. *Field*, 1889, 27 S. L. R. 242.

[4] *Welch's Exrs.*, 29 May 1896, 33 S. L. R. 585.

[5] *Webster* v. *Greig*, 1802, Hume, 436; *Bruce* v. *Bruce*, 1826, 5 S. 119.

[6] Ersk. iii. 8. 52; *Earl of Kinghorn* v. *Leslie*, 1607, M. 3574; *Gordon* v. *M'Dowal*, 1615, M. 3575.

abolished), the creditor was bound to discuss the heir-of-line before calling on the heir-of-conquest.[1] And the heir-of-line must be discussed before calling on the heir-male, under a settlement in favour of heirs-male.[2] The disponee of a particular subject which is not burdened with the heritable security is only liable to the creditor after the heir and executor have been discussed.[3]

Questions between representatives of debtor: Intestate Succession

In questions between the representatives of the debtor, on his death intestate, the general rule as to the liability for debts heritably secured is well settled, and may be given in the words of Lord President Inglis: "If one rule is better settled than another in the law of intestacy it is this, that in such cases the heir must pay debts heritably secured, and the executors those which rest on personal security, with mutual relief against each other."[4] In all cases of intestacy which are at all likely to occur in practice, the heir is liable for heritable debts, although the very exceptional case might be put of a bond where the obligation was expressly laid upon executors, and not upon heirs. Thus it was held that where heritable security was given for a cash-credit bond, the amount due under the cash credit (which exceeded the value of the subjects disponed in security) was a debt due by the heir and not by the executor, even although, in a question between creditors, the heritable security would have been bad under the Act 1696, c. 5.[5] And where A. left his whole estate to his two sisters, under the burden of giving security for the payment of certain legacies at their death, and they granted a bond and disposition in security over certain heritable subjects, it was held, on the death of one of the sisters intestate, that the burden of her share of the legacies fell upon her heir, and not her next of kin.[6] Where, however, premonition of payment has been given by the debtor just before his death, it is probable that the burden of the debt he was just about to clear off would fall upon his moveable estate.[7]

[1] Ersk. iii. 8, 52; Bell, *Prin.* s. 1935.

[2] Erskine and Bell, *ut supra.*

[3] *Clelland* v. *Baillie*, 1845, 7 D. 461.

[4] *Duncan*, 1883, 10 R. 1042, at p. 1043; Ersk. iii. 9. 48; M'Laren, *Wills* (3rd ed.), ii. 1314. By the Consolidation Act, 1868, it is declared (s. 131) that nothing in the Act "shall affect or interfere with the present law and practice in regard to the liability of the lands contained in any security, or with the rights and remedies of the creditor, or of the creditors of the creditor."

[5] *Bell's Tr.* v. *Bell*, 1884, 12 R. 85. Does it follow that if an inadequate heritable security is given for a large debt already contracted on personal credit, the whole debt becomes a burden on the heir?

[6] *Duncan*, 1883, 10 R. 1042.

[7] M'Laren, *Wills and Succession* (3rd ed.), ii. 1307; *Earl of Minto* v. *Elliott*, 1823, 2 S. 180; 1825, 1 W. & S. 678.

Testate succession.

In testate succession, any express direction will of course rule the case; or if the whole tenor of the will evinces clearly an intention that a debt heritably secured should be paid from the moveable estate, the executors will be liable for it.[1] But the general rule is, that where an estate subject to a burden is disponed *mortis causa*, the disponee is the debtor in the burden; and this rule will not yield to general directions in the same or another testamentary deed, to the effect that the executors shall be bound to pay all debts.[2] Thus where A. left a settlement, disponing his heritable estate to B., his heir-at-law, and directing that his funeral charges and expenses, together with all his lawful debts, should be paid by his executors, it was held that this did not relieve B. from liability for a bond charged on the heritable estate.[3] If a testator dispones two estates to different parties, and both are subject to a heritable debt, the burden is payable rateably by the two disponees, according to the value of the respective estates, after deduction of any charges preferable to the burden in question. Thus where a testator left an annuity to his widow secured over the estates of A. and B., and A. was burdened with a preferable bond for £10,000, it was held, in a question between singular successors of the two estates, that in fixing the proportion of the annuity to be paid by each according to the rental of the respective estates, the rental of the estate of A. must be taken under deduction of the interest on the preferable bond.[4]

Diligence appropriate to attach right of creditor in heritable security.

Where the creditor of the holder of a heritable security desires to attach it by diligence, it is believed that adjudication is, in all cases, the appropriate method. A right in security over lands is an estate in lands, and therefore should be attached by the diligence appropriate to heritable rights.[5] If the security is constituted by an *ex facie* absolute disposition with a back-bond, this is unquestionable. If it is a bond and disposition in security, or a real burden, some doubt may perhaps be caused by the fact that such securities are now moveable in the succession of the creditor.[6] But it is held that this section, though rendering heritable securities moveable in succession, does not affect their heritable character in other respects;[7] and therefore it is prob-

[1] *Macleod's Tr.*, 1871, 9 Macp. 903.

[2] Per Lord Pres. Inglis in *Macleod's Tr.*, *supra*, at p. 906, citing *Fraser* v. *Fraser*, *infra*, and *Douglas' Tr.* v. *Douglas*, 1868, 6 Macp. 223; *Sinclair* v. *Fraser*, 1798, Hume, 176.

[3] *Fraser* v. *Fraser*, 1804, M. App. Heir and Executor, No. 3; affd. 3 Pat. 642.

[4] *Ferrier* v. *Cowan*, 1896, 23 R. 703.

[5] Ersk. ii. 12. 6.

[6] 31 & 32 Vict. c. 101, s. 117. See *infra*, p. 126.

[7] *Hare*, 1889, 17 R. 105.

able that adjudication is still the proper diligence. Arrears of interest, however, are moveable, and should be attached by arrestment.[1]

A difficulty arises where the creditor in the security which it is desired to attach is dead, and the adjudication has to be brought against his representative. Unless they are expressly excluded, the security passes to the executors;[2] and it is doubtful whether the heir or the executors should be called as defenders in the action of adjudication. In the last edition of the *Juridical Styles*, it is recommended that both should be called.[3]

Means by which adjudger of heritable security may complete his title.

By sec. 65 of the Conveyancing Act, 1874, which is to be read as if it were sec. 129 of the Consolidation Act, 1868, it is provided that where the subjects in a decree of adjudication are heritable securities, it shall be competent for the adjudger to make up his title by recording either the abbreviate of adjudication or an extract of the decree in the Register of Sasines.[4]

International law as to heritable securities.

As international questions with regard to immoveable property are governed by the *lex loci rei sitæ*, there can be no doubt that the validity and extent of a heritable security must be decided by the law of the country in which the lands which form the subject of the security are situated. Thus, in an English case, a company which had an office in London, but owned house property in Florence, granted "obligations" payable to bearer, purporting to bind all their property, real and personal. They afterwards granted a mortgage in the Italian form to a bank. It was held that the validity of charges over property in Florence must be decided by Italian law, and that, in the absence of any proof that the "obligations" in question were valid by Italian law, they were to be held as bonds, and not as mortgages.[5] There is an absence of authority in the law of Scotland to the effect that the validity of a mortgage over English real property would be decided by English law, although the contract relating to it were made in Scotland. But it has been held in England that the question how a Scotch heritable bond could be transferred was a question to be settled by the law of Scotland, even although the

[1] Ersk. ii. 12. 8; *Broughton* v. *Fraser*, 1832, 10 S. 418.

[2] 31 & 32 Vict. c. 101, s. 117.

[3] P. 106.

[4] 31 & 32 Vict c. 101, s. 129; 37 & 38 Vict. c. 94, s. 65. This does not apply to a security by an *ex facie* absolute disposition with back-bond, in which case the adjudger must make up his title, in the same way as an adjudger of an absolute right, by recording the decree or a notarial instrument upon it (31 & 32 Vict. c. 101, s. 62).

[5] *Norton* v. *Florence Land Co.*, 1877, 7 Ch. Div. 332.

transfer was granted by a domiciled Englishman.[1] Thus an English will, which did not contain words sufficient, according to the law of Scotland at the time, to pass heritable property, was held not to carry a bond secured over a Scotch estate.[2]

Modern methods of constituting heritable security.

The modern methods of constituting a security over heritable subjects may be divided into two classes: those in which the subjects are conveyed to the creditor, whether *ex facie* redeemably or irredeemably, and those in which the right of the creditor is only a burden on the estate of the debtor. Omitting obsolete forms, to the former class belong the bond and disposition in security and the disposition *ex facie* absolute, with back-bond; to the latter, the real burden. By the former class of security the creditor obtains a right to enter into possession of the subjects, and the completion of his title depends on his own infeftment; by the latter class, no right to possession is given, and the completion of the title depends upon the infeftment of the person in right of the lands which are subject to the security.

Equitable mortgage not known in Scotland.

The form of heritable security known in England as an equitable mortgage, by which the pledge or deposit of the title deeds to land confers on the pledgee the rights of a mortgagee, has never been recognised as a means of burdening Scotch heritable property. It is true that a law agent, who is in possession of his client's title deeds, is entitled to retain them in security of his business account, but this right is restricted to law agents, or other persons similarly employed.[3] In no other case will the deposit or pledge of title deeds give the recipient any right to retain them in a question with a third party who has a legitimate interest to demand them, much less to establish a claim on the estate on the strength of such deposit or pledge. Thus it was held that a law agent, who had made advances to his client, was not entitled to retain the title deeds in security of such advances, either on the plea of a right of retention, or on a special agreement whereby they were pledged to him.[4]

Before proceeding to the detailed discussion of the different methods of constituting a heritable security, two questions of general interest with regard to all rights in security, heritable as well as moveable, may be considered here. These are: (1) the question how far the creditor in a right in security may be compelled to assign his right to a party having an interest in the

[1] *Johnstone* v. *Baker*, 1817, 4 Madd. 474, note; *Cust* v. *Goring*, 1854, 18 Beavan, 383; cf. *Mackintosh* v. *May*, 1895, 22 R. 345 (lease).

[2] *Johnstone* v. *Baker*, 1817, 4 Madd. 474, note.

[3] See Chapter XI.

[4] *Christie* v. *Ruxton*, 1862, 24 D. 1182.

subjects, and offering to pay the debt for which the security is held; and (2) the question how far the rights of a creditor holding a security over more than one subject belonging to his debtor may be controlled by the rights of other parties holding an interest over one or both subjects, *i.e.* the case of catholic and secondary creditors.

Cases where creditor is bound to assign his security on receiving payment of his debt. Payment by debtor.

Where the debtor in a real security pays the debt for which it was granted, he is *primâ facie* entitled only to a discharge, since he has, as a rule, no interest in keeping up the debt against his own estate. The exceptions to this rule, where the debtor has parted with the subjects of the security, and is forced to pay the debt under the personal obligation, and where he is an heir of entail, and wishes to keep up heritable debt against the estate, will be dealt with later.[1] But when payment in full is offered by a third party with the authority of the debtor, or by his trustee in bankruptcy, the creditor is bound to grant an assignation of his rights, remedies, and securities against the debtor, unless his own interests will thereby be prejudiced.[2] But payment of a dividend by the trustee in bankruptcy is not payment in full, and will not entitle him to anything but a discharge, or force the creditor to make available to him his securities for the debt.[3]

Payment by third party if creditor is pressing for payment.

The creditor is, of course, not bound to assign his security to anyone who may choose to offer to pay the debt, unless such person has the direct authority of the debtor. So long as he is satisfied with his security, and does not press for payment by the use of diligence, by entering into possession, or by proposing to realise the subject, no one who has not the direct authority of the debtor can force him to assign his rights.[4] But if a creditor is taking active steps to obtain payment, he is under an equitable obligation to assign his security to anyone who has a reasonable interest in the subject, and offers to pay the debt, provided that his own interests will not thereby be prejudiced. A friend of the debtor, a postponed bondholder, or a purchaser of the subjects at a sale at the instance of a postponed bondholder, are parties who may have a right to demand an assignation.[5] But this right is equitable in its origin, and must be supported by a reasonable

[1] See pp. 93 and 139.

[2] *Fleming* v. *Burgess*, 1867, 5 Macp. 856.

[3] *Ewart* v. *Latta*, 1863, 1 Macp. 905; revd. 1865, 3 Macp. (H. L.) 36.

[4] *Smith* v. *Gentle*, 1844, 6 D. 1164; *Fleming* v. *Burgess*, *supra*. As to the right of a *pari passu* or postponed bondholder to sell the subjects, and require the creditor to discharge his security on receiving payment, see *infra*, pp. 116, 117.

[5] Ersk. iii. 5. 11; *Govan* v. *Govan*, 1859, 2 Pat. App. 27; *Grant* v. *Austin*, 1826, 7 S. 701.

interest. Thus, for instance, it has been stated that a postponed bondholder would not be entitled to ask for an assignation of the prior bond merely on the ground that he desired to keep up his own bond as an investment; but would be entitled to do so if such an assignation was necessary in order to enable him to obtain payment of his debt.[1]

Creditor not bound to assign if he has an interest to refuse.

Even supposing such a legitimate interest in the party demanding the assignation, the creditor is entitled to refuse it, or to qualify it with a stipulation that it shall not be used in competition with his own rights, if an unqualified assignation would conflict with any legitimate interest of his own.[2] Such an interest on the part of the creditor will usually consist either in a further interest in the estate of the debtor, or in some liability to which the assignation might expose him. But an interest acquired after the demand for assignation has been made, and merely as a pretext for refusing it, is not sufficient. Thus where the debtor's trustee in sequestration demanded an assignation, and the creditor, *pendente lite*, acquired a postponed right over the subjects, it was held that the newly acquired right did not entitle him to refuse to assign.[3] In order, however, to justify a refusal to assign, the creditor is not bound to prove that the assignation will result in actual loss to him; it is sufficient if he shows that he will thereby be exposed to the risk of loss, or to trouble, inconvenience, or expense.[4] The application of this principle will be best shown by a few examples from the cases which have been decided on the subject.

Cases on this subject.

In a case where a landlord was in process of sequestration for rent, it was held that he was not bound to assign the sequestration to a third party, a friend of the tenant, who offered to pay the rent, on the ground that he had a legitimate interest to refuse to assign in the fact that it was desirable for him to have a tenant who was able to pay the rent out of his own resources, and without being driven to the expedient of borrowing money on the security of his crops, by means of an assignation to the landlord's sequestration.[5] Again, in *Will* v. *Elder's Trs.*, a creditor was held to be entitled to refuse to assign his debt, and the

[1] *Cunningham's Trs.* v. *Hutton*, 1847, 10 D. 307.

[2] *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107. Cases cited *infra*.

[3] *Fleming* v. *Burgess*, 1867, 5 Macp. 856.

[4] In addition to cases cited below, see *Cunningham's Trs.* v. *Hutton*, *supra*; *Guthrie & M'Connachy* v. *Smith*, *supra*; *A.* v. *B.*, 1744, M. 6228; *Mitchell* v. *Mackinlay*, 1842, 4 D. 634; *Fraser* v. *Carruthers*, 1875, 2 R. 595.

[5] *Grahams* v. *Gordon*, 1842, 4 D. 903.

subjects he had adjudged in security thereof, to one of several co-debtors who offered to pay the whole debt as it should be fixed on an accounting, the refusal being justified on the ground that such an accounting would not be binding on the other co-debtors, who were abroad, and were not made parties to it, and the creditor might therefore be exposed to liability to them.[1] In *Russell's Tr.* v. *Mudie* a postponed bondholder sold the subjects, and the purchaser offered payment of his debt to the prior bondholder, who was in possession, and demanded an assignation with an ordinary clause of warrandice. This the prior bondholder refused to grant, as an ordinary obligation of warrandice would imply warrandice *debitum subesse*, and he understood that a challenge of his bond was contemplated. He offered to grant an assignation with a specially limited clause of warrandice, and it was held that this was all he could be called upon to do.[2] On the other hand, where A. held a decree of expenses in his favour in an action against B., and the payment thereof had been made a condition precedent to B. obtaining a new trial, it was decided that A. was not entitled to refuse to assign the decree to a third party who offered payment. For insisting against a new trial was equivalent to pressing B. for payment, and the interest alleged by A., that in the event of ultimate success in the action, B. would be his debtor, when the decree of expenses might be used as a ground for diligence against him, was not held to be a legitimate interest to refuse to assign.[3]

Catholic and secondary creditors.

Where a party has granted to one creditor a right in security over two or more subjects, and to another creditor a postponed right over one of such subjects, these rights are known as catholic and secondary securities, and the holders thereof as catholic and secondary creditors. The rules which regulate the rights of parties holding this relation are the same, whether the subjects of security are all heritable, or partly heritable and partly moveable, or all moveable; but as in all the cases which have occurred the subjects, or one of them, have been heritable, it has been thought advisable to insert them here.

General principles of rules on this subject.

Where a creditor has a security over several subjects, and no other party except the debtor has a special interest in any one of them, he may realise his securities in any order he pleases, and the personal creditors of the debtor are not entitled to interfere with his discretion. But where other parties are interested, as

[1] *Will* v. *Elder's Trs.*, 1867, 6 Macp. 9.

[2] *Russell's Tr.* v. *Mudie*, 1857, 20 D. 125.

[3] *Smith* v. *Gentle*, 1844, 6 D. 1164.

postponed bondholders, in one or more of such subjects, the catholic creditor cannot lay the whole burden of his debt upon one subject, but must act in accordance with certain fixed rules designed to protect the interests of the postponed bondholders.[1] The principle upon which these rules are based is that, as the catholic creditor has, as such, no interest except to obtain full payment of his debt, and the debtor has no legitimate interest except that all the burdens should be paid as fully as possible, therefore the catholic creditor must use his securities so as to leave the largest possible margin for the postponed creditor, if there is only one, or to apportion the burden fairly between them, if there are two or more.[2] But these rules do not prevent a creditor, so long as the debtor is solvent, from relinquishing one subject of his security, even although the subject he relinquishes may be otherwise unburdened, and the subject he retains burdened with a second security.[3] If, however, the debtor were bankrupt, it is probable that a catholic creditor could not release the unburdened portion of his security without rendering himself liable to the postponed bondholder on the other subject for any loss which the latter might sustain by the release.[4] But it is mainly when the catholic creditor proceeds to realise his securities that equitable rules come into operation for the benefit of the secondary creditor or creditors. The two main cases to which these rules are applicable are: (1) where only one of the subjects of the catholic security is otherwise burdened; (2) where each of them is burdened.

Rights of secondary creditor where one estate only is burdened.

(1) Where one estate only is burdened. Where one creditor has a prior bond over two estates, A. and B., belonging to the same debtor, and another creditor has a second bond over A., while B. is otherwise unburdened, the rule is that in realising his security the catholic creditor must either exhaust the estate of B. before touching the estate of A., or, if he realises A., he must assign his security over B. to the second bondholder. It is obvious that it may often be convenient for the catholic creditor to realise the estate of A. first, supposing it to be the more easily realisable of the two. In this he is entitled to exercise his choice, subject to the obligation to grant an assignation of his right over B. to the second bondholder, whose security has thus been injured.[5]

[1] Bell, *Com.* ii. 417.

[2] See opinion of Lord Pres. Macneill in *Littlejohn* v. *Black*, 1855, 18 D. 207, at p. 212.

[3] *Crs. of Weir* v. *Robertson*, 1793, M. 3403; *Morton* (Liddell's curator) v. *Liddell*, 1871, 10 Macp. 292.

[4] *Kemp's Tr.* v. *Ure*, 1822, 1 S. 235.

[5] Bell, *Com.* ii. 417; *Littlejohn* v. *Black*, 1855, 18 D. 207; *Nicol's Trs.* v. *Hill*, 1889, 16 R. 416.

Even if both estates are actually realised, the creditor may draw his whole debt from the proceeds of A., if he assigns his claim on the proceeds of B. to the second bondholder.[1] The law is thus stated by Lord President Colonsay:—"In the ordinary case of a catholic creditor, *i.e.* a creditor holding a security over two subjects, which, for the sake of simplicity, I shall assume to be heritable subjects, and another creditor holding a postponed security over one of them, there can be no doubt that the catholic creditor is entitled to operate payment out of the two subjects as best he can for his own interest; but he is not entitled, arbitrarily or capriciously, to proceed in such a manner as to injure the second creditor without benefiting himself—as, for instance, capriciously to take his payment out of the subjects over which there is a second security, and thereby to exhaust that subject, to the detriment of the second creditor, leaving the other subject of his own security unaffected or unexhausted. The second creditor will be protected against proceedings so contrary to equity, and the primary creditor will be compelled either to take his payment, in the first instance, out of that one of the subjects in which no other creditor holds a special interest, or to assign his right to the second creditor from whom he has wrested the only subject of his security."[2]

These rights not affected by sequestration of debtor.

This rule holds whether the debtor is solvent or not. In *Littlejohn* v. *Black*, where the debtor was sequestrated, the trustee attempted to maintain that the interest acquired by him would control the right of the second bondholder. An insurance company held a catholic security over a heritable property, and over some ships, both belonging to the same debtor. B. held a second bond over the heritage, but no right over the ships. On the sequestration of the debtor the insurance company sold the whole subjects, satisfied their own claim, and brought a multiplepoinding to settle the disposal of the balance. The proceeds of the heritage was insufficient to satisfy both the debts secured upon it, but the proceeds of the two subjects left a balance over the catholic debt. B. claimed that he was entitled to be ranked on the assumption that the balance was part of the price of the heritable subjects, the price of the ships having been first exhausted. The trustee in the sequestration maintained that the catholic debt must be held to have been satisfied rateably out of the two subjects, on the ground that the sequestration placed him in the position of a competing secondary creditor. It was held that the catholic

[1] *Goldie* v. *Bank of Scotland*, 1834, 12 S. 498.

[2] *Littlejohn* v. *Black*, 1855, 18 D. 207, per Lord President, at p. 213.

debt must be paid primarily out of the price of the ships, thus leaving the balance of the price of the heritage to the secondary creditor, because the trustee, taking the estate *tantum et tale* as it stood in the bankrupt, could not affect the equitable right of the secondary creditor.[1]

Rights of secondary creditors when both estates are burdened.

(2) As the right of the secondary creditor rests upon the fact that no one else has a special interest in the estate not burdened with his security, his position is altered if that subject should also come to be burdened with a second security in favour of a third party. His right then is only to insist that the two estates should bear the burden of the catholic debt rateably, in proportion to their value; or, if the subject of his security is first exhausted, that he should obtain an assignation of the preferable security over the other estate, to the extent of the share of the catholic debt which that other estate should have borne.[2] Such an assignation will be assumed in any process for the distribution of the balance remaining after the catholic debt is paid.[3] Thus if there is a catholic bond for £3600 over the estate of A. worth £4000, and the estate of B., worth £2000, and both estates are burdened with postponed securities, the catholic creditor ought to draw £2400 from the estate of A. and £1200 from the estate of B. If he chooses to draw the whole £3600 from the estate of A., the postponed creditor on A. would be entitled to an assignation of the catholic security over B., to the extent of £1200.[4]

Other applications of these principles.

For the sake of clearness, the case taken has been that of a catholic security over two estates, one or both of which are burdened with a second bond. The same rules apply if the catholic security comprises more than two estates, and wherever there are separate interests, of whatever nature, in the various estates over which the catholic security extends. Thus if one estate is burdened with a postponed bond, and the other is sold to a third party, the burden of the catholic bond must be apportioned rateably.[5] If there is no second bond on either estate, but one is sold, it is conceived that the creditor would be bound first to exhaust the other. Similarly, if two estates are burdened

[1] *Littlejohn* v. *Black*, 1855, 18 D. 207.

[2] Ersk. ii. 12. 66; Bell, *Com.* ii. 417; *Menzies* v. *Clark*, 1716, M. 3378.

[3] Per Lord Ivory in *Littlejohn* v. *Black*, *supra*, at p. 218.

[4] For the purpose of rateable contribution, the value of the two estates over which the catholic security extends is to be taken under deduction of any burden preferable to the right of the catholic creditor, which may happen to affect one or other of them—*Ferrier* v. *Cowan*, 1896, 23 R. 703.

[5] *Earl of Moray* v. *Mansfield*, 1836, 14 S. 886.

with a heritable security, and pass to a different series of heirs, the burden of the bond is apportioned rateably.[1] Again, the same rules are applicable to the case where one creditor has attached the whole of a subject by diligence, and another creditor has attached a part. Thus where A. arrested part of the crop and stocking of his debtor, a farmer, and the landlord sequestrated the whole stock under his hypothec for rent, it was held that the landlord must either satisfy his claim for rent out of the stock not attached by A.'s diligence, or must assign to A. his right of hypothec.[2]

In cases where two creditors have executed diligence.

A prior security over a single subject may become catholic by use of diligence, and, if so, the rules as to catholic and secondary securities become applicable.[3] Thus in *Goldie* v. *Bank of Scotland*, the Bank held a first bond over an estate which was burdened by several postponed bonds. Shortly before the sequestration of the debtor, they executed a poinding of the ground. By arrangement, the effects poinded were sold by the trustee in sequestration, and part of the price was paid to the Bank, the remainder being retained by the trustee. Afterwards the postponed creditors brought a ranking and sale. The Bank claimed to be ranked for their whole debt, under deduction of the amount they had actually received from the poinding. The common agent, on behalf of the postponed creditors, maintained that the Bank was bound to deduct the whole amount realised by the poinding, whether they had received it or allowed it to remain in the hands of the trustee. This contention was repelled; but it was found that the Bank was bound, on receiving full payment, to assign to the postponed heritable creditors their claim against the trustee for the balance of the sum realised by the poinding.[4] The principle of this case was that the Bank, having a right over two subjects, the estate itself and the poinded effects, might operate payment out of either subject as they pleased. But being in the position of catholic creditors, they were bound to assign their right over the subject otherwise unburdened, if they chose to take payment out of the subject burdened with postponed securities. In a later case this principle was more clearly brought out. A prior and a postponed bondholder each executed a poinding of the ground.

[1] *Rose* v. *Rose*, 1786, M. 5229 *MacKenzie* v. *MacKenzie*, 1847, 9 D. 836; cf. *Coventry* v. *Coventry*, 1834, 12 S. 895; *Ferrier & Cowan*, *supra*.

[2] *Butler* v. *Riddell*, 1790; Bell's Oct. Cases, 154.

[3] *Goldie* v. *Bank of Scotland*, 1834, 12 S. 498; *Nicol's Tr.* v. *Hill*, 1889, 16 R. 416.

[4] *Goldie* v. *Bank of Scotland*. 1834, 12 S. 498.

The bankruptcy of the debtor within sixty days of the decrees reduced their respective preferences from the poinding to an amount equal to the current half-year's interest and one year's arrears. The subjects of the poinding having been sold, the prior bondholder thus obtained a preference for £122, and the second bondholder a preference for £24. Subsequently the prior bondholder sold the subjects of the security, and paid his entire debt out of the price without touching the £122 for which he had a preference in the sequestration. The balance of the price left was insufficient to meet the postponed bond. Thereupon the second bondholder obtained from the first an assignation to the preference for £122; and it was held that, in virtue of this assignation, he was entitled to a preferential ranking for that amount. For the first bondholder, by obtaining a preference over the moveables by the poinding, was placed in the position of a catholic creditor, having two securities, the first his right over the estate, the second his preference for £122. The first of these was subject to a postponed security, the second was not. He was therefore bound either to exhaust the unburdened subject before touching the other, or to assign his right to the postponed bondholder.[1]

Catholic creditor not bound by these rules if he has any conflicting interest.

The obligation laid upon a catholic creditor either to satisfy his debt in the way least detrimental to the interests of postponed bondholders, or to assign his right, is subject to the important qualification that he is not bound to do so if it will conflict with any legitimate interest of his own. Thus if a creditor holds a catholic security over the estates of X. and Y., and also has a security for a separate debt over the estate of Y. only, he is entitled to lay the whole burden of the catholic debt on the estate of X., even although X. may be burdened with a postponed bond in favour of another party.[2] Similarly, a catholic creditor is entitled, if he acquires a postponed bond on one of the estates, to act in such a manner as to give that bond a preference over a bond held by another party over the other estate. Thus if there are three bonds held by A., B., and C. over the estates of X. and Y., the bond held by A. being a first bond over both estates, that held by B. being a second bond over the estate of X., and that held by C. being a second bond over the estate of Y., A., if he is acting in good faith and during the solvency of the debtor, is entitled to acquire the bond held by C., and thereafter to satisfy his catholic bond out of the estate of X., leaving the estate of Y. to meet the

[1] *Nicol's Tr.* v. *Hill*, 1889, 16 R. 416.

[2] Ersk. ii. 12. 66; *Pitcairn* v. *Haliday*, 1710, M. 3371; *Preston* v. *Erskine*, 1715, M. 3376.

bond he has thus acquired. This he may apparently do even if the result is that B. is entirely deprived of all benefit from his security over the estate of X.[1]

Nor where creditor has two securities, but the subjects belong to separate debtors.

The rules as to catholic and secondary securities do not apply where a creditor has two securities for the same debt, but the subjects belong to different parties. Thus if a creditor has a bond over the estate of A., on which there is a second bond, and another bond over the estate of B., belonging to a cautioner for the debt, the postponed bondholder on A. is not entitled to insist that the estate of B. should be first exhausted, or even that the catholic debt should be apportioned rateably. The cautioner is entitled to insist that the creditor should either exhaust the estate of the debtor before coming upon him, or should grant him an assignation of the security over the debtor's estate.[2]

Nor where security of creditor consisted of personal obligation of original granter and right over the lands in the hands of a singular successor.

A similar conclusion would probably be arrived at in the case where the creditor's security consisted of the personal obligation of the original granter of the bond, and a real right over the lands in the hands of a third party, to whom they have been sold subject to the security. If such third party granted a postponed bond over the lands in question, the postponed bondholder could not insist upon the prior creditor putting in force his personal claim against the original granter of the bond. For if the granter of a bond and disposition in security has parted with the subjects, and is nevertheless obliged to pay under his personal obligation, he is entitled to an assignation of the real right over the subjects, which will be preferable to the equitable claim of a postponed bondholder.[3] In these cases the prior creditor has not really a catholic security: he has two securities for the same debt, but they are not exigible from the estate of the same person, and, therefore, the equity which protects the debtor subsidiarily liable overrides the equity in favour of the postponed bondholder.

Case of *Sligo* v. *Menzies*.

The case of *Sligo* v. *Menzies*, which is dealt with elsewhere, may be mentioned here, in order to point out the distinction between the rights of a secondary bondholder and the wider rights of a cautioner in an analogous position. It has been seen that a catholic creditor is not bound to assign his rights to the holder of a postponed bond, if such an assignation will interfere with his own interests. Now, if a creditor has a prior bond over an estate fortified by a cautionary obligation, and a second bond over the

[1] *Scotland* v. *Bairdner*, 1696, M. 3367. This case is doubted by Prof. Bell, *Com.* ii. 419.

[2] *Grant* v. *Mansfield, Ramsay & Co.*, 1779, M. 1384; *Steuart* v. *Maxwell*, 11 Jan. 1814, F. C.

[3] *North Albion Prop. Invest. Co.* v. *Macbean's Curator*, 1893, 21 R. 90.

same estate for which no cautioner is liable, he is very much in the position, with regard to the cautioner, of a catholic creditor. But should the security prove insufficient to meet both bonds, he is not entitled to draw the second bond out of its proceeds, and make the cautioner liable for the first. If he should satisfy the second bond out of the subjects of his security, the cautioner is, *pro tanto*, relieved of his obligation.[1]

[1] *Sligo* v. *Menzies*, 1840, 2 D. 1478; cf. *Steuart* v. *Maxwell*, 11 Jan. 1814, F. C.; and see Chapter XXII.

CHAPTER III

BOND AND DISPOSITION IN SECURITY

Nature of security.
Burden must be definite.
Act 1696, c. 5.
Right of creditor depends on infeftment.
Proof of consideration.
Real rights on competition with creditor.
Form of bond.
Rights of creditor.
Remedies of creditor. Personal obligation.
Entering into possession.
Real diligence.
Sale.
Transmission *inter vivos*.
Transmission *mortis causa*.
Restriction.
Rights of debtor over subjects.
Redemption.
Extinction.

Bond and disposition the ordinary method of security.

THE three ordinary methods of creating a security over heritable estate are: the bond and disposition in security; the absolute disposition with a back-bond stating it to be in reality a security; and the real burden. In the great majority of cases the bond and disposition in security is the form employed; as the real burden is more frequently used in family settlements than in commercial contracts; while the disposition *ex facie* absolute is resorted to, generally speaking, only in those cases where certain rules of law, to be explained presently, render a bond and disposition in security inadvisable. It will therefore be convenient to treat the bond and disposition in security as the typical form of heritable security, and to consider the respective rights of debtor and creditor mainly in relation to it.

Nature of right thereby given.

A bond and disposition in security is the normal method of creating a security over land for an instant advance, or for a debt of fixed amount. This form of security is the result of a long process of development, by which an annual rent, granted on the security of lands, has had added to it, first a power of sale, then a personal obligation by the granter, and ultimately a conveyance of the lands in security thereof; and it has thus become a complex instrument, by which a personal obligation is given, and lands or other heritages are disponed in security thereof. The theory of the contract is that the lands are transferred to the creditor in security, or, as it might be put, pledged to him. The rights of the parties to a bond and disposition in security differ

indeed, in certain respects, from those of the parties to a contract of pledge, but these differences are due chiefly to the publicity afforded by the registers to transfers of heritable property. In most essential particulars the contracts strongly resemble each other; as the lands cannot be physically pledged, they are conveyed in security.

Restrictions on its use by the following rules.

The employment of a bond and disposition in security as a general and ordinary method of creating a security over land is considerably restricted by two rules of law—the first imposed by the common law, the second by Statute. These rules are: (1) That no burden of uncertain amount can be laid upon land by a deed expressly bearing to be a security; and (2) that a bond and disposition in security, for whatever consideration it may bear to be granted, will only cover those debts which were due by the granter to the grantee at the date when infeftment was taken on the bond.

(*a*) That no indefinite pecuniary burden can be laid upon land.

In every case in which land is burdened by a security completed by infeftment, the amount for which such security is granted, and the name of the creditor, must be mentioned in the deed recorded in the Register of Sasines, otherwise it will not form a real right over the lands.[1] The principle upon which this rule was founded would appear to be that third parties are entitled to see from the register what is the exact amount and nature of the burden affecting the land. The rule does not apply to the case of an *ex facie* absolute disposition with a back-bond, because in that case the form of the transaction is not a security or real right over the lands, but an absolute conveyance. But the amount covered by a bond and disposition in security, or a real burden, must be stated exactly.[2] The limits of this rule are not very easy to define. Thus a bond and disposition in security for the amount of five acceptances, which were identified by their dates and not by their amounts, was held to be indefinite, and to give no preference over the other creditors of the granter.[3] Again, where the owner of minerals disponed them to the owner of the surface ground, in security of any damage which the latter might sustain through the working, the bond was found ineffectual as a real security.[4] On the other hand, in *Edmondstone* v. *Seton* it was held that an

[1] Menzies, *Conveyancing*, p. 842; Mont. Bell, *Conveyancing*, ii. 1159.

[2] *Stein's Crs.* v. *Newnham, Everitt, & Co.*, 1789, M. 1158 and 1236; 1793 M. 14127, affd. 3 Pat. 345; *Macdonald* v. *Place*, 1821, Hume, 544; cases below; and see, as to real burdens, p. 170.

[3] *Tod* v. *Dunlop*, 1838, 1 D. 231.

[4] *Smith-Sligo* v. *Dunlop & Co.*, 1885, 12 R. 907.

obligation to purchase and transfer to certain trustees the capital stock of £5000 Consols, or, until that was done, to pay the interest upon that amount, might properly be secured by a bond and disposition in security. It was decided that it was not void as an indefinite encumbrance, as the obligation to transfer stock, though its pecuniary amount could not be ascertained owing to the fluctuation in the value of the stock, was effectual as an obligation *ad factum præstandum*; while the obligation to pay interest was definite as to amount.[1]

This rule does not invalidate a bond because the rate of interest is not specified.

The fact that no rate of interest is specified will not render a bond void as indefinite, so far as the principal is concerned.[2] But while such a bond may infer a personal obligation against the debtor for interest at the legal rate of five per cent.,[3] it is extremely doubtful whether it will create a real security for interest at that rate, or for arrears thereof.

And an indefinite burden may be good as real warrandice.

An obligation which would be void as indefinite, if regarded as a security, may be good as an obligation of real warrandice. This argument was strongly pressed in the case of *Smith-Sligo*,[4] where the bond was actually set forth to be in real warrandice of a disposition of the surface. But this argument was repelled on the ground that real warrandice must be given, by the disponer or some third party, in security of some defect or encumbrance upon the title, which the disponer was bound to purge. In order that a claim under such warrandice may arise, there must be eviction. But in this case there was no encumbrance on the title to the surface which the disponer was bound to purge or clear off, as the disponee had at common law a claim against the owner of the minerals for damage done by the mineral workings, and such damage could not be regarded as eviction. It was pointed out in the judgment of the Lord Ordinary (M'Laren), that in an earlier state of the titles to the subjects the surface lands had been held subject to an obligation to accept compensation for damage done by mineral workings at a specified rate per acre. While that obligation remained in force, a bond and disposition in security might have been sustained as real warrandice, because the obligation to accept damages at a specified rate, instead of the amount actually incurred, was an encumbrance which the disponer of the surface might have been bound to purge.[5]

[1] *Edmondstone* v. *Seton*, 1888, 16 R. 1.

[2] *Forbes* v. *Welsh & Forbes*, 1894, 21 R. 630.

[3] *Gordon* v. *Howden*, 1853, 15 D. 378; *Cuningham* v. *Boswell*, 1868, 6 Macp. 890.

[4] *Infra*, 1885, 12 R. 907.

[5] *Smith-Sligo* v. *Dunlop & Co.*, 1885, 12 R. 907.

(*b*) That security will only cover debts incurred prior to infeftment (Act 1696, c. 5).

Another and more important restriction on the use of the bond and disposition in security is imposed by the Act 1696, c. 5. By that Act it is provided: "Because infeftments for relief not only of debts already contracted but of debts to be contracted for thereafter, are often found to be the occasion or covert of fraud, it is therefore further declared: That any disposition, or other right that shall be granted hereafter for relief or security of debts to be contracted in the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infeftment following on the said disposition or right, but prejudice to the validity of the said disposition and right as to other points as accords."

Effect of this Statute.

The effect of this Statute is that a bond and disposition in security, whatever may be the sum for which it may bear to be granted, will only be sustained as a real security for the debt actually incurred at the date of infeftment. The debtor or his personal representatives cannot plead the Act, and their personal liability is quite unaffected by it;[1] but in a question with postponed bondholders, or with the trustee in the debtor's sequestration, the effect is that the bond will not form a real security for any debt contracted after infeftment is taken upon it.[2] Thus where a landlord took a bond and disposition in security from his tenant to cover past arrears of rent, and also rents to become due in future, it was held that this gave him no preference for rents which became due after he had taken infeftment, nor even for the rent which was then current, but not yet payable. This was held in a multiplepoinding raised under a trust deed granted for behoof of the creditors of the granter of the security.[3]

Effect on cash credit bonds.

The most important effect of the Act was that it made it impossible to use a bond and disposition in security for a cash credit. It was held that under the Act the bond would only cover the amount which had been advanced before infeftment was taken, and would cease to secure even that amount if a sum sufficient to discharge it was paid into the debtor's account after the infeftment.[4] The rule applies equally to a bond and disposition in security given to a cautioner in a cash credit. In *Selby* v. *Brough* a bond and disposition in security was given by A.

[1] *Brown* v. *Bedwell & Yates*, 1830, 9 S. 136; *Bell's Tr.* v. *Bell*, 1884, 12 R. 85.

[2] *Bruce* v. *Hughson's Tr.*, 1835, 13 S. 1011; *Black* v. *Curror & Cowper*, 1885, 12 R. 990. So an "eik" to a heritable bond is incompetent, and gives no preference — *Turner* v. *M'Intyre*, 1816, Hume, 660.

[3] *Bruce* v. *Hughson's Tr.*, *supra*.

[4] *Pickering* v. *Smith*, 1788, M. 1155, 2 Ross's L. C. 645; *Selby* v. *Brough*, 1794, M. 14118, 2 Ross's L. C. 661.

to B., who was his cautioner in a cash credit with a bank, in security of any liability B. might incur under the cash credit. After a certain sum had been drawn out by A., B. took infeftment on the bond. A. continued to operate on the cash credit, paying in sums sufficient to wipe out the balance due at the date of B.'s infeftment, but drawing out other and larger sums. A. was sequestrated, and B. was obliged to pay the amount due by him on the cash credit. In a question with the trustee in the sequestration, it was held that B. had no security whatever by his bond. For all that could be secured thereby was the debt due by A. on the cash credit at the date of B.'s infeftment, so long as that debt existed. But on the principle of appropriation of payments, by which the first credit item is set against the first debit item, the debt due at the date of the infeftment was extinguished by the payments made by A. afterwards, and therefore no longer existed to support any claim of preference made by B.[1]

The restriction thus imposed partially removed by Cash Credit Act.

The inconvenience caused by these decisions led to the passing of several Acts to provide means whereby a bond and disposition in security could be given in security of a cash credit.[2] By the latest of these Acts, by which the earlier provisions are practically reproduced, it is enacted that a bond and disposition in security may be given in security of a cash credit, or for relief of a cautioner in a cash credit, provided that the principal and interest which may be due upon such cash credit "shall be limited to a certain definite sum, such definite sum not exceeding the amount of the principal sum and three years' interest thereon at five per cent." The infeftment upon such a security is declared to be "equally valid and effectual as if the whole sums advanced upon the cash credit had been paid prior to the date of the sasine or infeftment taken thereon."[3] It is a sufficient compliance with the Statute if the principal sum is specified, though the capital amount due as interest is not.[4] The effect of the Statute is that the security for every advance within the limit ranks as of the date at which infeftment is taken on the bond, and therefore is preferable to any other security, adjudication, or inhibition posterior to the infeftment, though prior to the actual advance.[5] But the creditor in the cash credit may close it at any time, so long as he deals fairly with his debtor, even if he has obtained heritable security

[1] *Selby* v. *Brough*, *supra*.

[2] 33 Geo. III. c. 74; 54 Geo. III. c. 137; 19 & 20 Vict. c. 91, s. 7.

[3] 19 & 20 Vict. c. 91, s. 7. See form in *Jurid. Styles*, i. 427.

[4] *Morton* v. *Hunter & Co.*, 1828, 7 S. 172; affd. 4 W. & S. 379.

[5] *Campbell's Tr.* v. *De Lisle's Exrs.*, 1870, 9 Macp. 252.

up to a certain limit, and that limit has not been reached.[1] In spite of the facilities provided by this Act, it is believed that securities for cash credits are usually taken in the form of *ex facie* absolute dispositions with back-bonds.

Cases where Act 1696, c. 5, does not apply.

Although the Act 1696, c. 5, has, as the cases above narrated show, been interpreted with some degree of strictness, it has not been carried to the lengths which its language might seem to warrant. Thus the mere fact that the money is not actually advanced before the infeftment is taken will not invalidate the security, if the whole proceedings form in reality one transaction, or if the deeds constituting the security are not delivered to the creditor until he has actually made the advance.[2] And if the bond is granted in security of bills duly specified therein, the renewal of the bills after infeftment has been taken will not invalidate the security.[3] Again, if at the date of the infeftment the creditor has come under an absolute obligation to advance the sum for which the bond is granted, the security will be valid on his doing so.[4] But the obligation to advance that sum must be absolute and capable of being enforced. Thus in *Dempster* v. *Kinloch* a bond was granted for £20,000 Scots, of which £8735 was instantly advanced, and the creditor undertook to advance the remainder at any ensuing term of Whitsunday or Martinmas. Infeftment was taken upon the bond before the balance was actually advanced, and it was held that the bond did not give the creditor any preference for the amount so advanced after infeftment; on the ground, apparently, that the undertaking to make the advance was not one which could be enforced.[5] In the subsequent case of *Fulton* v. *Lead* a trustee in bankruptcy attempted to reduce a bond for £1400, granted by the bankrupt, to the extent of £800, which had been advanced by the creditor after infeftment had been taken upon the bond. The bond was sustained to the full extent, as it was proved that the creditor had, at the date of granting, come under a binding obligation to advance the £800 in question upon receiving a search for encumbrances over the lands in question, and had, on receiving such a search, actually advanced it.[6]

[1] *Johnston* v. *Commercial Bank*, 1858, 20 D. 790. Opinion of Lord Neaves in *Campbell's Trs.*, *supra*, at p. 257.

[2] *Dunbar* v. *Abercromby*, 1789, M. 1156, 2 Ross's L. C. 638.

[3] *Bank of England* v. *Bank of Scotland*, 1781, M. 14121.

[4] *Dempster* v. *Kinloch*, 1750, M. 10290, 2 Ross's L. C. 632; *Fulton* v. *Lead*, 1826, 4 S. 740, 2 Ross's L. C. 636.

[5] *Dempster* v. *Kinloch*, *supra*.

[6] *Fulton* v. *Lead*, *supra*.

Act does not apply to obligations granted to cautioners.

It is probable, though not settled, that the Act would not be held to apply to bonds granted in security of cautionary or other obligations, which are not primarily securities for a money debt, though they may ultimately come to be so. Thus where a bond and disposition in security is granted by a proprietor to one who is his cautioner in a debt, it is probable that an effectual preference is thereby conferred upon the cautioner, even if he takes infeftment on the bond before he has actually been called upon to pay anything under the cautionary obligation, and therefore before anything is due by the granter to him.[1] A similar question arises with regard to the use of heritable securities in relief of the obligation of a cautioner *ad factum præstandum*, as, for instance, the cautioner for the fidelity of an official. If infeftment is taken upon the security at once, there is clearly no debt due to the cautioner at the date of infeftment, though the obligation, if it ever becomes due, may resolve itself into a debt. It would appear to have been the opinion of Lord President Campbell in the case of *Stein's Crs.*, that if the cautioner took infeftment on such a security before the granter's default had rendered his own obligation prestable, the infeftment would be cut down by the Act as a security in relief of debts to be contracted in the future.[2] A contrary opinion has been expressed by Professor Bell,[3] and it would appear that to cut down such securities would be putting a very strained construction upon the Act.

Effect of Act 1696, c. 5, on building loans.

The restriction imposed by the Act 1696, c. 5, should be borne in mind by agents who are employed to arrange loans on building properties. In such cases, if the whole amount of the loan is advanced at once, the lender runs the risk of the insolvency of the borrower before the buildings have reached such a stage as to form an adequate security for the loan. If, on the other hand, the lender advances only part of the sum agreed upon, but obtains and records a bond for the whole amount, he will have no preference for advances made after the bond is recorded, by the operation of the Act 1696, c. 5.[4] The dangers of advancing the money to an agent, especially if he is also agent for the borrower, are illustrated by the cases of *Mair & Sons* v. *Thom's Tr.*,[5] and *Mackintosh* v. *Pitcairn*,[6] which have been already narrated.[7] The usual and proper course in loans on building property is for the lender to take and record a bond for the whole sum, part of which is

[1] Bell, *Com.* ii. 219.
[2] *Stein's Crs.* v. *Newnham, Everett, & Co.* 1789, M. 1158.
[3] *Com.* ii. 219.
[4] *Ante*, p. 69.
[5] 1850, 12 D. 748.
[6] 1851, 14 D. 147.
[7] *Ante*, p. 46.

actually paid to the borrower, while the remainder is consigned in bank in the joint names of borrower and lender, to be drawn out by the borrower, either in one sum or by instalments, upon the production of architect's certificates that the buildings have been completed, or have reached a certain stage.[1] The drawback to this system is that the borrower has to pay interest on the whole sum from the first, and only receives in return bank interest on the money consigned; but if any other method is adopted—if for instance, the bond and disposition in security is kept unrecorded until the whole advance has been made, the lender runs a very serious risk of losing his security by the bankruptcy or fraud of the borrower. The difficulty under the Act 1696, c. 5, would be surmounted by the lender taking an *ex facie* absolute disposition, and granting a back-bond; but by completing his title on such a disposition he would become personally liable for the feu-duty.[2]

To obtain a real right, the grantee of the bond must be infeft.

The execution of a bond and disposition in security, and its delivery to the creditor, will confer upon him only a personal right against the debtor and his representatives, and the power to obtain a real right over the lands by taking infeftment on the bond. The system of recording deeds relative to the transfer of land requires for its efficiency, that no burden should be effectual in competition which does not appear on the record. Thus it is a fundamental rule in all questions as to the priority and effect of bonds and dispositions in security, that the right of the creditor depends, in questions with third parties, upon the date and validity of his infeftment, and not upon the actual contract between him and his debtor.[3] Before infeftment the right of the creditor is merely a personal claim against the debtor and his representatives; on infeftment being taken the debt is made real upon the lands, and, appearing on the record, forms a preferable charge upon the lands in the hands of any person to whom they may be transferred.

Mode of infeftment. Registration.

The rules of the common law regulating the infeftment of a creditor in a bond and disposition in security were similar to those regulating the infeftment of an ordinary disponee in an absolute disposition. Thus it was held that a precept of sasine intended for an absolute infeftment could be appropriately used to infeft in security only.[4] The methods of taking infeft-

[1] *City of Glasgow Bank* v. *Sword*, 1862, 24 D. 703; *Ritchie and Sturrock* v. *Dullatur Feuing Co.*, 1881, 9 R. 358.

[2] *City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.

[3] See Mont. Bell, *Conveyancing*, ii. 1167.

[4] *Bonthrone* v. *Barthrone's Crs.*, 1805, Hume, 238; *Melvin* v. *Dakers*, 1843, 5 D. 1217.

ment have been revolutionised by the Conveyancing Statutes, which provide, in general, that the registration of a conveyance in the Register of Sasines shall be equivalent to taking infeftment on it. In the case of bonds and disposition in security, this is enacted by 10 & 11 Vict. c. 50, s. 6, a section which is in substance re-enacted by sec. 120 of the Consolidation Act, 1868. It is there provided as follows:—"Heritable securities, whether dated before or after the commencement of this Act, may be registered in the appropriate Register of Sasines at any time during the lifetime of the grantee, and shall in competition be preferred according to the date of the registration thereof. Provided always that if a heritable security has not been so registered in the lifetime of the grantee, such heritable security shall be as full and complete warrant for completion of the title in favour of the party having right thereto as if it had been a bond and disposition in security, containing precept of sasine and other clauses, in the ordinary form in use prior to the 30th day of September 1847, which title may be completed as after provided, or by service or notarial instrument, as the circumstances of the case may require."[1]

Titles wrongly made up under former system of conveyancing.

It is not necessary now to enter fully into the rules which governed the infeftment of a disponee of lands before the changes introduced by this enactment.[2] Prior to 1847 a bond and disposition in security was usually granted with an alternative method of holding, and contained a procuratory of resignation and precept of sasine. By executing the precept of sasine, and recording the instrument of sasine thereon in the Register of Sasines, the creditor was duly infeft, but only in a base right holding of the debtor as his superior. If he wished to enter with the immediate superior, it was necessary for him either (1) to resign upon the procuratory of resignation, obtain from the superior a charter of resignation, and expede and record sasine thereon; or (2) to expede and record sasine on the precept of his debtor, and obtain from the superior a charter of confirmation.

In the ordinary case, where the bond was granted with an alternative method of holding, there was, as a rule, nothing to be gained by the security-holder entering with the superior, as his title was rendered perfectly safe by infeftment. Occasionally, however, where subinfeudation was prohibited in the titles of the granter, bonds were granted with an obligation to infeft *a me* only. In such cases the title of the security-holder could be completed either by

[1] 31 & 32 Vict. c. 101, s. 120.

[2] See Mont. Bell, *Conveyancing*, i. 684; Menzies, *Conveyancing*, p. 613.

resignation, or by sasine, followed by a charter of confirmation. But it was a common error in conveyancing to take sasine on such bonds, without proceeding to obtain a charter of confirmation. This left the title of the security-holder incomplete and personal, because the obligation to infeft *a me* did not warrant a base holding. The result was, that any posterior bondholder, who either took sasine on a bond with an alternative method of holding, or who, if his bond, like the prior one, contained only an obligation to infeft *a me*, entered with the superior, would obtain a right preferable to that of the prior bondholder whose title remained incomplete.[1]

These difficulties no longer occur, as registration is the criterion of preference.

This difficulty can no longer occur under the modern system of conveyancing, as no particular manner of holding is expressed in the modern bond, and registration thereof in the Register of Sasines is declared to have the same effect as if the bond had contained an obligation to infeft *a me vel de me*, and precept of sasine, and as if sasine had been duly taken thereon, and the instrument of sasine recorded.[2] As priority now depends upon the date of registration of the bond, there is no longer any possibility of a posterior bondholder acquiring a preference by being the first to enter with the superior,[3] and it is no longer competent for superiors to grant charters or writs of confirmation or resignation.[4]

Does registration of bond imply entry with superior?

A question of some importance has been raised by the provisions of sec. 4 of the Conveyancing Act, 1874, whereby infeftment is declared to imply entry with the superior. Does this section apply to the case of a bondholder who has taken infeftment by registration of his bond in the Register of Sasines? Is he thereby entered with the superior, and therefore liable to the casualty of composition, in cases where this casualty exists?[5] The words of the section in question are: "Every

[1] Mont. Bell, *Conveyancing*, ii. 1178; *Rowand* v. *Campbell*, 1824, 3 S. 196; *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48; *M'Nair* v. *M'Nair*, 1827, 5 S. 372; *Peebles* v. *Watson*, 1825, 4 S. 290 (trustee in sequestration of grantee preferred).

[2] Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 118).

[3] *Ib.* s. 120.

[4] Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 4, subs. 4.

[5] *Ib.* s. 4, subs. 2; *Campbell* v. *Deans* 1890, 17 R. 661, where the question was raised but not decided. It may be noticed that those sections of the Consolidation Act, 1868,—by which a means whereby the heir, executor, or assignee of a bondholder may complete their respective titles is provided,—contain a provision that registration of the notarial instruments applicable to such cases shall imply entry with the superior, in the same manner and to the same effect as the original creditor himself was entered, but there is no such provision as to the effect of the registration of

proprietor who is at the commencement of this Act, or thereafter shall be duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior, whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft," etc. The word "proprietor" is not defined by the Act, and would not seem necessarily to include the holder of a bond and disposition in security; on the other hand, the word "lands" is declared to mean "all subjects of heritable property which are, or may be, held of a superior according to feudal tenure,"[1] a definition which certainly includes the estate of the holder of such a bond. It has been settled by a series of decisions that the entry of a singular successor by infeftment under this provision of the Conveyancing Act, renders him liable to a composition in the same way as if he had entered by the methods in use prior to the Act;[2] and there can be no doubt that a bondholder entering under the former law, by confirmation or resignation, was a singular successor and liable to a composition.[3] It may therefore be desirable, in order to avoid raising the question as to the effect of the section above quoted, that bonds, in cases where the entry of singular successors is untaxed, should be granted with an express holding *de me*; in which case it is clear that registration would not imply entry with the superior, as the estate of mid-superiority thus interposed would not be defeasible at the will of the bondholder.

Date of registration the criterion of preference.

As the methods of taking infeftment have been simplified by the Conveyancing Statutes, the grantee of a bond and disposition in security will now rarely remain uninfeft, as the usual course is to register the bond at once in the appropriate division of the General Register of Sasines, which is equivalent, in modern practice, to taking infeftment upon it, and completes the title of the grantee, provided that the granter was himself infeft.[4] The statutory criterion of preference between heritable securities is the date of registration, and not the date of grant-

the bond by the grantee thereof (31 & 32 Vict. c. 101, ss. 125–130. Schedules JJ, II, KK, and MM).

[1] Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 3.

[2] *Lamont* v. *Rankin's Trs.*, 1879, 6 R. 739; affd. 1880, 7 R. (H. L.) 10. Other cases there cited.

[3] Bell, *Prin.* s. 897; *Sandeman* v. *Scott. Prop. Invest. Co.*, 1883, 10 R. 614; revd. 1885, 12 R. (H. L.) 67, per Lord Rutherfurd Clark, at p. 632.

[4] Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 120). *Ante*, p. 73.

ing the bond.[1] This is merely applying to the modern system of infeftment by registration the rule that the criterion of preference between competing heritable securities, as between other real rights to land, was the date at which the sasine taken upon them was recorded.[2] Thus where two sasines were handed in to the keeper of the Minute Book of the Register of Sasines, at the same time and by the same agent, it was held that the sasine first entered in the Minute Book was to be preferred.[3] But where deeds are sent by post, and arrive simultaneously, they are ranked *pari passu*. It is of course competent, by a clause in a bond, to provide that it and another bond, to be recorded subsequently, or even bonds to a certain fixed amount to be granted subsequently, shall rank *pari passu*.[4]

Position of bondholder while uninfeft.

The right over the lands which is conferred on the grantee by the execution, and delivery of a bond and disposition in security, is effectual, without infeftment, in a question with the granter of the security, or with any person gratuitously deriving right from such granter.[5] But it does not, until completed by infeftment or registration, amount to a *jus in re*, or real right over the lands, which will entitle the security-holder to attach them in the hands of anyone to whom they may happen to be transferred. Therefore a bond and disposition in security, not completed by registration, although good against the personal representatives of the granter, will not entitle the grantee to compete with other persons who have acquired real rights in the lands for onerous causes. There is even authority for the statement that it is immaterial whether the person acquiring a posterior real right was aware of the existence of the prior right or not, and that, even though he was aware of it, he is entitled to take advantage of its incomplete state. Thus it was held not relevant to allege against a posterior bondholder, claiming preference on the ground that the title of the prior bondholder was incorrectly made up, that the prior bond was expressly excepted in the warrandice clause of his bond, though it may be doubtful whether this case would now be followed.[6] But however this may be, there is no doubt that any purchaser of the lands or posterior bondholder, who was not aware of the

[1] Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 120.

[2] Stair, iii. 1. 21; Ersk. ii. 3. 48; Act 1617, c. 16; Bell, *Prin.* s. 772.

[3] *Douglas* v. *Dunlop & Co.*, 1835, 13 S. 505; Consolidation Act, 1868, s. 142.

[4] See *Jurid. Styles*, i. 409.

[5] *Bell's Trs.* v. *Bell*, 1884, 12 R. 85.

[6] *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48; cf. *Moncrieff* v. *Laurie*, 1896, 23 R. 577.

existence of the prior incomplete right, and who has made his own right real by infeftment, will be preferred to a bondholder whose right remains merely personal.[1] The fact that the granter of the bond, in subsequently granting a disposition or other right over the lands, may have committed a fraud, does not interfere with the preference of the posterior right, if first completed; since, in the case of feudal rights, fraud is not an exception which can be pleaded against singular successors.[2] Further, a personal creditor of the granter may, by the use of diligence, acquire a real right over the lands which will be preferable to the rights of the bondholder uninfeft. Thus an adjudger, even for a personal debt, will be preferred to the holder of an unregistered security, even although his adjudication is posterior in date, if he is the first to complete his title. If the granter of a bond and disposition in security should be sequestrated before the grantee has taken infeftment thereon, the latter is not thereby precluded from completing his title by registering his bond. But it is then a race between the grantee of the bond and the trustee in the sequestration, and the one who first completes a feudal title will be preferred. If the title of the security-holder is first completed, his security will give him a real right over the lands; but if the trustee is the first to complete a title, the security-holder will be reduced to the level of a personal creditor.[3]

Postponement of infeftment to within sixty days of bankruptcy of granter does not render bond reducible under Act 1696.

The rule that the date of the bond was, in competition with third parties, to be determined by the date of the infeftment taken upon it, was at one time supposed to involve the corollary that where a security was given by a bond and disposition in security, it was to be held as given at the date of the infeftment, and not at the date of the granting of the bond. If, therefore, an interval elapsed between the granting of the bond and the infeftment thereon, the infeftment was held to constitute a security for

[1] Stair, ii. 5. 1; Mont. Bell, *Conveyancing*, ii. 1167.

[2] Stair, iv. 40. 21; *Thomson* v. *Douglas, Heron & Co.*, 1786; 3 Ross's L. C. 132.

[3] Bell, *Com.* ii. 207; *Cormack* v. *Anderson*, 1829, 7 S. 868; *Young* v. *Leith*, 1847, 9 D. 932, per consulted judges, at p. 938. These cases were decided on the former Bankruptcy Acts (54 Geo. III. c. 137; 2 & 3 Vict. c. 41.); and the terms of the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 102), as to the vesting of the bankrupt's estate in the trustee, are somewhat more comprehensive. But it is not supposed that the law on this point is altered (Goudy on *Bankruptcy*, p. 253). The statement in the text also rests on the assumption that substitution of registration of the bond for registration of the sasine on the bond, has changed the method, but not, in this respect at least, the legal effect of infeftment.

prior debts, even although the bond was granted for an instant advance. So if the date of the infeftment was within sixty days of the bankruptcy of the granter of the bond, the security was reducible under the Act 1696, c. 5, as a security for prior debts granted within sixty days of the bankruptcy of the granter.[1] But this decision has since been disapproved of; and it is now held that the fact that infeftment has been taken, after an interval, upon a bond granted for an instant advance, does not render the transaction ineffectual as a security for prior debts.[2]

Extent of subjects covered by security depends upon terms of the infeftment.

The extent of the lands over which a right is given by a bond and disposition in security depends, in a question with the creditors of the granter, or with third parties, upon the description inserted in the instrument or deed which is recorded in the Register of Sasines, and not upon the actual contract between granter and grantee.[3] Thus in *Mansfield* v. *Walker's Trs.*, A., the owner of a property called by the general name of Hillside, borrowed money from B. on the security thereof. He sent to the agent employed to prepare the bond a description of the subjects, which was in fact a description of the lands of Hillside proper, which formed only a small part of the whole estate of Hillside; and with this description the bond was drawn up, and on it sasine was taken and recorded. It was held to be proved that A. had sent the wrong description by mistake, and with no intention to commit a fraud; but the effect was that the only burden which appeared on the record was a bond over the estate of Hillside proper. On the bankruptcy of A., it was held that his trustee took the lands subject only to the burden which appeared on the record, and therefore that B. could only claim a preference over the lands of Hillside proper, and not over the whole estate of Hillside.

All special conditions must enter the register in questions with singular successors.

Similarly, when any special conditions are attached to the security, they must be set forth on the record, in order to be effectual against third parties. Any special conditions, limiting the ordinary rights of debtor and creditor in a bond and disposition in security, such, for instance, as a stipulation that payment shall only be made in a particular manner, or after some special notice, will not be good against third parties to whom the lands may have been transferred for onerous causes, unless they are

[1] *Lowis Trs.* v. *Charteris*, 1731, M. 1233.

[2] *Johnston* v. *Home*, 1751, M. 1130; *Mitchell* v. *Finlay*, 1799, M. App. *voce* Bankrupt, No. 10.

[3] *Mansfield* v. *Walker's Trs.*, 1833, 11 S. 813; affd. *Inglis* v. *Mansfield*, 1835, 1 S. & M'L. 203. See this case discussed, *ante*, p. 13.

inserted in the deed which is recorded in the Register of Sasines.[1] Thus in an early case a wadsetter was held not entitled to plead, in a question with an assignee of the right of reversion, that he had made further advances to the reversioner, and contracted with him that the lands should not be returned until such further advances were repaid.[2] And an agreement that a bond shall remain undisturbed for a certain number of years, if it remains personal and does not appear on the record, is not binding on the trustee in the debtor's sequestration, though it will give the creditor a right to be ranked in the sequestration for damages as a personal creditor.[3]

Case of *Ashburton* v. *Escombe.*

The recent case of *Ashburton* v. *Escombe* would appear, at first sight, to have been decided contrary to this principle. In this case A. borrowed £20,000 from B. on a bond and disposition in security over an estate belonging to him, which was duly recorded in the Register of Sasines. It was agreed by a separate deed that the lender should not be obliged to accept repayment except by instalments at the rate of £2000 per annum; but this agreement remained personal, and did not enter the record. A. afterwards obtained a further loan from C., and conveyed his whole estates to trustees, of whom C. was one, for the payment of his debts. The trustees tendered to B. immediate payment of the £20,000, but it was held that B. was entitled to refuse it. The ground of the decision was that as the agreement that payment should only be made by instalments was merely a personal contract, it did not affect the lands; but that, because it did not affect the lands, the trustees, as disponees thereof, had no title to challenge it.[4] At first sight it would appear that an agreement qualifying the rights of debtor and creditor was here sustained against singular successors, although it did not enter the record. But the real reason of the judgment was that the trustees had no title to interfere with the arrangement, because it was not a burden affecting the lands, but only a personal obligation of the debtor. The opinion was intimated by Lord Kinnear, who delivered the judgment of the Court in this case, that had the question been one of ranking on the heritable estate of the

[1] *Home* v. *Home*, 1565, M. 10172; *Insurance Co. of Edinburgh* v. *Royal Bank*, 1749, M. 10194; *Gall* v. *Mitchell*, 1729, M. 10306. On the same principle, real burdens, in order to become *debita fundi*, must enter the infeftment, *infra*, p. 168.

[2] *Home* v. *Home*, 1565, M. 10172.

[3] *Don's Trs.* v. *Cameron*, 1885, 22 S. L. R. 348 (Outer House, Lord M'Laren).

[4] *Ashburton* v. *Escombe*, 1892, 20 R. 187.

debtor, B. could not have ranked as a preferable creditor under his bond for his prospective interest under the personal agreement, but only for his actual advance.

Proof of consideration for which bond is granted.

The question as to the means by which it may be proved that the consideration given for the bond, as therein expressed, does not represent the true state of the facts, may, in special circumstances, be of some difficulty. If the granter of a bond alleges that, although the bond bears to have been granted in consideration of the receipt of a certain sum, he has not as a matter of fact received it, how is he to prove that allegation? In the ordinary case, if the grantee of the security takes his stand upon the terms of the bond, the only evidence that can competently be brought to disprove them is the writ or oath of the grantee himself.[1] But in a very special case, where it was established by the findings of an interlocutor, which had been allowed to become final, that the granter of the bond had not received the whole of the consideration money, the Court were of opinion that the narrative of the bond was not conclusive, and that the books and correspondence of an agent who had carried out the transaction for both parties, and a receipt by him, might be looked at.[2] Again, if the grantee of the bond admits on record that the statement of the consideration expressed in the bond is false, the circumstances of the case are altered, and the actual facts must be inquired into by a proof *prout de jure*, the *onus* lying apparently on the holder of the bond to prove that he gave any consideration at all.[3] Thus where a bond was granted for £900, and the grantee, while admitting that he had never advanced that amount, claimed to have advanced £300, while the granter only admitted the receipt of £5, it was held that it lay upon the grantee to prove that he had made any advances beyond £5.[4]

Effect of back-letter varying the terms of the bond.

Where the terms of the bond are explained or varied by a back-letter, the Court will give effect to the contract thus expressed, in a question between the parties themselves. But an assignee of the security would be entitled to enforce the bond according to its terms, if he had no notice of the back-letter. In *Reliance Mutual Banking Co.* v. *Pettigrew*,[5] the bond narrated the advance of £500, and took the debtor bound to repay it, with the additional sum of £131, 5s., as interest, at the ensuing term. By a back-letter it was agreed that the debtor should be bound to pay in five years

[1] *Gordon* v. *Trotter*, 1833, 11 S. 696.
[2] *Mackintosh* v. *Pitcairn*, 1851, 14 D. 187.
[3] *Hotson* v. *Paul*, 1831, 9 S. 685; cf. *Grant's Trs.* v. *Morison*, 1875, 2 R. 377; and see *infra*, p. 147.
[4] *Hotson* v. *Paul*, *supra*.
[5] 1892, 29 S. L. R. 378.

by certain fixed quarterly instalments, but that, on the happening of certain events, the creditor should have power to call up "the loan, or the balance thereof," at once. The events on which this depended occurred after five instalments had been paid. The Court, construing the whole contract on these documents, held that the lender was not entitled to claim more than the balance of the £500 he had advanced, with interest thereon at 10 per cent. to the date of payment.

Charges on land which are preferable to right of creditor.

Before proceeding to an examination of the rights of a creditor under a bond and disposition in security, it may be proper to indicate those charges on land, public or private, which may be asserted as real rights in preference to him. The respective rights of the holders of voluntary securities *inter se* depend upon the date at which they are completed by infeftment, or, in modern practice, by registration in the Register of Sasines. This has been already discussed: it is now proposed to mention those rights other than voluntary securities which may be brought into competition with the real right of the heritable creditor.

(1) Public burdens.

All ordinary public burdens are declared by Statute to be a first charge upon land, preferable to the right of any creditor, whether fortified by diligence or not. Thus the creditor can acquire no right which will entitle him to a preference over local rates.[1] The preference of exceptional and special rates for local purposes, such as the formation of a new street, depends upon the terms of the Act under which they are levied. But it may be stated as a general rule, that it will require very clear terms to let in the supposition that such a rate is to be postponed to the principal or interest of any heritable security. Thus where it was enacted, in a private Act, that the rate for making a new street should form a real burden and charge upon the property chargeable with it, in priority to any encumbrance affecting the lands, and created subsequently to the application for authority to make the street, it was nevertheless held that the rate was preferable to securities which were made real prior to such application for authority.[2]

(2) Rights of superior.

The heritable creditor is also postponed to the claim of the

[1] Poor Law Act, 1845 (8 & 9 Vict. c. 83, s. 88); Taxes Management Act, 1880 (43 & 44 Vict. c. 19, s. 4); *North British Prop. Invest. Co.* v. *Paterson*, 1888, 15 R. 885. It is doubtful whether 51 & 52 Vict. c. 62, applies to Scotland. See *infra*, Chapter XII.

[2] *Greenock Board of Police* v. *Liquidator of Greenock Prop. Invest. Co.*, 1885, 12 R. 832. There were other clauses which favoured this construction.

superior for the feu-duty and the casualty of relief.[1] Where, in feu-rights granted before the Conveyancing Act, 1874, came into operation, a composition was expressly stipulated for, it became a *debitum fundi*, and was preferable to any heritable security afterwards granted. But it is questionable whether an untaxed composition, resting on common law, is a *debitum fundi*, or merely a personal obligation of the vassal.[2] By the Conveyancing Act, 1874, s. 23, it is no longer competent, in feus dated after 1st October 1874, to stipulate for any casualties at uncertain intervals, nor will such arise at common law, but it is lawful to stipulate for an increase in the feu-duty at certain fixed intervals. Such a payment, as an inherent condition of the feu-right, would no doubt be preferable to any posterior security.

(3) Widow's terce.

Where the widow of the debtor in a bond and disposition in security has been served and cognosced in her terce, she is liable, if the creditor is infeft, in one-third of the interest in the bond.[3] Her right, however, will affect the real right of the creditor to this extent, that his claim cannot be brought *in computo* with the terce. That is, the creditor, if he enters into possession and uplifts the rents, cannot take the rents of the subjects affected by the terce, except in payment of the one-third of the interest of the bond for which the widow is liable. He cannot, as he could if there were no terce, uplift the whole rents and apply them in reduction of the principal sum in the bond.[4]

(4) Rights of creditors who have attached subjects by diligence.

The holder of a bond and disposition in security may be postponed to creditors who have attached the subjects of the security by diligence. The two forms of diligence which may be used to affect heritable property are adjudication and inhibition. By the former the creditor obtains a real right in the lands; by the latter, though no real right is acquired, the debtor is interpelled from granting any right over his heritable property in prejudice to the debt on which the inhibition proceeds.

Adjudication.

An action of adjudication for debt may proceed either on a *debitum fundi* or on a personal debt. Where it is led on a *debitum fundi*, the preference of the adjudger depends upon that of the debt on which he proceeds.[5] It is therefore not necessary

[1] Ersk. ii. 5. 50; Bell, *Com.* ii. 403; Bell, *Prin.* s. 697.

[2] *Morrison's Tr.* v. *Webster*, 1878, 5 R. 800; *Stewart* v. *Gibson's Tr.*, 1880, 8 R. 270.

[3] Stair, ii. 6. 18; Fraser, *Husband and Wife*, p. 1111.

[4] Fraser, *Husband and Wife*, p. 1111; *Belschier* v. *Moffat*, 1789, M. 15863; Hailes, 838; *Whish* v. *Scott*, 1895, 3 S. L. T., No. 11 (Lord Stormonth Darling).

[5] See *infra*, p. 109.

to consider it at present. An action of adjudication on a personal debt, on the other hand, has the object of raising that debt to the level of a real security.

Procedure in adjudication.

It is not proposed here to enter into a discussion of the history of apprisings and adjudications for debt, a subject which belongs properly to a treatise on diligence.[1] In modern practice an action of adjudication must be raised in the Court of Session. If it is the first that has been raised, intimation is ordered on the walls and in the Minute Book for twenty days, in order that other creditors may come forward and have their adjudications conjoined. On decree being pronounced, an extract of it, called an abbreviate, must be registered within sixty days in the Register of Abbreviates. After this time has expired, it can only be registered on leave being obtained by a petition to the Court.[2] The title of the adjudger may be made up by recording the decree, or a notarial instrument upon it.[3]

Pari passu ranking of adjudications.

By the Act 1661, c. 62, all apprisings (now adjudications) led within a year and a day of that first made effectual, and all led before it, rank *pari passu*. An adjudication was rendered effectual when infeftment was taken upon it, or a charge to the superior given; or, in modern practice, when the decree, or a notarial instrument upon it, is recorded in the Register of Sasines. The date from which the year and day is calculated is the date of the decree, and not of the infeftment.[4]

Effect of adjudication.

The effect of an adjudication, even when completed by infeftment, is only to vest in the adjudger a redeemable right, a pledge, or *pignus prætorium*, of the lands. It is redeemable by the debtor at any time within ten years of the decree, a period which is known as the legal.[5] After the expiry of that period the creditor may bring a declarator of expiry of the legal, decree in which will give him an irredeemable right. If no such declarator is brought, the lands remain redeemable at any time. But if the creditor is infeft and in possession for the prescriptive period of forty years, after the expiry of the legal, though without a declarator, his title becomes irredeemable by prescription.[6]

[1] See Stair, iii. 2. 14, and iv. 51; Ersk. ii. 12; Mont. Bell, *Conveyancing*, ii. 1191.

[2] See Mackay, *Practice*, ii. 327; *Jurid. Styles*, iii. 101; Bell, *Prin.* ss. 826, 2299; Bell, *Com.* i. 740, ii. 402; Mont. Bell, *Conveyancing*, ii. 1191.

[3] 31 & 32 Vict. c. 101, s. 62, and, 3 where the subjects adjudged are heritable securities, s. 129; 37 & 38 Vict. c. 94, ss. 62 and 65.

[4] Ersk. ii. 12. 30; *Balfour* v. *Douglas*, 1671, M. 238; *Rickarton* v. *Countess of Traquair*, 1678, M. 240.

[5] Bell, *Com.* i. 743.

[6] *Robertson* v. *Duke of Athole*, 1815, Dow, 108; Bell, *Com.* i. 745–6;

Sequestration equivalent to adjudication.

The importance and the frequency of adjudication for debt is greatly diminished by the provisions of the Bankruptcy Act, 1856. By that Act "the sequestration shall, as at the date thereof, be equivalent to a decree of adjudication of the heritable estate of the bankrupt, for payment of the whole debts of the bankrupt, principal and interest, accumulated at the said date; and when the sequestration is dated within year and day of any effectual adjudication, the estate shall be disposed of under the sequestration, subject to the provisions of this Act."[1] By another section the trustee is bound, within twenty-one days of his confirmation, to record an abbreviate of his title in the Register of Abbreviates.[2]

Rights of preference between adjudgers and heritable creditors.

The foregoing sketch of the leading points in the law of adjudication seemed necessary in order to render intelligible the points which may arise in competition between adjudgers and heritable creditors. Where subjects have been disponed in security, and have been adjudged by another creditor, the criterion of preference is the date at which the respective rights have been made real by infeftment, or, in modern practice, by registration in the Register of Sasines.[3] Whether the security was granted before or after the debt on which adjudication is led was contracted, or before or after the adjudication itself, it will be preferable if first completed by infeftment. But the rule that preference depends on priority of infeftment is subject to an exception in favour of the adjudger. It was held that by the raising of an action of adjudication the subject was rendered litigious, and therefore that in this way an adjudication might be preferable to a security granted after it was led, even although the security might be completed by infeftment before the adjudication. But this preference only applied while the adjudger was *in cursu diligentiæ*, and if he delayed unnecessarily to complete his right, a heritable security with prior infeftment would be preferred.[4] Thus where an adjudger took decree, but delayed more than three years to take infeftment, it was held that a heritable security granted at the end of the three years, and on which infeftment followed at once, was preferable.[5] Under the provisions of the Consolidation Act, 1868, an adjudger may register in the Register of Sasines a notice (in the form of

Hinton v. *Connell's Trs.*, 1883, 10 R. 1110.

[1] 19 & 20 Vict. c. 79, s. 102.

[2] 19 & 20 Vict. c. 79, s. 17.

[3] Stair, iv. 35. 8.

[4] *Ib.* 35. 17.

[5] *Wallace* v. *Barclay*, 1736, 1 Ross's L. C. 228; *Duchess of Douglas* v. *Scott*, 1764, 1 Ross's L. C. 233.

Schedule RR) of the signeted summons of adjudication; and no action of adjudication has any effect in rendering the subject litigious unless such a notice is published.[1]

Ranking where two adjudications within year and day, and heritable security intervening.

A more complicated question arises where there are two adjudications within year and day of each other, but a heritable security completed by infeftment intervenes between them. The first adjudication is then, if duly completed by infeftment, preferable to the heritable creditor, and the heritable creditor is preferable to the second adjudger. But by the Act 1661, c. 62, the two adjudications rank *pari passu*. After much discussion, and some conflicting decisions, the rules as to ranking in these circumstances have been finally settled. As between the first adjudger and the heritable creditor, the former is entitled to a preference for his whole debt, and is ranked accordingly. On the balance the heritable creditor is entitled to be ranked in full in preference to the second adjudger. When the ranking is thus adjusted, the second adjudger is entitled to draw back from the first adjudger the amount which he has been ranked for over and above the amount for which he would have been ranked had it been a question between adjudgers alone, and the heritable security had never existed.[2] Taking a simple case, and supposing the fund to be £6000, and each of the debts £4000, the first adjudger will be ranked for £4000, the heritable creditor for the balance, £2000. On this ranking the second adjudger will receive nothing. But if the heritable security had never existed, the first adjudger, ranking *pari passu* with the second, would only have been entitled to £3000; £1000 is therefore drawn back from his ranking, and given to the second adjudger. The final ranking would therefore give £3000 to the first adjudger, £2000 to the heritable creditor, and £1000 to the second adjudger.[3]

Inhibition. procedure.

An inhibition may be inserted in the will of a summons, or may proceed on a warrant obtained on the production of a *fiat ut petitur* duly obtained in the Bill Chamber, on a bill presented along with a proper ground of debt, or along with a depending summons on which the inhibition is to be raised.[4] Since 31st December 1868, it must be registered in the General Register of Inhibitions, and has no effect against acts done before such registration, unless before or after the execution of an inhibition

[1] 31 & 32 Vict. c. 101, s. 159.

[2] Ersk. ii. 12. 32; Bell, *Com.* ii. 404; *Binning* v. *Auchenbreck*, 1747, 1 Ross's L. C. 248; *Chalmers* v. *Cunningham*, 1737, 1 Ross's L. C. 253.

[3] For more complicated cases, see 1 Ross's L. C. 257.

[4] Ersk. ii. 11; Bell, *Com.* ii. 134; Mont. Bell, *Conveyancing*, ii. 1187; *Jurid. Styles*, iii. 269.

a notice, containing the names of the parties by and against whom the inhibition is raised, and the date of signeting, is registered in the General Register of Inhibitions. If this is done, and the inhibition and the execution thereof are duly registered within twenty-one days of the date of the registration of such notice, the effect of the inhibition draws back to the date of the registration of the notice.[1]

Prescription of inhibitions.

At common law an inhibition, when duly registered, remained in force for forty years.[2] But by the Conveyancing Act, 1874 (s. 42), it is provided that all inhibitions in force at the date of the commencement of the Act (1st October 1874) shall prescribe not later than five years from that date, and all posterior inhibitions shall prescribe in five years from the date at which they take effect. But in either case they may be reserved for a further period of five years by a memorandum duly registered in the Register of Inhibitions, and such memorandum may be renewed at the end of each period of five years. The result is that it can never be necessary, in dealing with modern titles, to search the records for inhibitions for more than five years.

Effect of inhibition.

The effect of an inhibition is negative and prohibitory: it restrains the person inhibited from contracting debt or granting any voluntary right over his heritable estate, in prejudice to the inhibitor's diligence. It has now no effect on heritable property acquired after its date,[3] nor on the moveable estate,[4] but it strikes at all voluntary alienations of heritable estate, and all diligence done against the heritable estate on debts contracted subsequent to its date. If a subsequent real right, for instance a heritable security, is granted, the inhibitor is not in the position of the holder of a competing real right, but is entitled to reduce the security *ex capite inhibitionis* in so far as he is prejudiced by it.[5] But an inhibition will not strike at a real right completed after its date, if the debtor was under a prior obligation to grant it; and therefore, apparently, if the debtor has come under a personal obligation to grant heritable security for a debt, he may fulfil that obligation in spite of an intervening inhibition.[6] And a security which has been granted prior to an inhibition is not reducible on the

[1] Consolidation Act, 1868, s. 155, Schedule PP.

[2] Stair, iv. 50. 23.

[3] Consolidation Act, 1868, s. 157. Formerly lands afterwards acquired were affected. More, *Notes to Stair*, ccccxxvii.

[4] Bell, *Prin.* s. 2310; Stair, iv. 50. 5.

[5] Stair, B. iv. 50; Bell, *Prin.* s. 2309.

[6] Stair, iv. 50. 19; Ersk. ii. 11. 11; Bell, *Com.* ii. 142; *Livingston* v. *Macfarlane*, 1842, 5 D. 1.

ground that infeftment has not been taken until after the inhibition.[1]

Ranking of inhibitor and heritable creditors.

Where there exist an inhibition and one or more heritable securities, their preference is to be settled according to their dates. Securities granted prior to the inhibition are entirely unaffected by it;[2] of those granted posterior to it, the burden of the inhibitor's debt falls on those which are lowest in the ranking. Thus if A. has a heritable security prior to an inhibition, and B. and C. have securities posterior to it, but, *inter se*, B. is preferable to C., A. is entirely unaffected by the inhibition, and, in a question between B. and C., the inhibitor's debt must be deducted from the ranking which would otherwise be allotted to C.[3]

Of inhibitor and adjudgers.

Questions of great difficulty arise when, in addition to a heritable security, the rights of an adjudger, or of the trustee in bankruptcy regarded as an adjudger, come into competition with an inhibition. As the right obtained by an adjudger, or by the trustee in sequestration, is not voluntary on the part of the debtor, the inhibition does not strike at them, unless in so far as they are founded on debts posterior to it. In a question then with adjudgers alone, when the debtor is sequestrated, the inhibitor is postponed to any adjudger who has made his right effectual more than a year and a day before the sequestration. With other adjudgers, he ranks *pari passu* with those whose debts were contracted before the inhibition, and has a preference, in virtue of the inhibition, over those whose debts were contracted after it.[4]

Of inhibitor, adjudgers, and heritable creditors.

The existence of a heritable security, subject to the inhibition, but preferable to the adjudications, renders the question of ranking much more complicated. The canons of ranking in such circumstances were discussed in the distribution of several involved estates in the last century. The guiding principle is that the inhibitor is neither to be prejudiced nor benefited by the existence of the right at which the inhibition strikes, but is entitled to draw the same amount which he would have obtained had that right never existed.[5] The detailed rules have been drawn out by Prof. Bell under five heads.[6] These, having been approved by the Court,[7]

[1] *Livingston* v. *Macfarlane*, 1842, 5 D. 1.

[2] *Campbell's Trs.* v. *De Lisle Exrs.*, 1870, 9 Macp. 252.

[3] *Lithgow* v. *Whitehaugh*, 1747, M. 6974; 1 Ross's L. C. 276; *Crs. of Langton*, 1760, M. 6995.

[4] *Baird & Brown* v. *Stirrat's Tr.*, 1872, 10 Macp. 414.

[5] *Campbell* v. *Gordon*, 1841, 3 D. 629; revd. 1842, 1 Bell's App. 563; 1 Ross's L. C. 263.

[6] Bell, *Com.* ii. 413.

[7] In *Baird & Brown* v. *Stirrat's Tr.*, 1872, 10 Macp. 414.

may be regarded as settled, and it has been thought unnecessary to reproduce them here.

Form of bond and disposition in security.

The older forms of a bond and disposition in security have been superseded in practice by the forms given in the Conveyancing Statutes of 1857[1] and 1868, the form given in the latter Statute being the one in common use.[2] By a bond in this form the receipt of the money paid in consideration of the bond is narrated, and the debtor, his heirs, executors, and representatives, without the necessity of discussing them in their order, are taken personally bound in payment of the principal sum, at a time and place to be mentioned in the bond (usually at the next ensuing term of Whitsunday or Martinmas, and at a bank in the place where the creditor resides); of the interest, at the terms of Whitsunday and Martinmas of each year during non-payment; and of a fifth part more both of principal and interest as liquidate penalty in case of non-payment. Next, the lands are disponed in security of the personal obligation, redeemably, but irredeemably in the event of a sale under the power of sale contained in the bond. Then follow various short clauses: an assignation to rents; an assignation to writs; an obligation of warrandice; a reserved power of redemption; an obligation by the debtor for the expenses of assigning or discharging the security; a power of sale in default of payment; a consent to registration for preservation and execution; and, finally, a testing clause. The meaning of these various clauses, as explained by the Act and by decisions, will be considered in dealing with the respective rights of debtor and creditor under the statutory form of bond.

Rights of creditor under this form of bond.

The respective rights of the debtor and creditor under a bond and disposition in security depend largely on the terms of the form of bond which has just been described, and the interpretation given by the later sections of the Act of 1868 to these terms. They may most conveniently be considered from the point of view of the powers and remedies open to the creditor for the safeguarding of his security and, ultimately, the recovery of his debt, principal and interest, since all the rights of the creditor are intended to effect one or other of these purposes. For the purpose of safeguarding his security, he has in his bond an assignation to writs, an obligation of warrandice, and a consent to registration. For the purpose of realising the principal and interest of his debt, he has a right to sue under the personal obligation; to enter into possession and

[1] 10 & 11 Vict. c. 50.

[2] Consolidation Act, 1868 (31 & 32 Vict. c. 101), s. 118, Schedule FF; *Jurid. Styles* (5th ed.), i. 401.

management of the estate; to use real diligence; and, ultimately, to sell the subjects.

Right to writs.

The clause in the statutory form of a bond and disposition in security, by which a right to the writs is given to the creditor, is "I assign the writs."[1] This is declared to have the same effect as the fuller clause in use prior to 1847, by which the writs were assigned to the creditor so far as might be necessary for the purpose of making up his title. In virtue of this assignation, if the debtor had an unexecuted precept of sasine the creditor could take infeftment thereon:[2] if he possesses, under the modern system, on an unrecorded conveyance, the creditor, as has already been explained, can expede a notarial instrument thereon.

Does this entitle creditor to have custody of title deeds.

It would seem somewhat doubtful whether the assignation to writs entitles the creditor to the custody of the title deeds. In the earlier cases it was distinctly held that no such right was implied, and that, if the creditor desired to have the custody of the titles, or to have them placed in neutral custody, a special stipulation in the bond was necessary. It was held that he was entitled, on the strength of the ordinary assignation, to demand the exhibition, but not the custody, of the title deeds.[3] In one case, where the term of payment was postponed to an unusual extent, and the creditor desired to assign the bond, it was held that he was not even entitled to have the title deeds delivered over to him for inspection.[4] In contrast to these cases it was held by the Second Division, in a case apparently free from specialties, and where the assignation to writs was in the ordinary statutory form, that the creditor, who was in possession of the titles, was not bound to deliver them to the debtor on a borrowing receipt, even for a limited period.[5] The usual practice is, unless the estate over which the bond is granted is a very large one, for the creditor to retain the titles; or, if he does not retain them, he gets formal delivery of them, and returns them on a simple borrowing receipt, whereby he can recover them on demand.

Where custody of title deeds is expressly stipulated for, creditor is bound to allow debtor to borrow them.

Where the creditor stipulates in the bond for the actual custody of the title deeds, he is held to have acquired an addition

[1] Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 119). As to the proper receipt for writs, see *Schaw* v. *Blacks*, 1888, 26 S. L. R. 545.

[2] *Melvin* v. *Dakers*, 1843, 5 D. 1217.

[3] *M'Neill* v. *Blair*, 1835, 14 S. 14.

[4] *Hamilton* v. *Brown*, 1839, 1 D. 725.

[5] *Bain* v. *Duncan*, 1892, 29 S. L. R. 335.

to his security, and the debtor, or his trustee in bankruptcy, cannot demand redelivery without paying the debt.[1] The question was raised in this case whether the creditor under such a stipulation would be entitled to refuse to allow the debtor, or his trustee in bankruptcy, to borrow the titles in order to effect a sale of the subjects. On the case of *Bain* v. *Duncan*[2] he would seem to have such a right even without any special stipulation.

Lien of law agent of debtor.

While the titles remain in the custody of the debtor, the creditor is exposed to the risk that they may become subject to a lien on the part of the debtor's law agent, in security of his business account. This right is effectual, even against creditors, and entitles the law agent to refuse to part with the titles, or exhibit them for the purpose of making up a title, until his account against his client is paid; or, if the subjects are sold, to claim a preference over the price.[3] The creditor may thus be seriously restricted in his dealings with the subject of his security, and it is therefore not unusual to arrange that the titles shall be placed in the hands of a neutral third party. Where the same law agent acts for both parties in effecting the bond, he cannot insist on retaining the title deeds against the creditor for an account due to him by the debtor, as he cannot be heard to maintain that in doing business for one client he relied on the security of titles which he had led another client to believe to be free from all incumbrance.[4]

Warrandice.

The phrase "I grant warrandice" is interpreted to mean absolute warrandice as regards the lands and title deeds thereof, and warrandice from fact and deed as regards the rents.[5]

Consent to registration.

The consent to registration in the statutory form of bond, unless specially qualified, imports "a consent to registration and a procuratory of registration, in the Books of Council and Session, or other judge's books competent, therein to remain for preservation; and also, if for execution, that letters of horning, and all necessary execution, shall pass thereon, upon six days' charge, on a decree to be interponed thereto in common form."[6] By the Lands Register Act, 1868, any writ competently registered in the Register of Sasines shall be held to be also registered in the Books

[1] *Malcolm* v. *Carmichael*, 1854, 16 D. 825.

[2] *Supra*, 1892, 29 S. L. R. 335.

[3] Bell, *Prin.* s. 1442; *Dobie* v. *Scales*, 1831, 9 S. 609.

[4] *Allan* v. *Sawers*, 1842, 4 D. 1356. See further on this subject, Chapter XI.

[5] Consolidation Act, 1868 (31 & 32 Vict. c. 101, ss. 119 and 138).

[6] *Ib.*

of Council and Session for preservation, or for preservation and execution, as the case may be; provided that there is an addition to the warrant of registration stating that the deed is to be registered for preservation, or for preservation and execution, as well as for publication.[1] By a later Statute it is provided that when a writ containing a clause of registration for preservation and execution has been registered in the Register of Sasines upon a warrant of registration for preservation only, it shall be competent afterwards to register an extract thereof for execution.[2]

Remedies open to creditor are personal and real.

The powers granted to the creditor for the recovery of his debt, principal and interest, are of a double character; corresponding to the double character of his bond as a personal obligation and a real right in security. Accordingly, the creditor is entitled either to charge the debtor for payment under the personal obligation, or to enter into possession, use real diligence, and ultimately sell the subjects under his real right. The former remedy is available against the debtor and his personal representatives, but not, without special agreement, against singular successors in the lands; the latter remedies, against anyone into whose possession the lands may come. The creditor is entitled to proceed both on the personal obligation and the real right at the same time: he may charge the debtor personally, and call up the bond and proceed to sell the lands.[3] Thus it was held that the fact that the creditor had given premonition requiring payment of the bond within three months, in accordance with the provisions of sec. 119 of the Consolidation Act, 1868, did not prevent him from charging the debtor to pay before the three months had expired.[4] This rule is of course subject to any special conditions limiting the rights of the creditor, which may be inserted in particular bonds. But unless there is such a special condition in writing, the right of the creditor is absolute—where there are no postponed bondholders. No verbal agreement can be founded on as qualifying the rights given by the bond.[5] The limitations imposed by the existence of postponed bondholders upon the right of the creditor to select his remedy will be considered later.

The right of the creditor to proceed either upon his personal

[1] 31 & 32 Vict. c. 64, s. 12.
[2] 40 & 41 Vict. c. 48, s. 6.
[3] *M'Whirter* v. *M'Culloch's Trs.*, 1887, 14 R. 918; *M'Nab* v. *Clarke*, 1889, 16 R. 610.
[4] *M'Whirter, supra.*
[5] *Wood* v. *Northern Reversion Co.*, 1848, 11 D. 254.

or real right is qualified by the equitable obligation, if he sues the original granter of the bond personally, to assign the bond to him on payment. Where the granter of the bond has continued to be the proprietor of the lands affected thereby, an assignation is not usually necessary, as a simple discharge, if duly registered, will clear the lands of the burden, and is all, as a rule, that the debtor is entitled to demand on payment. But where the lands have been transferred to a third party, subject to the bond,—where, for instance, they have been sold, and the price received has been the value of the lands less the amount of the bond,—and the original granter is called upon under his personal obligation to pay the bond, he has an interest to demand that the bondholder shall assign the bond to him, in order that he may work out his relief against the purchaser of the lands. In such a case, if the bondholder is, for any reason, unable to assign the bond in its entirety, the granter is relieved of his personal obligation.[1] Thus where a bondholder had granted a deed of restriction, limiting the lands covered by the security to a part of those originally burdened, in favour of a person who had purchased the lands, it was held that he could not sue the original granter on his personal obligation, as he had rendered it impossible to assign the bond in its original condition.[2] It was not necessary, in this case, to decide whether the bondholder had entirely lost his right to sue the original granter, or whether he could still sue for an amount proportionate to the amount of the subjects still covered by the security. In a later case it has been held that the right to sue is entirely lost, even where all that the creditor did was to consent to the feuing of part of the subjects and to free the *dominium utile* of the part feued from the security.[3] The question whether the debtor has suffered any damage is quite immaterial; the rule is that he has an absolute right, on payment, to an assignation of the security in the condition in which he granted it, and will be freed from his personal obligation if the creditor is unable to grant such an assignation.

Creditor, if he sues on personal obligation, must assign the bond to the debtor, if the latter has parted with the lands.

Another application of the same principle has been decided in England, and would doubtless be followed in Scotland. Where the granter of a bond transfers the subjects to a third party under burden of the bond, and that third party grants a second bond over them to the same bondholder, such bondholder cannot sue the granter of the first bond without assigning that bond to him,

Application of this principle in England.

[1] *North Albion Prop. Invest. Co.* v. *M'Bean's Curator*, 1893, 21 R. 90.

[2] *Ib.*

[3] *Mackirdy* v. *Webster's Trs.*, 1895, 22 R. 340.

with the priority attaching to it; that is to say, he cannot satisfy the first bond by suing the granter personally, and thereby reserve the security-subjects to satisfy the second bond.[1]

Summary diligence.

The personal obligation contained in a bond and disposition in security may be enforced by summary diligence. As has already been stated, the bond may be registered for execution, so that letters of horning or other competent diligence may pass thereon on a six days' charge upon a decree to be interponed thereto in common form.[2] Such a charge is now competent not only against the granter of the bond, but also against his heir or gratuitous disponee, and against an onerous disponee when an agreement to transmit the personal obligation appears *in gremio* of the conveyance to him.[3]

Transmission of personal obligation (sec. 47 of Conveyancing Act, 1874).

The personal liability of the heir of the granter of the bond, or of a disponee taking the lands by a lucrative title, and the means by which such personal liability may be transmitted against onerous disponees, have been regulated by the Conveyancing Act, 1874. The transmission of personal liability against any person taking the estate by succession, gift, or bequest, has been already discussed.[4] It is also provided by sec. 47 that a heritable security duly constituted on land, together with any personal obligation for repayment, shall transmit against any person taking the estate by conveyance, without the necessity of a bond of corroboration, when an agreement to that effect appears *in gremio* of the conveyance, and may be enforced by summary diligence. A warrant to charge may be obtained from the Bill Chamber or Sheriff Court, in the form of Schedule K of the Act, and all diligence may thereupon proceed in common form. The Act provides that a discharge of the personal obligation of the original or any subsequent debtor shall not, when the debt still exists, prejudice the security on the estate nor the obligation as transmissible against the existing proprietor. But the question, What is an "agreement to transmit?" has given rise to some difficulty.

Meaning of "agreement to transmit."

It is frequently convenient for the proprietor of lands, who has burdened them by granting a bond and disposition in security, to dispose of such lands without paying off the bond by which they are burdened: receiving from the purchaser the value of the

[1] *Kinnaird* v. *Trollope*, 1888, 39 Ch. Div. 636.

[2] Consolidation Act (31 & 32 Vict. c. 101, s. 138). A *curator bonis* to a person insane may charge in the name of the ward—*Yule* v. *Alexander*, 1891, 19 R. 167.

[3] Conveyancing Act, 1874 (37 & 39 Vict. c. 94), s. 47.

[4] *Ante*, p. 50.

estate, minus the amount of the bond.[1] In such a case it was usual, before the Conveyancing Act, 1874, for the purchaser to grant a bond of relief to the seller, agreeing to relieve him of his personal obligation; or, if the creditor was a party to the transaction, the purchaser granted to him a bond of corroboration, by which his personal obligation was substituted for that of the original granter of the bond. The bond of relief, to which the creditor was not a party, gave him no right to sue the purchaser personally, and did not prevent him from suing the original granter, who had merely the obligation of the purchaser to relieve him of anything he might be called upon to pay, and the right, on payment, to demand an assignation of the bond, and thereby make good his right of relief out of the land.[2] The object of sec. 47 of the Conveyancing Act, 1874, was to simplify this procedure, by giving effect to a transmission of the personal obligation contained in the conveyance of the burdened lands. In considering the effect of this provision, it was held that an obligation to relieve the seller of all personal liability, which was inserted in a conveyance, did not amount to an agreement to transmit the personal obligation in the bond, so as to entitle the creditor to sue the purchaser personally.[3] But this case has been questioned in a decision where it was held that the following clause was an agreement to transmit: "the disponee by acceptance hereof declares and agrees that the personal obligation"—"contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was on that of the disponer, without the necessity of a bond of corroboration or other deed of procedure, and the personal obligation may be enforced against the disponee by summary diligence and otherwise, in the same manner as against the disponer."[4] But the mere fact that a conveyance is made under burden of the security does not imply an agreement to transmit the personal obligation. Thus where A. borrowed money from B. on the security of buildings in course of construction—the money being lodged in a bank, to be drawn out upon the production of architect's certificates—and conveyed the subjects to C. under burden of the existing securities, it was held that C., who completed the buildings and drew the balance of the loan,

[1] Such a conveyance requires an *ad valorem* stamp for the whole amount, *i.e.* for the price actually paid, plus the amount of the burden—*Comrs. of In. Rev.* v. *Liquidator of City of Glasgow Bank*, 1881, 8 R. 389.

[2] *Kippen* v. *Stewart*, 1852, 14 D. 563.

[3] *Carrick* v. *Rodger, Watt & Paul*, 1881, 9 R. 242.

[4] *Wright's Trs.* v. *M'Laren*, 1891, 18 R. 841.

was not personally liable to B. He was held to have drawn the balance of the loan as the agent of A., and the conveyance under burden of the securities was not construed as an agreement to transmit the personal obligation.[1]

Creditor need not be a party to the conveyance.

It is not necessary that the creditor should be a party to the conveyance by which the personal obligation is transmitted,[2] though the effect is to give him an additional remedy for his debt. For even where the personal obligation is effectually transmitted against the purchaser of the lands, the seller is not thereby relieved of the personal obligation undertaken by him in granting the bond. Thus the effect of an agreement between the purchaser and seller of lands is to give the bondholder the right to sue either of them personally.[3]

Real remedies.

The creditor is also entitled to the use of remedies derived from the real right in the lands which is conferred by a bond and disposition in security. These include (1) the right to enter into possession, (2) the right to use real diligence, and (3) the right to sell the lands.

Entering into possession.

According to sec. 119 of the Consolidation Act, 1868, the words "I assign the rents," when used either in the form of bond provided by the Act or in any similar bond, import, "an assignation to the creditor and his representatives *in mobilibus*, or his heirs, as the case may be, and to his assignees, to the rents to become due or payable from and after the date from which interest on the sum in the security commences to run, as in the fuller form generally in use prior to the 30th day of September 1847, including therein a power to the creditor and his foresaids to insure all buildings against loss by fire, and on default of payment to enter into possession of the lands disponed in security and uplift the rents thereof, or to uplift the rents thereof if the lands are not disponed in security, and to make all necessary repairs on the buildings, subject to accounting to the debtor for any balance of rents actually recovered beyond what is necessary for payment to such creditor and his foresaids of the sums, principal, interest, and penalty, due to him or them under such security, and of all expenses incurred by him or them in reference to such possession, including the expenses of management, insurance, and repairs."

Procedure in entering into possession.

It is as yet an undecided question of considerable practical

[1] *Ritchie & Sturrock* v. *Dullatur Feuing Co.*, 1881, 9 R. 358.

[2] *Wright's Trs.* v. *M'Laren*, 1891, 18 R. 841.

[3] *University of Glasgow* v. *Yuill's Trs.*, 1882, 9 R. 643.

importance what is the procedure by which the creditor can exercise the powers thus conferred upon him. It has been held on a similar clause of the Heritable Securities Act, 1847,[1] that the creditor might uplift the rents, when the interest of his bond was in arrears, in virtue of the assignation in his bond and of intimation thereof to the tenants.[2] Such intimation should be notarial. However, even without formal intimation, the creditor, in virtue of the assignation to rents, and the intimation thereof afforded by registration of the bond in the Register of Sasines, has been held to have a right to the rents preferable to that of any personal creditors of the granter of the bond;[3] but this rule was disregarded in a recent case, where it was held that the right of a house-factor, who had been employed to collect the rents of a property, to retain those rents in security of a debt due to him by the proprietor, was preferable to the right of prior bondholders, who were infeft, but had not raised an action of maills and duties.[4] In questions with the tenant, the creditor is, *quoad* the rents, in the position of the holder of an unintimated assignation. Therefore until he actually intimates his assignation, or does something which in law is held to be equivalent, the tenant is in safety to pay to the landlord.[5] The regular method of intimation is by an action of maills and duties, which is considered later.[6] But although such an action would as a rule be advisable, in order to preclude question, it does not appear to be indispensable, and any other means whereby the assignation, and the intention to put it in force, are brought under the notice of the tenant, would equally operate as intimation. Thus if the bondholder intimated his intention to uplift the rents by a registered letter, this would probably put the tenant in bad faith in paying to the landlord, and render him liable in a second payment. The mere registration of the bond is to a certain extent intimation of the assignation, but it does not intimate the intention to put in force the right to the rents thereby acquired, and the tenant is in safety to pay to the landlord until interpelled by some further procedure. This is illustrated by two cases, in which the effect of a poinding of the ground as an intimation of the assignation to rents was considered. In the earlier case, where the specialty occurred that the assigna-

[1] 10 & 11 Vict. c. 50.

[2] *Neils* v. *Lyle*, 1863, 2 Macp. 168.

[3] *Webster* v. *Donaldson*, 1780, M. 2902.

[4] *Stevenson, Lauder, & Gilchrist* v. *Macbrayne*, 1896, 23 R. 496.

[5] *M'Gill* v. *Hay's Crs.*, 1733, Elchies, Competition, No. 1; *Forsyth* v. *Aird*, 1853, 16 D. 197.

[6] *Infra*, p. 102.

tion to rents was mentioned in the summons of poinding, it was held to operate as full intimation, and to render it incompetent for a tenant to prove, by reference to the oath of the landlord, that rents due before the date of the poinding had been paid.[1] But in a later case, where the assignation to rents was not mentioned in the summons of poinding of the ground, it was held that the service of the summons did not interpel the tenants from paying their rents to the landlord.[2]

Entering into possession where debtor is in natural occupation of the subjects. At common law.

Where the debtor was in actual occupation of the lands covered by the security, it was, until recent legislation, difficult for the creditor to enter into possession. An action of maills and duties is then incompetent, as such an action is intended to secure the rents, and rents do not exist when the proprietor is in actual occupation.[3] An action of poinding of the ground is competent, but may often be inexpedient or unproductive.[4] In two cases it was held that the creditor was entitled to remove the debtor from possession by a declarator of removing in the Court of Session.[5] But no one is entitled to make rules by contract which tend to establish a diligence different from that established by law; and therefore extreme powers in a bond, though consented to by the debtor, will not be enforced.[6] Thus where it was stipulated that in the event of the debtor falling into arrears for two months with monthly instalments of the debt it should be in the power of the creditor to remove him "without any warning or legal process whatever," it was held that such extreme powers could not be legally enforced, and that a petition to the Sheriff for summary removal of the debtor from the occupation of the subjects was incompetent.[7]

Under Heritable Securities Act, 1894.

But the powers of a creditor in this respect have been enlarged by the Heritable Securities Act, 1894.[8] It is there provided that where a debtor is in the natural possession of the lands covered by the security, or a part thereof, and has made default in payment of the interest under the security, or of the principal after a formal requisition for payment, the creditor may take proceedings to eject him as if he were an occupant without a title.[9] That is

[1] *Lang* v. *Hislop*, 1854, 16 D. 908.

[2] *Royal Bank* v. *Dixon*, 1868, 6 Macp. 995.

[3] *Smith's Trs.* v. *Chalmers*, 1890, 17 R. 1088.

[4] *Campbell's Trs.* v. *Paul*, 1835, 13 S. 237. Sequestration, as under the landlord's hypothec, is inept—*Hood* v. *Martin's Crs.*, 1835, 13 S. 923.

[5] *Wilson* v. *Fraser*, 1822, 1 S. 316; *Blair* v. *Galloway*, 1853, 16 D. 291. See also *Rankin* v. *Russell*, 1868, 7 Macp. 126 (*ex facie* abs. disposition).

[6] *Wylie* v. *Herit. Secur. Invest. Assoc.*, 1871, 10 Macp. 253; *Scot. Prop. Invest. Build. Soc.* v. *Horne*, 1881, 8 R. 737.

[7] *Wylie, supra.*

[8] 57 & 58 Vict. c. 44, s. 5.

[9] *Ib.*

to say, it is presumed, he may bring a summary action of removing in the Sheriff Court.

Extent of powers of creditor in possession.

It is a question of some uncertainty what are the powers which a creditor in possession, whether with or without a decree of mailles and duties, is entitled to exercise. As has been already stated, he has by Statute the power to enter into possession, uplift the rents, and make all necessary repairs upon the buildings. It is difficult to say what is included in the power of entering into possession. It would seem to imply that a creditor may assume the ordinary management of the subjects, as if he were a judicial factor. He has at common law the power to grant leases to endure for the term of his own possession. It was doubtful whether he was entitled to grant leases of longer duration without the concurrence of the debtor.[1] But now, by Statute, any creditor in possession may let the subjects, or any part thereof, for a period of not more than seven years. He may also apply to the Sheriff for warrant to let the subjects for a longer period, setting forth in his application the name of the proposed tenant and the duration and conditions of the proposed lease. The Sheriff, after service on the proprietor and upon other bondholders, if any, and after any inquiry he may think proper, may, if he is satisfied that a lease for more than seven years is expedient for the lands, approve of the proposed lease, provided that no such lease shall exceed twenty-one years for heritable property in general and thirty-one years for minerals. This interlocutor is final, except as to questions of titles, or where the principal sum in the heritable security exceeds one thousand pounds.[2]

Power to input and output tenants.

Again, a creditor in a bond containing power to output and input tenants was held entitled to pursue an action of removing against tenants, as a heritor, under the A. S., 1756;[3] and there would seem no reason to doubt that the same powers are conferred by the statutory form of bond. Otherwise the creditor might, by connivance between the debtor and the tenants, be deprived of all benefit from the rents.

Power of creditor to enter into actual occupation of subjects.

It is believed to be not uncommon for the creditor to enter into actual possession of arable subjects, take over the stock, and farm them himself. In such a case he would, no doubt, be bound to account to the debtor, or subsequent bondholders, if his management were grossly inadequate or unskilful; but his right so to enter into the natural possession of the subjects would seem to be a necessary corollary of his right to enter into possession

[1] Mont. Bell, *Conveyancing*, ii. 1170.
[2] 57 & 58 Vict. c. 44, ss. 6, 7, and 12.
[3] *Forsyth* v. *Aird*, 1853, 16 D. 197.

at all. In one case it was held that a creditor was not entitled to take credit for the salary of a factor whom he employed to collect the rents, on the ground that his right to them was that of a proprietor.[1] But now, under the statutory form of bond, he is entitled to take credit for the expense of management, and would therefore be entitled to employ a factor.[2]

Position of creditor in possession is not that of a proprietor.

On the other hand, his position is in several respects to be distinguished from that of a proprietor. Thus he retains the right to poind the ground, which a proprietor cannot do.[3] He is not entitled to be enrolled as a voter, nor to exercise the rights of a proprietor in parish or county government.[4] The proper criterion as to the limits of his rights would seem to be found in the consideration of the legitimate interest of a creditor in entering into possession. These are solely to obtain payment of his debt, principal and interest, out of the proceeds of the subjects. Whatever powers may be necessary for that purpose he would seem entitled to exercise; but he is not, it is submitted, entitled to use the subjects for his own convenience or enjoyment in any manner which has no effect in reducing his debt. This would seem to be the criterion applied, in *Grindlay* v. *Drysdale*, to the analogous case of an adjudger. There a right of patronage was adjudged; and the adjudger, on the occurrence of a vacancy in the church before the expiry of the legal, proposed to present to it. It was held that although a right of patronage had a pecuniary value, and might therefore be adjudged, yet, as the right of presentation on a vacancy had no pecuniary value, the adjudger was not entitled to exercise it.[5] It is true that in several of the opinions given in this case it was thought that an adjudger in possession would have the right of shooting over the lands; but this may be explained by the fact that, at the date of the decision, shootings had not come to be considered a valuable part of an estate.

Liabilities of creditors in possession.

If a creditor enters into possession he incurs many, if not all, of the liabilities of a proprietor. If he uplifts the rents, he is liable to the superior for feu-duty. Thus where a proprietor granted a bond and disposition in security, and afterwards disponed the lands by a disposition *ex facie* absolute, upon which the disponee was infeft, it was decided that the *ex facie* absolute disponee, on being compelled to pay the feu-duty, was

[1] *Kildonan* v. *Douglas, Heron & Co.*, 1785, M. 14135.

[2] Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 119).

[3] *Henderson* v. *Wallace*, 1875, 2 R. 272.

[4] *Forsyth* v. *Aird*, 1853, 16 D. 197, at p. 204.

[5] *Grindlay* v. *Drysdale*, 1833, 1 Ross's L. C. 140.

entitled to relief from the holder of the bond and disposition in security, on the ground that the latter had entered into possession and uplifted the rents.[1] The creditor in possession would also seem to come under the definition of the word "owner" in various Statutes relating to local government. Thus in the Public Health Act, 1867, an owner is defined as "the person for the time being entitled to receive, or who would, if the same were let, be entitled to receive, the rents of the premises."[2] In the Burgh Police Act, 1892, it is provided that the word "owner" shall include "joint-owner, fiar, liferenter, feuar, or other person in the actual possession of and entitled to receive the rents of lands and premises of every tenure and description, and the factor, agent, or commissioner of such persons, or any of them, or any other person who shall intromit with or draw the rents."[3] Under these and similar definitions it is clear that the heritable creditor, if he uplifts the rents, would be liable in payment of the rates imposed under these various Statutes;[4] and, if in actual possession, would be responsible for the fulfilment of police and sanitary regulations with regard to the subjects. Further, if the creditor actually enters into the possession and management of the subjects, though not if he merely receives the rents without interfering in the management, he incurs the responsibilities of an owner in questions with third parties. Thus he will be liable in an action of damages at the instance of a party who is injured by the dangerous or defective state of the lands or premises. Thus in a case in which it was held that the owner of a house whose titles included the *solum* of the street in front of it was bound to keep the pavement in repair, it was decided that a heritable creditor, who had entered into possession of the house to the exclusion of the owner, was liable in an action of damages at the instance of a person who had been injured owing to the defective state of the pavement in question.[5]

Real diligence.

So far we have dealt with the right of the creditor to enter into possession, and the position he acquires upon doing so. The creditor may also strengthen his position and increase his means for the recovery of the debt by the use of real diligence. The forms of such diligence which require consideration are the

[1] *Liquidator of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.

[2] 30 & 31 Vict. c. 101, s. 3.

[3] 55 & 56 Vict. c. 55, s. 4.

[4] See General Police and Improvement Act, 1862 (25 & 26 Vict. c. 101, s. 3); Income Tax Act, 1842 (5 & 6 Vict. c. 35, s. 60, Rule 4); *Greenock Board of Police* v. *Liquidator of Greenock Prop. Invst. Co.*, 1885, 12 R. 832.

[5] *Baillie* v. *Shearer's Judicial Factor*, 1894, 21 R. 498.

actions of maills and duties, poinding of the ground, and adjudication.

Distinction between real and personal diligence.

By the actions of maills and duties and of poinding of the ground the creditor may attach the produce of the subjects in security of his debt. These forms of real diligence are methods of enforcing rights which the creditor already possesses, unlike personal diligence, which is a method of obtaining rights which the creditor does not already possess. Thus the heritable creditor has an assignation to rents, he puts that assignation in force by an action of maills and duties; he has a right in security over the moveables on the ground,[1] he gives effect to that right by an action of poinding of the ground. This has been the guiding principle in all cases of competition between the diligence of real and personal creditors. No race of diligence is thereby created, as the real creditor is merely enforcing a security already conferred upon him, the personal creditor is striving to obtain a security to which his debt by itself does not entitle him.[2] On the same principle, when several real creditors poind the ground, their respective priority depends on the date of their infeftment, and not on the date of the commencement, or completion, of the diligence.[3]

Maills and duties. Who may bring action.

An action of maills and duties may be brought by a proprietor or by any creditor in right of a *debitum fundi*, or real right affecting the lands, provided that he has the right to enter into possession. Thus this diligence is open to the holder of an *ex facie* absolute disposition with back-bond, or to the creditor in a bond and disposition in security, but not to the holder of a reserved burden, who has no right to enter into possession.[4]

Procedure.

When at the instance of a heritable creditor, the action was formerly directed against the proprietor, and the tenants of the subjects covered by the bond. But it was not indispensable, though usual, to call the proprietor.[5] Where he was called, the conclusions usually were against him for expenses, and against the tenants for payment of their rents to the creditor. It might be brought in the Sheriff Court, or, where the value exceeded £25, in

[1] See *Campbell's Trs.* v. *Paul*, 1835, 13 S. 237, per Lords Balgray and Mackenzie; *Scottish Heritages Co.* v. *North British Prop. Invest. Co.*, 1885, 12 R. 550; *Athole Hydropathic Co.* v. *Scottish Provident Insur. Co.*, 1886, 13 R. 818; *Allan* v. *Cowan*, 1892, 20 R. 36, per Lord Kinnear, p. 40.

[2] *Athole Hydropathic Co.* v. *Scottish Prov. Insur. Co.* 1886, 13 R. 818, Lord Pres.

[3] Stair, ii. 5. 12; *Bell* v. *Cadell*, 1831, 10 S. 100.

[4] Stair, iv. 35. 24. It cannot be brought by a superior—*Prudential Assur. Co.* v. *Cheyne*, 1884, 11 R. 871.

[5] *Haliburton* v. *Tenants of Carse*, 1702, M. 2232.

the Court of Session. This form of action, directed against the landlord and tenants, is still competent; but a new and more convenient form of procedure has been introduced by the Heritable Securities Act, 1894.[1] By that Act an action of maills and duties may be raised against the proprietor only, in the form of Schedule A of the Act. Notice may be given to the tenants of the raising of this action by registered letter in the form of Schedule B of the Act; and the receipt of this notice is declared to have the effect of interpelling the tenants from paying their rents to the landlord, to the same extent as if they had been called as defenders in an action of maills and duties. On decree being given, and upon notice thereof being given to the tenants (in the form of Schedule C), "the tenants shall make payment of the rents due by them respectively, in the same manner and under the same legal compulsitors as if the same had been decerned for and a charge for payment given in an action of maills and duties according to the existing law and practice; and payment when so made shall be a complete exoneration and discharge to such tenants respectively."[2] It was held under the former law that all the tenants who are actually in possession of the subjects must be called, otherwise the decree would have no effect against those who had not been called, and the same rule would probably be applied to the notice under the statutory form.[3] But where all the tenants at the date of raising the action and obtaining decree were called, it was held that it was not necessary to bring a fresh action against a new tenant, or even to intimate to him, and that the new tenant could not resist a demand for payment of his rent to a creditor in possession under a decree of maills and duties, on the ground that the decree was not against him, but against his predecessor in the holding.[4]

Effect of decree.

The effect of decree in an action of maills and duties, and notice to the tenants, is not to give the creditor a right to the rents, as such a right has already been conferred upon him by the assignation to rents in his bond, but to interpel the tenants from paying their rents to the debtor, which, without such notice, or other similar intimation, they would be entitled to do, and to render them liable to pay them to the creditor.[5] Thus the effect of the service of the summons, or the receipt of the registered notice under the new form, is to interpel the tenant from paying

[1] 53 & 54 Vict. c. 44.
[2] 57 & 58 Vict. c. 44, s. 3.
[3] *Smith's Trs.* v. *Chalmers*, 1890, 17 R. 1088.
[4] *Robertson's Tr.* v. *Gardner*, 1889, 16 R. 705.
[5] *Forsyth* v. *Aird*, 1853, 16 D. 197.

his rent to the landlord. This is illustrated by a case where a tenant claimed to retain an instalment of the rent which became due after the service of the summons, but before decree, on the plea of compensation with a debt due to him by the landlord. It was held that there was no *concursus crediti et debiti*, as the assignation to rents had been duly intimated by the service of the summons, and thereafter the landlord was no longer the proper creditor for rent.[1] And it has been held in the Sheriff Court that where rents are paid forehand, there is a *primâ facie* presumption of *mala fides* in a question with a heritable creditor who has obtained a decree of maills and duties.[2]

Sequestration of debtor not a bar to action of maills and duties.

Again, as the action of maills and duties is only to enforce a preference already secured, the sequestration of the debtor does not act as a bar to it;[3] although, where the action is raised after the sequestration, the creditor is not entitled to recover his expenses from the trustee, which he could have obtained against the debtor, while solvent.[4] By the Bankruptcy Act, 1856, the preference obtained by an action of maills and duties, where a charge has not been given sixty days before the bankruptcy of the debtor, was restricted, in a question with the trustee, to an amount sufficient to satisfy the current half-year's interest on the bond and one year's arrears.[5] But this section has been repealed by sec. 55 of the Conveyancing Act, 1874,[6] and therefore sequestration is no bar to the action of maills and duties.[7]

Creditor, by taking decree, enters into possession.

The creditor who has obtained decree in an action of maills and duties is held thereby to have entered into possession of the subjects. His rights and liabilities, when in possession, have been already discussed.[8] It would, however, seem from one case that by obtaining a decree of maills and duties the creditor obtains the right to use the landlord's hypothec for rent, which might be of great importance in urban subjects.[9]

Application of rents under decree.

Subject to the payment of feu-duties and public burdens, the creditor is entitled to draw the rents, and apply them in payment of the interest, or reduction of the principal, of his debt. He is

[1] *Chambers' Judicial Factor* v. *Virtue*, 1893, 20 R. 257.

[2] *Glasgow Savings Bank* v. *Mills*, 1882; Guthrie, *Sheriff Court Cases*, 2nd series, 258.

[3] *Campbell's Trs.* v. *Paul*, 1835, 13 S. 237.

[4] *Johnston* v. *Bridge*, 1871, 8 S. L. R. 381.

[5] 19 & 20 Vict. c. 118.

[6] The 118th sec. of the Bankruptcy Act was re-enacted as to poindings of the ground, not as to maills and duties, by 42 & 43 Vict. c. 40.

[7] *Royal Bank* v. *Bain*, 1877, 4 R. 985; *Dick's Tr.* v. *Whyte's Tr.*, 1879, 6 R. 586.

[8] *Ante*, p. 99.

[9] *Railton* v. *Muirhead*, 1834, 12 S. 757.

of course bound to account for his intromissions to the proprietor and to other bondholders. In the ordinary case postponed bondholders are not entitled to insist on his applying the rents, after payment of interest, in reduction of the principal debt. He is entitled to pay the surplus to the debtor. Thus where the competing postponed right was that of the wife of the debtor, who was infeft in an annuity payable after his death, it was held that the prior creditor in possession, after meeting the interest, was entitled to pay the balance of the rents to the debtor.[1] But where he has taken possession in competition with the diligence of other creditors, he must either apply the rents in reduction of his debt or pay them over to other creditors.[2] And if a creditor is in right of two bonds, and on the prior bond a cautioner is liable, the creditor, if he draws the rents of the subject, is bound to apply them in reduction of the prior debt.[3]

Poinding of the ground. Who may poind.

An action of poinding of the ground may be brought in the Court of Session or Sheriff Court,[4] and is directed against the proprietor and the tenants of the lands. This form of diligence is open only to creditors in right of a *debitum fundi*, or debt affecting the lands, and to such creditors only as long as they remain in right of such a debt.[5] Thus it may be brought by a superior for the feu-duty,[6] by the holder of a bond and disposition in security,[7] or by the creditor in a real burden,[8] but not by the assignee of a lease recorded under the Registration of Leases Act, 1857,[9] nor by the holder of a disposition *ex facie* absolute, with back-bond, as the last is, in point of title, a proprietor, and not the creditor in a *debitum fundi*.[7] It may be brought for arrears of interest by a creditor as long as he remains in possession of his bond, but not after he has assigned it to a third party.[10] It is doubtful whether an executor could poind the ground for arrears of interest which

[1] *Brown* v. *Rae*, 1835, 13 S. 256.

[2] Bell, *Prin.* s. 914. The cases there quoted (note *f*) refer to sales.

[3] *Scott* v. *Fothringham*, 1859, 21 D. 737.

[4] As to differences in form of warrant, see *Kennedy* v. *Ramsay's Trs.*, 1852, 14 D. 513.

[5] Thus it was held that a superior who had parted with his superiority, could not poind the ground for arrears of the feu-duty—*Scottish Heritages Co.* v. *North British Prop. Invest. Co.*, 1885, 12 R. 550.

[6] Stair, iv. 23. 5 ; Bell, *Com.* i. 724.

[7] *Scottish Heritable Security Co.* v. *Allan Campbell & Co.*, 1876, 3 R. 333. But a creditor in a bond and disposition in security may poind the ground, even although he is in possession under a decree of maills and duties—*Henderson* v. *Wallace*, 1875, 2 R. 272.

[8] *Wilson* v. *Fraser*, 1822, 1 S. 316 ; affd. 1824, 2 Sh. App. 162.

[9] *Luke* v. *Wallce*, 1896, 23 R. 634.

[10] *Scottish Heritages Co.* v. *North British Prop. Invest. Co.*, 1885, 12 R. 550.

have passed to him as moveable property, in a case where the bond has remained heritable and passed to the heir.[1] The action may be brought for interest current but not yet payable, although in such a case the sum realised by the poinding is not payable until the interest becomes due.[2] On the same condition, it would probably be competent to poind the ground on a bond with a postponed term of payment, even before that term of payment has arrived.[3] It has been questioned, but not decided, whether an action at the instance of two bondholders jointly is competent.[4]

Poinding by postponed creditor.

The right to poind the ground depends upon the infeftment in the *debitum fundi* on which it proceeds, and it is therefore *primâ facie* the privilege of a preferable creditor.[5] If such a poinding is brought by a postponed creditor, anyone having a preferable real right may appear and be preferred.[6] And as a prior creditor is, while the debtor is solvent, entitled to exhaust the whole moveables on the ground in payment of his debt, poinding by a postponed creditor can rarely be effectual, except when the preferred debt is of very small amount. Where the debtor is bankrupt, a poinding can only obtain a preference for the current half-year's interest and one year's arrears, and therefore it may often be possible for a postponed creditor to acquire a preference thereby.[7]

Procedure.

The summons of poinding of the ground concludes for a warrant to messengers-at-arms "to pass and seek for, fence, arrest, comprise, poind, and destrain" all the moveables on the ground, but, with regard to those belonging to tenants, only to the extent of the amount of their rents due and unpaid at the time. On decree being obtained, a warrant to poind is given, which may be carried out by messengers-at-arms, and by a sale of the goods poinded. The decree in the action attaches the ground, and may be put in force so long as the pursuer is alive and in possession of his debt, although the proprietor called as defender may be dead, or the lands transferred to a new owner.[8] Similarly, when obtained

[1] *Waugh* v. *Jamieson*, 1676, M. 5453 and 5526; *Marquis of Ailsa* v. *Jeffrey*, 1859, 21 D. 492, per Lord Deas, p. 503; *Scottish Heritages Co.*, *supra*, Lord Lee, 12 R. 557.

[2] *Stewart* v. *Gibson's Tr.*, 1880, 8 R. 270.

[3] *Stewart*, *supra*, per Lord Mure.

[4] *Douglas* v. *Tait*, 1884, 12 R. 10.

[5] Cf. *Bell* v. *Cadell*, 1831, 10 S. 100.

[6] *Scottish Heritages Co.* v. *North British Prop. Invest. Co.*, 1885, 12 R. 550; *Young's Trs.* v. *Hill's Trs.*, 1893; 1 S. L. T., No. 378 (Lord Low).

[7] *Nicol's Tr.* v. *Hill*, 1889, 16 R. 416; *supra*, p. 62.

[8] Bell, *Com.* ii. 57; *Keir* v. *Hepburn*, 1624, M. 10544.

against a tenant it may be put in force against his successor in the holding.[1]

Nature of right acquired.

The nature of the right which is put in force by decree in an action of poinding of the ground has been described by the Lord President (Inglis) as follows:—"The security which a heritable creditor holds over moveables is of exactly the same nature and has the same effect as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground; but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor therefore, in raising his action, is not seeking to obtain a preference, but to give effect to a preference which is already his; but it is a preference which ranks with the preference of other heritable creditors, according to the priority of the dates of the creditors' titles."[2] The illustration of this supplied by the criterion of preference between poindings raised by competing heritable creditors has been already mentioned. It is also illustrated by the rule that the *nexus* imposed by the poinding dates from the service of the summons, which is held to prevent the owner of the moveables from allowing any other party to acquire a right to them;[3] and by a case in which it was held that where the moveables were removed after the service of the summons, but before decree, the creditor was entitled to recover them.[4] But all that can be attached are the moveables which are actually on the premises at the date of the service of the summons, or are brought thereon afterwards. The creditor cannot therefore recover moveables which have been removed prior to the service of the summons, though he may, in certain cases, have an action of damages against the party so removing them. Thus where a judicial factor was appointed on the sequestrated estate of a baker, under sec. 16 of the Bankruptcy Act, 1856, and he, at the request of the trade creditors, removed the machinery from the bakehouse just before the heritable creditor brought an action of poinding of the ground, it was held that, whether the conduct of the judicial factor was justifiable or not, the poinding did not attach the machinery which had been removed.[5] Though it was unnecessary to decide

[1] *Forrester*, 1612, M. 10543.

[2] *Athole Hydropathic Co.* v. *Scottish Prov. Insur. Co.*, 1886, 13 R. 818, per Lord Pres., at p. 822. See obs. on this judgment in *North British Prop. Invest. Co.* v. *Paterson*, 1886, 15 R. 885; see also Kames, *Law Tracts*, 2nd ed., p. 169; Ross, *Lectures*, ii. p. 422, 438; *Stevenson, Lauder, & Gilchrist* v. *Macbrayne*, 1896, 23 R. 496.

[3] *Lyons* v. *Anderson*, 1880, 8 R. 24.

[4] *Barstow* v. *Mowbray*, 1856, 18 D. 846.

[5] *Urquhart* v. *Macleod's Tr.*, 1883 10 R. 991.

the question, the Court seemed to lean to the opinion that the judicial factor, in the circumstances, was justified in removing the machinery.

What may be poinded.

All the moveables on the ground belonging to the proprietor may be poinded;[1] moveables belonging to tenants only to the extent of their rents due and unpaid.[2] Goods belonging to third parties may not be poinded, even though they happen to be situated on the ground.[3] It was held in an early case that where goods were sold, but allowed to remain on the ground of the seller, they might be poinded; but this judgment would probably not be repeated now.[4] But the mere fact that goods belonging to a third party have by mistake been poinded, will not entitle such third party to an action of damages against the poinder, unless he has actually suffered appreciable damage.[5]

Preference of creditor over moveables poinded. Postponed to taxes.

The *nexus* obtained by the service of a summons of poinding of the ground confers a right over the moveables poinded which is preferable to any right acquired by any private creditor by personal diligence.[6] But, by Statute, rates and taxes are preferable to any private diligence; and thus it was held that a personal poinding at the instance of a collector of poor-rates prevailed over a poinding of the ground which had been already executed by a heritable creditor.[7]

Effect of sequestration of debtor on right of creditor to poind.

At common law the sequestration of the debtor was held to be no bar to a poinding of the ground at the instance of a heritable creditor.[8] By the Bankruptcy Act, 1856, s. 118, it was provided that no poinding of the ground, not carried out by a sale of the effects sixty days before the sequestration, should be effectual in a question with the trustee, except for the current half-year's interest and one year's arrears. This section was repealed by the Conveyancing Act, 1874,[9] but re-enacted by a later Statute.[10] It was held that this limitation applied only in a question with a trustee in sequestration—not

[1] Bell *Com.* ii. 56.

[2] 1469, c. 36.

[3] *Collet* v. *Master of Balmerinoch*, 1679, M. 10550.

[4] *Watson* v. *Reid*, 1628, M. 10545; doubted per L.J.C. (Moncreiff); *Thomson* v. *Scoular*, 1882, 9 R. 430.

[5] *Nelmes & Co.* v. *Gillies*, 1883, 10 R. 890.

[6] *Bell* v. *Cadell*, 1831, 10 S. 100; *Campbell's Tr.* v. *Paul*, 1835, 13 S. 237; *Athole Hydropathic Co.* v. *Scottish Prov. Insur. Co.*, 1886, 13 R. 818; *Tullis* v. *White*, 18 June, 1817, F. C., doubted by Prof. Bell, *Com.* ii. 57.

[7] *North British Prop. Invest. Co.* v. *Paterson*, 1888, 15 R. 885; 8 & 9 Vict. c. 83, s. 88; 43 & 44 Vict. c. 19, s. 88.

[8] *Bell* v. *Cadell*, 1831, 10 S. 100; *Royal Bank* v. *Bain*, 1877, 4 R. 985; *Dick's Trs.* v. *Whyte's Tr.*, 1879, 6 R. 586.

[9] 37 & 38 Vict. c. 94, s. 55.

[10] 42 & 43 Vict. c. 40, s. 3.

with a receiver in an English bankruptcy, or a liquidator of a company;[1] and that a poinding at the instance of a creditor of an ancestor was not affected by the sequestration of the heir who was in possession of the estate.[2] The limitation is made applicable to the liquidation of a company by 49 Vict. c. 23, s. 3, and (by 50 & 51 Vict. c. 69, s. 2) to all poindings of the ground by which moveables belonging to a bankrupt estate, whether administered in Scotland or not, are attached, and whether the debt or security on which the poinding proceeds was granted by the bankrupt, his ancestor, or any other person.

In the case of sequestration, the date at which the current half-year's interest is to be struck, and from which the year's arrears are to be calculated, is the date of the sequestration, not that of the poinding of the ground.[3] When there are two or more heritable creditors and the debtor is sequestrated, each of them may poind the ground. They will thus acquire, assuming that the moveables are of sufficient value, a preference for the current half-year's interest and one year's arrears of their respective debts.[4]

Adjudication

The creditor in a bond and disposition in security is entitled to adjudge the heritable estate of the debtor in two capacities: as the holder of a *debitum fundi*, or real right affecting the lands, and as a personal creditor, in virtue of the personal obligation contained in his bond.

On a *debitum fundi*.

An adjudication on a *debitum fundi*, which must be preceded by a decree of poinding of the ground, can only attach the estate over which the *debitum fundi* in question extends.[5] It may be used in cases where there is no power of sale in the bond, or for the purpose of accumulation of interest and principal into one principal sum. Such adjudications are expressly exempted from the Act 1661, c. 62, by which the *pari passu* ranking of all ordinary adjudications led within a year and a day of that first made effectual was introduced.[6] But they are preferable, not according to the date of the diligence, but according to the date of the infeftment upon which the adjudication was based; or, as it is put by Professor Bell, the adjudger retains

[1] *Scottish Union & National Insur. Co.* v. *James*, 1886, 13 R. 928; *Athole Hydropathic Co.* v. *Scottish Prov. Insur.*, 1886, 13 R. 818.

[2] *Millar's Trs.* v. *Miller & Son's Tr.*, 1886, 13 R. 543.

[3] *Budge* v. *Brown's Tr.*, 1872, 10 Macp. 958.

[4] *Nicol's Tr.* v. *Hill*, 1889, 16 R. 416.

[5] Ersk. ii. 8. 37; More, *Notes to Stair*, p. cccliii; Bell, *Com.* i. 753; *Herries* v. *Aslowen*, 1610, M. 257.

[6] Mont. Bell, *Conveyancing*, ii. 1193.

after the adjudication the preference he acquired by the *debitum fundi*.[1] It has accordingly been held that when an adjudication on a *debitum fundi* was led by a prior creditor, a postponed creditor had no right to appear.[2]

As a personal creditor.

As a personal creditor, the bondholder may attach by adjudication the whole heritable estate of his debtor, including the lands over which his bond is granted. But such an adjudication is subject to the rule that all adjudications led prior to that first completed, and all led within a year and a day after it, rank *pari passu*.[3] And as sequestration is now equivalent to adjudication, and supersedes all private adjudications which have not been completed for more than a year and a day, this form of diligence can rarely be of any practical advantage to a heritable creditor.[4] But if the bondholder attaches by adjudication other heritable estate of the granter, and the latter is not sequestrated within a year and a day, he may acquire an important advantage in the ranking in any process for distribution of the granter's estate. He is, of course, entitled to be ranked for the whole sum in his bond, with interest, on the estate over which that bond is granted. Should that prove insufficient, he is also entitled to rank as an adjudger on the other heritable property attached by the adjudication, without deducting the amount he has drawn under the security, subject, of course, to the rule that he is not in any case to draw more than twenty shillings in the pound.[5]

Sale. Statutory provisions.

The ultimate remedy of the creditor is to sell the subjects of the security under the power of sale contained in his bond. The phrase in the form of bond given in the Consolidation Act, 1868, "on default of payment I grant power of sale," is interpreted by the 119th sec. of the Act. It provides that if the granter of the bond should fail to make payment of the sum contained in the personal obligation therein within three months of a demand for payment made to him, then it should be lawful for the creditor, after advertisement published once weekly for at least six weeks after the expiry of the said three months in certain newspapers, to sell the lands in whole or in lots by public roup. The sale may take place in Edinburgh or Glasgow, or in the head burgh of the county in which the lands, or a

[1] Bell, *Com.* i. 753.

[2] *Young* v. *Scott*, 1893, 1 S. L. T., No. 15 (Outer House, Lord Stormonth Darling).

[3] Act 1661, c. 62.

[4] See *ante*, p. 85.

[5] Bell, *Com.* ii. 415; *Douglas, Heron, & Co.* v. *Bank of England*, 1781, M. 14131.

chief part thereof, are situated; or in any burgh or town sending, or contributing to send, a member to Parliament; or in any burgh or town which has adopted the General Police and Improvement (Scotland) Act, 1862, which may be nearest to the lands in question, whether in the same county or not. The creditor is entitled to enter into articles of roup, and to grant dispositions containing all usual and necessary clauses, in particular a clause binding the granter of the bond in absolute warrandice of such dispositions, and obliging him to corroborate and confirm the same, and to grant all other deeds requisite and necessary by the law of Scotland for rendering such sale or sales effectual, in the same manner and to the same effect as the granter could do himself. It is also provided that these proceedings shall be valid and effectual although the debtor in the bond is in pupilarity or minority, or subject to any legal incapacity. In carrying out such sale it is declared to be lawful for the creditor to prorogate and adjourn the sale from time to time as he may think proper, previous advertisement of the adjourned sale being given, in the newspapers mentioned, once weekly for three weeks.

Formalities must be strictly carried out.

The formalities requisite in a sale should be strictly carried out, otherwise the sale may be reduced at the instance of the debtor or other party interested, and the purchaser at the roup would be entitled to resile.[1] But any objections to the sale must be stated within a reasonable time; and the Court refused to listen to objections advanced by a postponed creditor who had been aware of the sale and of the irregularities he alleged, but had taken no action for six years.[2]

Intimation, requisition, and protest.

The demand for payment, known as intimation, requisition, and protest, should be made notarially in the form provided in No. 2 of Schedule FF of the Consolidation Act, 1868.[3] It should be intimated to the debtor personally, or at his dwelling-place, if within Scotland; or, if furth thereof, at the office of the Keeper of the Record of Edictal Citations, in presence of a notary and two witnesses. Intimation must be made to the debtor, and, if the estate has been transferred to another party, to the present owner; but it would seem not to be indispensable, though probably advisable, to intimate to postponed bondholders, or to a party holding a postponed security by disposition *ex facie* absolute.[4]

[1] *Stewart* v. *Brown*, 1882, 10 R. 192; *Ferguson* v. *Rodger*, 1895, 32 S. L. R. 525.

[2] *Stewart* v. *Brown*, *supra*.

[3] 31 & 32 Vict. c. 101, s. 119.

[4] *Stewart* v. *Brown*, 1882, 10 R. 192, per Lord President (Inglis), p. 202; *Leask* v. *Johnstone*, 1886, 24 S. L. R. 78.

A copy of the requisition, certified by the notary public in the form No. 3 of Schedule FF of the Consolidation Act, 1868; or, if the demand has been intimated to more persons than one, a copy so certified of the demand intimated to one of these persons, with a certificate by the notary public that a demand has been made on the other persons, and stating the names and designations of such persons, with the place and date of intimation, is declared to be sufficient evidence of the demand for payment.[1] Once intimation has been properly made, it is unnecessary to renew it, even if a long interval takes place before a sale is effected, or a sale is effected and the purchaser has failed to carry it out.[2] In *Stewart* v. *Brown* this was questioned, though it was unnecessary to decide it; but in *Howard & Wyndham* it was held that the sale was regular without any renewal in intimation, though there was an interval of six years, ten exposures, and two abortive sales, between the intimation and the final sale.

Cases provided for by Heritable Securities Act, 1894.

An intimation, requisition, and protest is valid and effectual although the debtor is in pupilarity or minority, or subject to any legal incapacity.[3] If (*a*) the debtor in the heritable security is dead, and no heritable title has been completed to the lands by his heir or other representative, and the name and address of such heir cannot be ascertained by the creditor; or (*b*) if the creditor cannot ascertain the address of the debtor, or whether he is still alive; or (*c*) if the creditor cannot ascertain the address of the person who, in terms of such heritable security, is the person legally entitled to receive intimation of the demand for payment, the creditor may apply to the Sheriff for warrant to intimate the demand for payment at the office of the Keeper of the Record of Edictal Citations, in such form, and addressed to such person, as the Sheriff may think fit; and a demand for payment so made shall have the same effect as if it had been delivered personally to the debtor.[4] In a case which arose before this Act, the Court, on application, appointed a judicial factor to receive the requisite notice.[5]

Question to whom intimation should be made when debtor is sequestrated, but no trustee is yet appointed.

A case sometimes arises in practice upon which it appears there is no decision. A debtor gets into difficulties, and his ordinary creditors petition for his sequestration. The sequestration commences from the date of the first deliverance,[6] and the

[1] 31 & 32 Vict. c. 101, s. 119.

[2] *Stewart* v. *Brown*, 1882, 10 R. 192; *Howard & Wyndham* v. *Richmond's Trs.*, 1890, 17 R. 990.

[3] 31 & 32 Vict. c. 101, s. 119.

[4] 57 & 58 Vict. c. 44, s. 16.

[5] *Reid* v. *Steele*, 1852, 24 *Jurist*, 266.

[6] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 42).

trustee's act and warrant transfers to him absolutely the whole heritable estate in Scotland belonging to the bankrupt at the date of the sequestration.[1] As the trustee may not be appointed for some weeks after the date of the first deliverance, upon whom is the heritable creditor to serve his schedule of intimation in the meantime? It is thought that intimation to the debtor only would be sufficient, as the right of the trustee is "subject to such preferable securities as existed at the date of the sequestration,"[2] and it is provided by the Bankruptcy Act, 1856, that nothing therein contained should affect the rights "of any heritable creditor holding a power of sale preferable to the powers of the trustee."[3] It would be contrary to the policy of the Bankruptcy Act to hold that a preferable creditor should be obliged to delay his procedure until a trustee is actually appointed. But it would be desirable for the creditor, after the trustee is actually appointed, to make a formal intimation to him of the steps he is taking.

Advertisement.

The time and place of the sale must be advertised once weekly, for at least six weeks, after the expiry of three months from the date of the intimation, in a newspaper published in Edinburgh or Glasgow, and also in a newspaper published in the county in which the lands are situated; or, if no such newspaper exists, in a newspaper published in the next or a neighbouring county.[4] In the case of lands situated in Midlothian or Lanarkshire, advertisement in an Edinburgh or Glasgow paper would probably be sufficient. Advertisement in a purely advertising paper is sufficient.[5] But the six weeks must be strictly adhered to, and, in a case where the first advertisement appeared on the 26th of January and the sale was held on the 7th of March, it was held that the purchaser was entitled to resile, as the sale, having taken place on advertisement for five weeks and five days, was irregular.[6] It is provided by the Consolidation Act, 1868, that *primâ facie* evidence of advertisement shall be afforded by certificates from the publishers of the newspaper; a provision which obviates the necessity of preserving the newspapers themselves with the title deeds.[7]

Advertisement of adjourned sale.

When a sale is adjourned, a new exposure may take place upon advertisement once weekly for three weeks in similar news-

[1] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 102).
[2] *Ib.* s. 102.
[3] *Ib.* s. 107.
[4] 31 & 32 Vict. c. 101, s. 119.
[5] *Earl of Rosslyn, Petr.*, 1830, 8 S. 964.
[6] *Ferguson* v. *Rodger*, 1895, 22 R. 643.
[7] 31 & 32 Vict. c. 101, s. 119.

papers.[1] There is no limit in the Consolidation Act, 1868, as to the time for which a sale may be adjourned; and in practice it is usual to adjourn without inserting any date in the minute of adjournment, and to fill it in when the date of the new exposure is decided on. In one case the propriety of a sale upon three weeks' advertisement was questioned when an interval of two years had intervened between the first exposure and the sale;[2] but in a later case it was decided that if the actual time between the two exposures was not unreasonably long, the sale will be quite regular on three weeks' advertisement, even if it was adjourned to a date to be afterwards fixed.[3] But in cases where a very considerable interval has elapsed between the two exposures, it would be prudent to advertise, *ob majorem cautelam*, for six weeks. The same course should be followed when a sale has taken place at the first, or any subsequent exposure, but has fallen through.[4]

Title given to purchaser.

Where a sale under the powers contained in a bond and disposition in security has been carried out with all necessary formalities, the title given to the purchaser is declared to be as valid and effectual as if it had been granted by the granter of the bond, notwithstanding that the latter may have died in the interval, and that the party debtor in the bond, and in right of the lands, may be in pupilarity, minority, or subject to any legal incapacity.[5]

Creditor bound to consign price, after satisfying his debt.

When a sale is carried out, the creditor is bound to account to the debtor or postponed bondholders for the price received, and to consign the surplus, after deducting his debt and interest, and the expenses incurred by him, if any, while in possession, and the expenses of the sale, and after paying all previous encumbrances, and the expenses of discharging the same, in any Scotch bank incorporated by Act of Parliament or royal charter, in his own and the purchaser's name jointly, for behoof of the party or parties having right thereto. The bank in which consignation is to be made must be mentioned in the articles of roup.[6]

[1] 31 & 32 Vict. c. 101, s. 119.

[2] *Stewart* v. *Brown*, 1882, 10 R. 192.

[3] *Howard & Wyndham* v. *Richmond's Trs.*, 1890, 17 R. 990.

[4] If a purchaser at a sale takes a reasonable objection to the regularity of the procedure, and consequently to the validity of the title offered to him, he is entitled to have his objection removed by suspending a charge for the price, and obtaining a decision of the Court as to the validity of the title, at the expense of the seller—*Howard & Wyndam* v. *Richmond's Trs.*, 1890, 17 R. 990.

[5] Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 119).

[6] *Ib.* s. 122. It is customary to fix, in the articles of roup, a penalty for failure to implement the contract of sale.

How money thus consigned may be uplifted.

Some difficulty, which is not met by the Consolidation Act, may be caused by consignation. In many cases it will, no doubt, be easy to arrange for the payment of the money consigned to the debtor, or to the postponed bondholder. If there are actually two or more claimants, and therefore a double distress, the bank should probably raise an action of multiplepoinding. But a party may be the sole claimant, and yet unable to satisfy the bank that he is, beyond question, the party having best right to the money. In practice this difficulty is met by a petition to the Court for authority to uplift consigned money.[1]

Record cleared on consignation.

Upon consignation of the surplus of the price, or, if there be no surplus, upon the execution and recording of a notarial instrument, in the form No. 1 of Schedule L of the Conveyancing Act, 1874, the disposition by the seller to the purchaser, when recorded in the Register of Sasines, is declared to have the effect of completely freeing and disencumbering the lands of all posterior securities and diligences, as well as of the security of the creditor selling.[2]

Expenses. Penalty.

The creditor selling is entitled to charge the debtor with the expenses of the sale, and to retain the same out of the price paid by the purchaser.[3] This he is entitled to do, not only in terms of the 122nd sec. of the Consolidation Act, 1868, but also in virtue of the penalty stipulated for in his bond. Originally a means of evading the laws against usury, the penalty has been restricted by equitable considerations to the expenses reasonably incurred by the creditor in obtaining payment.[4] Besides the expenses incurred while in possession, and the expenses of a sale, it will cover expenses incurred by the creditor in vindicating his right under the security. It has, however, been held that it will not cover the expenses of an action against the debtor, in which the Court, while decerning in favour of the creditor, found no

This, however, should not be done, as its effect is, if the purchaser resiles, to limit the damages which the seller may obtain to the amount fixed by the penalty—*Johnstone's Tr.* v. *Johnstone*, 19 Jan. 1819, F. C.; *Hyndman's Tr.* v. *Miller*, 1895, 33 S. L. R. 359.

[1] See *Antrobus, Petr.*, 15 July 1894, 4 S. L. T. No. 143, where it was held that the Court of Session Consignation Act, 1895 [58 & 59 Vict. c. 19], did not apply to consignations under sec. 122 of the Consolidation Act.

[2] Consolidation Act, 1868, s. 123; Conveyancing Act, 1874, s. 48.

[3] Consolidation Act, 1868, s. 122. In any process for distribution of the price of the subjects, the creditor has the same preference for his expenses as he has for the principal debt—*Jamieson* v. *Beilby*, 1835, 13 S. 865.

[4] *Home* v. *Hepburn*, 1549, M. 10033; *Allan* v. *Young*, 1757, M. 10047.

expenses due.[1] But the expenses of a decree in absence against the debtor would be chargeable. And when the creditor has been obliged to litigate with a third party in defence of his preference under the bond, he is entitled, under the penalty, to charge the debtor with his expenses, even although no expenses have been found due.[2] Thus where an action at the instance of a postponed against a prior bondholder was decided by the House of Lords in favour of the latter, but no expenses were found due, the prior creditor was found entitled to retain his expenses out of the proceeds of the subjects, although, as they were insufficient to meet both debts, the effect was to make the postponed bondholder liable in expenses.[3]

Sale by *pari passu* bondholder.

Where there are *pari passu* bondholders, any one of them is entitled, at common law, to sell, but the sale leaves the other *pari passu* bonds unaffected, and they continue burdens on the lands. In an action by one *pari passu* bondholder concluding for declarator that the other was bound to consent to, and concur in, a sale, or that, failing such consent and concurrence, the sale should have the same effect as if they had been given, the defender was assoilzied.[4] This case probably led to the subject being dealt with by the Heritable Securities Act, 1894.[5] It is there provided that where a *pari passu* bondholder desires to sell, and cannot obtain the consent of the other creditor, he may apply to the Sheriff for a warrant to sell, calling the other creditor as a defender. The Sheriff, after such inquiry as he may think fit, may, if he think it expedient, order a sale, fix the price, and authorise either, or both, of the parties, or some third party, to carry it out, and, upon payment or consignation of the price, to grant a conveyance and disencumber the lands as fully as if the *pari passu* bondholders had been carrying out the sale by joint agreement. The expenses of, and connected with, the sale, are payable preferably out of the price, and the balance is to be distributed amongst the creditors in the securities charged upon the lands according to their just rights and preferences.[6] The Sheriff, in this procedure, means the Sheriff of the county in which the lands, or a portion of them, lie; or if they lie in more counties than one, then the Sheriff of any of such counties.[7] The word Sheriff includes

[1] *Gordon* v. *Maitland*, 1761, M. 10050; *Young* v. *Sinclair*, 1796, M. 10053.

[2] *Allardes* v. *Morison*, 1788, M. 10052: *Ramsay* v. *Goldie*, 1826, 4 S. 737; *Orr* v. *Mackenzie*, 1839, 1 D. 1046.

[3] *Orr*, *supra*.

[4] *Nicholson's Trs.* v. *M'Laughlin*, 1891, 19 R. 49.

[5] 57 & 58 Vict. c. 44.

[6] *Ib.* s. 11.

[7] *Ib.* s. 15.

Sheriff-Substitute.[1] The decision of the Sheriff is final, except in questions of title or where the principal sum in the security exceeds one thousand pounds.[2]

Sale by postponed bondholder.

A postponed bondholder is entitled to sell the subjects, under the power of sale in his bond. It has recently been held that he is entitled, on carrying out a sale, to give formal premonition to the prior bondholder of his intention to pay the sum in his bond, and to insist on that bondholder granting a discharge.[3] Such a discharge is clearly necessary in order to free the lands of the prior security, as the provisions of the Consolidation Act, 1868 (s. 123), with regard to clearing the record on a sale, are applicable only to freeing the lands from the bond under which the sale is made, and all posterior bonds, leaving prior bonds unaffected. The right of the posterior bondholder thus to force the hand of the prior bondholder, and compel him to give up a security with which he may be perfectly satisfied, was upheld by Lord Young (with whom the Lord Justice Clerk concurred), on the terms of sec. 122 of the Consolidation Act, 1868. It is there provided, *inter alia*, that a creditor selling is bound, on receipt of the price, to consign the surplus in bank, "after paying all previous encumbrances and the expense of discharging the same." According to the construction put upon this section by Lord Young,[4] it is the imperative duty of a posterior bondholder, in selling the estate, to pay off all prior bonds; and he would not be entitled, even if all parties were willing, to sell the estate subject to the prior bond. It is submitted that this is a very strict view of the words of the section, which might easily be understood to mean that the bondholder, in selling, must apply the price in paying off and discharging prior bonds, in a case where parties have arranged that they should be paid off. Lord Trayner, who concurred in the judgment in *Adair's Tr.* v. *Rankin*, rested his opinion on the fact that the debtor had given his authority to the premonition used by the postponed bondholder, and therefore that it was in reality a premonition by the debtor of his intention to redeem.

So far the case taken has been that of a sale under an ordinary bond and disposition in security, and in a case unmarked by specialties. It is now proposed to consider particular and special cases.

Sale under a bond not in the statutory form.

The formalities detailed above apply to a sale under a bond and disposition in security granted in the form provided by the Consolidation Act, 1868, or to similar bonds granted under the

[1] Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 28).

[2] 57 & 58 Vict. c. 44, s. 12.

[3] *Adair's Tr.* v. *Rankin*, 1895, 22 R. 975.

[4] *Adair's Tr.*, *supra*, at p. 981.

Heritable Securities Act, 1847.[1] In bonds prior to that date the methods of effecting a sale were usually specified in the bond itself, and should be closely followed.[2] It is doubtful whether an express stipulation in a bond that a sale should be carried out with less intimation or advertisement than the Consolidation Act requires, or without intimation or advertisement at all, would be held to be one which the creditor could lawfully act upon.[3]

Procedure where no power of sale in the bond.

Where a bond and disposition in security contains no power of sale, as was occasionally the case in the older forms, it is believed that the Court, if the debtor cannot be found, will appoint a judicial factor with power to sell. In the ordinary case, however, the creditor, if he cannot obtain payment, should bring about the sequestration of the debtor, when the estate will be sold by the trustee.

Ranking and sale.

The process of ranking and sale would frequently be open to a creditor having no power of sale in his bond. Where the lands are burdened with debt beyond their value, and heritable creditors are in possession, any heritable creditor may bring an action of ranking and sale before the Court of Session under the Act 1681, c. 17, whereby the lands will be sold, and the price divided amongst the various heritable creditors, under the orders of the Court.[4] But this method of procedure is expensive and practically obsolete, and the result is better secured by the sequestration of the debtor and a sale by the trustee.

Sale when debtor is sequestrated.

When the debtor in a bond and disposition in security is sequestrated, there are three methods by which the subjects of the security may be sold. (1) By the heritable creditor, in which case the trustee in the sequestration is empowered to give his consent and concurrence, so as to avoid questions as to title.[5] (2) By the trustee, with consent and concurrence of the heritable creditor.[6] (3) By the trustee alone, if authorised to do so by a resolution of a general meeting, and if that resolution is passed before the heritable creditor has taken any steps to sell, or if, having taken them, he delays the sale unduly; provided that the upset price is

[1] 10 & 11 Vict. c. 50.

[2] *Melville, Petr.*, 1854, 16 D. 419; *Nisbet* v. *Cairns*, 1864, 2 Macp. 863. If this is impossible,—if, for instance, advertisement is ordered in newspapers which have ceased to be published,—a petition should be presented to the Court of Session for authority to dispense with the particular formality—*Wallace & Others, Petrs.*, 1868, 7 Macp. 24; *Jurid. Styles*, iii. 753.

[3] *Scottish Prop. Invest. Build. Soc.* v. *Horne*, 1881, 8 R. 737.

[4] As to ranking and sale, see Bell, *Prin.* s. 2333–6; *Com.* ii. 233 *seq.*

[5] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 112.

[6] *Ib.* s. 113.

sufficient to meet the claims of the creditor for his debt, interest and expenses.[1] In practice it is usual for the trustee to sell, the heritable creditor concurring in the sale. The estate is then sold by the trustee in his own name, and the articles of roup and the conveyance to the purchaser are executed by the trustee, with consent of the creditor and the commissioners. The price must be paid by the purchaser to the parties legally entitled thereto, and, in so far as not paid at the time of the delivery of the conveyance, must be consigned in the bank in which the money belonging to the sequestrated estate is deposited. Such payment or consignation will free and discharge the estate and the purchaser from the security of the consenting creditor, and all posterior securities, whether the debt of the consenting creditor is satisfied or not.[2] The trustee may, with consent of a majority, in number and value, of the heritable creditors, and of the Accountant of Court, sell the estate by private bargain.[3] He may also, with consent of the commissioners, compromise any claim against the sequestrated estate,[4] and would therefore be justified, with their authority, in conveying the subjects to the heritable creditor in satisfaction of his claim.[5] And where, without the authority of the commissioners, he transferred the subjects to the heritable creditor, in return for a renunciation of a claim for an unsecured debt, it was held that although the other creditors might have been entitled to object to this, the bankrupt himself, who had been discharged on a composition of 1s. 6d. in the £, had no title to do so.[6]

Procedure in a sale by trustee in sequestration.

When the trustee sells, it is his duty to make up a scheme of ranking and division of the claims of the heritable and other creditors on the price of the heritable estate sold, and report it to the Court, and the judgment thereon is a warrant for payment of the price against the purchaser.[7] It is competent for the Court, on application by the trustee or any creditor interested, with a report thereon by the Accountant in Bankruptcy, and on cause shown, to grant an interim warrant for payment of preferable claims out of the price, or to authorise an interim scheme of division out of the price.[8] The purchaser is entitled, in a sale by the trustee alone, to pay to the trustee before a scheme of division is made up; and is safe in doing so so far as the claims of personal creditors are concerned, but runs the risk of having to pay over

[1] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 114.
[2] *Ib.* s. 113.
[3] *Ib.* s. 115.
[4] *Ib.* s. 176.
[5] *Dalzell* v. *Denniston*, 1876, 4 R. 222.
[6] *Douglas* v. *Maclachlan*, 1881, 8 R. 470.
[7] Bankruptcy Act, 1856, s. 116.
[8] *Ib.* s. 117.

again to the heritable creditor should the trustee misapply the money. Thus where the creditor pays before a scheme is adjusted, and the trustee absconds, he is entitled to take credit for the amount he has paid on a question with the personal creditors, but is bound to pay all heritable creditors in full, whether the amount still unpaid is sufficient to meet their claims or not.[1]

Trustee in possession without sale.

Where the subjects are unrealisable at the date of the sequestration, and the trustee remains in possession and manages them for the interest of all concerned, he ought to be careful to have the authority of the heritable creditor before making any important outlay. If he fails to do so, the creditor will not be liable in recompense, unless he is actually *lucratus* thereby.[2]

Persons entitled to object to a sale. Debtor and his personal creditors.

The question has been several times raised, whether there are any limitations on the right of the creditor to sell, beyond the observance of the statutory formalities: how far he can be controlled by the interests of the debtor, of personal creditors, or of postponed bondholders. It would seem clear that even where there are no postponed bondholders, the creditor is not entitled to act in reckless disregard of the interests of the debtor, as by selling at a time when there is no probability of obtaining a reasonable price. In an extreme case the Court would probably grant an interdict on equitable grounds.[3] In *Beveridge* v. *Wilson* it was held that the trustee in the debtor's sequestration could not prevent the heritable creditor from selling, unless he averred that substantial damage would be done to the debtor's estate. The case was there put by the consulted judges as follows:—"Our opinion therefore is, that by law the heritable creditor, whose right is constituted by infeftment in the way and manner here done, cannot be deprived of his right to sell. Still, however, it is a right subject to control. He is but an encumbrancer; and subordinate rights may be lawfully created by the common debtor, to which the creditor must pay a certain regard, provided they do not injure his own rights. Further, he is, to a certain degree, trustee for the common debtor, and of course for his representatives, and therefore, when he exercises his right, he must do so in a way beneficial, and not hurtful, to those concerned. If he acted nimiously, the Court would certainly interfere in the exercise of

[1] *M'Lane* v. *Roberton*, 1825, 4 S. 232; *Callum* v. *Goldie*, 1885, 12 R. 1137,—a sale under the 114th sec. of the Bankruptcy Act.

[2] *Buchanan* v. *Stewart*, 1874, 2 R. 78.

[3] Menzies, *Conveyancing*, p. 860; opinion of Lord J. C. (Moncreiff) in *Park* v. *Alliance Herit. Secur. Co.*, 1880, 7 R. 546; *Beveridge* v. *Wilson*, 1829, 7 S. 279.

this right of sale."[1] In a later case, however, it was held that a trustee for personal creditors was not entitled to prevent a sale on the ground that the law agent of the debtor held the title deeds under a lien, which would probably reduce the price which the subjects would bring.[2]

Postponed bondholder.

A postponed bondholder would seem to occupy a stronger position than a personal creditor; and the Court will interfere, at the instance of the former, to prevent a sale under specially unfavourable circumstances, or at an inadequate upset price.[3] Thus interdict was granted at the instance of a postponed bondholder, when the prior bondholder proposed to sell the subjects at a time when an action of reduction of the title of the common debtor was known to be impending, and at a price which would have left nothing for the postponed bondholder.[4] But a prior bondholder is entitled, at common law and under the Conveyancing Statutes, to sell at a price which leaves nothing for the postponed bondholder, if, as a matter of fact, the price obtained is a fair one.[5]

The right of a postponed creditor, or other party interested, to tender payment of the debt, and demand an assignation thereof, when the prior creditor proposes to sell, has been already dealt with.[6] The conclusions arrived at may be summarised here by the statement that, if a prior creditor proposes to sell, he is bound to grant an assignation to any postponed bondholder, or other party interested, who offers to pay the debt, and can show a reasonable interest to demand the assignation, unless he can show that he has himself a legitimate interest to refuse to assign; but that, on the other hand, if the preferred creditor takes no active steps to obtain payment, and is satisfied with his security, no one but the debtor can insist upon his accepting payment.[7]

Creditor selling is not entitled, at common law to purchase.

The creditor selling is not entitled, at common law, to purchase the subjects himself; and, in the ordinary case, such a sale would be reducible at the instance of the debtor, or of a postponed bondholder.[8] In one case where the creditor purchased, and made a judicial tender of reconveyance on payment of the price at which

[1] *Beveridge* v. *Wilson*, 1829, 7 S. 279, at p. 281; approved per Lord Pres. Inglis—*Stewart* v. *Brown*, 1882, 10 R. 192, at p. 203.

[2] *Bell* v. *Gordon*, 1838, 16 S. 657.

[3] *Beveridge* v. *Wilson*, 1829, 7 S. 279; *Kerr* v. *Macarthur's Trs.*, 1848, 11 D. 301; *Stewart* v. *Brown*, 1882, 10 R. 192—opinions of Lord Pres. and Lord Shand, at pp. 203, 208.

[4] *Kerr* v. *Macarthur's Trs.*, 1848, 11 D. 301.

[5] *Wilson* v. *Stirling*, 1843, 8 D. 1261; 2 Ross's L. C. 697.

[6] *Ante*, p. 56.

[7] See *ante*, p. 56.

[8] Menzies, *Conveyancing*, p. 860; Mont. Bell, *Conveyancing*, ii. 1166; *Jeffrey* v. *Aiken*, 1826, 4 S. 722; *Taylor* v. *Watson*, 1846, 8 D. 400.

he had bought the lands, it was held that if this offer was not accepted, the sale would be sustained.[1] But the authority of this case has been doubted.[2] A petition for the appointment of a judicial factor, with power of sale, in order to enable the creditor to purchase, was refused.[3]

Creditor may purchase where sale is not carried out by himself.

Where the sale is not actually carried through at his own instance, a heritable creditor may purchase. Thus where a sale is at the instance of one bondholder, any other bondholder may be the purchaser.[4] It is provided by the Bankruptcy Act, 1856, that where a sale is made publicly by virtue of the Act, any creditor may purchase.[5] This would seem to imply that a creditor may purchase even if the sale is at his own instance, with the concurrence of the trustee, under the 112th sec. of the Act. At common law, if the trustee sold, the heritable creditor was entitled to purchase.[6] The power of the trustee to compromise the creditor's claim, by conveying the subjects to him, has been already noticed.[7]

Provisions of Heritable Securities Act, 1894, to enable creditor to purchase.

The Heritable Securities Act, 1894, has provided a means whereby, in certain cases, the creditor selling may purchase the subjects.[8] By this Act, any creditor who has exposed the lands for sale at a price not exceeding the amount of his security, and of any prior or *pari passu* security (exclusive of the expenses attending the exposure or prior exposures), or at any lower price, and has failed to find a purchaser, may apply to the Sheriff[9] for decree of forfeiture, in the form of Schedule D of the Act. The Sheriff, after service on the proprietor, and on other creditors, if any, and after such inquiry as he may think fit, may grant the application and issue decree in the said terms. On such decree being pronounced, and an extract thereof, describing the lands, being recorded in the General Register of Sasines, the right of the debtor to redeem shall be extinguished; the creditor shall have right to the lands in the same manner as if the disposition in security had been an irredeemable disposition from the date of the decree; and the lands shall be disencumbered of all securities and diligences posterior to the security of the said creditor.[10] Alternatively, the Sheriff, instead of granting such decree, may order

[1] *Maxwell* v. *Drummond's Trs.*, 1823, 2 S. 130.

[2] Per Lord Fullarton, in *Taylor* v. *Watson*, *supra*.

[3] *Stirling's Trs.*, 1865, 3 Macp. 851.

[4] *Begbie* v. *Boyd*, 1837, 16 S. 232.

[5] 19 & 20 Vict. c. 79, s. 120.

[6] *Cruickshank* v. *Williams*, 1849, 11 D. 614.

[7] *Ante*, p. 119.

[8] 57 & 58 Vict. c. 44.

[9] This includes Sheriff-Substitute. Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 28).

[10] 57 & 58 Vict. c. 44, s. 8.

the lands to be re-exposed for sale, at a price to be fixed by himself; and in that case the creditor shall be entitled to bid for and purchase the lands, and the Sheriff may thereupon issue a decree in terms of Schedule D; or the creditor may grant a disposition to himself in the same manner as if he had been a stranger.[1] Provision is made for the clearing of the record upon consignation of the price, in the same way as in the case of an ordinary purchaser.[2] But the personal obligation of the debtor is declared still to exist in full force in so far as not extinguished by the price at which the lands have been acquired.[3] The interlocutor of the Sheriff is final, except as to questions of title, or where the principal sum due under the security exceeds one thousand pounds.[4] A purchaser from the creditor, or from a successor in his title, is not bound to inquire into the regularity of the proceedings by which the creditor acquired the lands, nor liable to be affected by any irregularity therein; all claims of damages against the creditor being reserved, and forming the appropriate remedy of the debtor if aggrieved by the sale.[5]

Transmission of bond and disposition in security *inter vivos*.

In order to divest the cedent, the assignee must be infeft.

The creditor in a bond and disposition in security receives thereby an estate in lands, which must therefore be transferred by sasine or by its equivalent under the Conveyancing Statutes. In a personal bond the cedent is completely divested, and the title of the assignee completed, by an assignation followed by intimation to the debtor.[6] But where a heritable security is granted, and assigned to a third party, the cedent is not divested until the assignee has made up a proper feudal title. The general position of a party who has a conveyance of heritable subjects, but has made up no title, and his rights in a question with posterior disponees, or with the creditors of the disponer, have been already considered.[7] The same rules apply to the assignee of a heritable security. Thus it was held in an early case, and does not seem to have been questioned since, that where a person infeft in a heritable bond assigned the debt by a simple assignation, on which no infeftment followed, he was not thereby denuded, and therefore that a posterior adjudger from him was preferable to the assignee.[8] The Heritable Securities Act, 1847, and the Consolidation Act,

[1] 57 & 58 Vict. c. 44, s. 8.
[2] *Ib.* s. 9, and *ante*, p. 114.
[3] *Ib.* s. 9.
[4] *Ib.* s. 12.
[5] *Ib.* s. 10.
[6] See Chapter XIV.
[7] *Ante*, p. 33.
[8] *Anstruther* v. *Black*, 1626, M. 829; cf. *M'Cutcheon* v. *M'William*, 1876, 3 R. 565. The bond may be extinguished by payment of the debt to the cedent (*i.e.* the original creditor) until the title of the assignee is made up.—*Macdowal* v. *Fullerton*, 1714, M. 576, *infra*, p. 135.

1868, have greatly simplified the form of transferring heritable securities, but it is conceived that they have not made any difference in this respect. In *M'Cutcheon* v. *M'William* a bond and disposition in security was conveyed by a badly drawn deed, which conveyed the lands, but did not expressly assign the bond or the debt. The assignee took infeftment by an instrument of sasine recorded in the Register of Sasines.[1] The cedent was afterwards sequestrated, and his trustee made up a title to the bond by a notarial instrument recorded in the Register of Sasines. In a multiplepoinding the bond was claimed by the assignee and by the trustee. The Lord Ordinary preferred the trustee, holding (1) that the deed was not a sufficient conveyance of the bond, in respect that it neither followed the form given in the Consolidation Act, nor satisfied the rules as to a disposition and assignation at common law, (2) that the title of the assignee was therefore inept, and (3) that, on the authority of *Anstruther* v. *Black*,[2] the doctrine of *tantum et tale* did not apply, and therefore that the trustee, being the first to complete a good title, must be preferred. This decision was reversed, on the ground that the deed in question was a sufficient assignation of the bond, and therefore that the title of the assignee was complete; but this judgment did not affect the decision of the Lord Ordinary as to the criterion of preference between an assignee uninfeft and a trustee in bankruptcy.[3] It would therefore appear that the preference of an assignee of a heritable security, on which the cedent was infeft, depends upon the date at which he completes his title.

Disposition and assignation.

Before the Heritable Securities Act, 1847,[4] came into operation, a bond and disposition in security was transferred *inter vivos* by a deed known as a disposition and assignation, by which the debt and the bond were assigned, and the lands conveyed, with a procuratory of resignation, precept of sasine, and other clauses then usual and necessary in an ordinary disposition of lands.[5] The title of the assignee was made up in the same way as that of the disponee of an irredeemable right.[6]

Transmission under Conveyancing Statutes.

This procedure was simplified by the Heritable Securities Act,

[1] A further question was raised as to the validity of this infeftment, on the ground that it was registered in the Burgh Register, although it was a feu-holding. But this was held to be unimportant under the 25th sec. of the Conveyancing Act, 1874.

[2] 1626, M. 829.

[3] *M'Cutcheon* v. *M'William*, 1876, 3 R. 565.

[4] 1st October 1845 (10 & 11 Vict. c. 50).

[5] See Mont. Bell, *Conveyancing*, ii. 759 *seq.*

[6] See Menzies, *Conveyancing*, 652 and 854; Mont. Bell, *Conveyancing*, ii. 761.

1847,[1] the provisions of which are practically repeated by the Consolidation Act, 1868.[2] By sec. 124 of the latter Statute, a bond and disposition in security may be assigned, if the cedent is infeft thereon, in the form provided by Schedule GG of the Act. By that form the cedent, in consideration of a sum paid by the assignee (who must be named and designed), assigns and dispones to him the bond, with all interest due thereon, and also the lands. The title of the assignee is completed by recording the assignation in the Register of Sasines. When the assignation is contained in any other deed, it is competent for the assignee to complete his title by expeding and recording a notarial instrument in the form of Schedule HH. Where, on the other hand, the cedent is not infeft in the security which it is proposed to assign, the registration of the assignation will not complete the title of the assignee. The case is not provided for in the Statute expressly, but it is possible that the assignee, as a party in right of an unrecorded conveyance, might be entitled to proceed under sec. 22 of the Act, and make up his title, by recording the disposition in security and the assignation in the Register of Sasines.

Other methods still competent.

These are the ordinary forms for the tranference *inter vivos* of a heritable security constituted by a bond and disposition in security; but it is not doubtful that the older form of disposition and assignation might still competently be used, or that other deeds conveying the same right would be equally effectual, though their employment might give rise to difficulties in making up the title of the assignee.[3]

Assignation of heritable security implies warrandice *debitum subesse.*

An assignation of a bond and disposition in security, when granted for onerous causes, implies, if nothing is said to the contrary, and whether warrandice is expressly granted or not, warrandice *debitum subesse* that the debt is binding on the person or persons appearing as obligants in the bond, whether as principals or cautioners.[4] Thus in *Reid* v. *Barclay* a debtor paid the debt due under a bond, with money advanced by A., and obtained an assignation from the creditor in favour of A. It afterwards turned out that the bond was invalid as regards the cautioners, and it was held that the creditor was bound to repay to A. the money he had advanced, and for which the security had been assigned to him.[5] Even if the warrandice is expressly limited to fact and deed, warrandice *debitum subesse* is implied

[1] 10 & 11 Vict. c. 50.
[2] 31 & 32 Vict. c. 101, s. 124.
[3] *M'Cutcheon* v. *M'William*, 1876, 3 R. 565; *ante*, p. 124.
[4] Ersk. ii. 3. 25.
[5] *Reid* v. *Barclay*, 1879, 6 R. 1007.

if the defect in the debt was known to the cedent and concealed from the assignee.[1] But if both parties are acting in good faith, and if it appears that the intention of the parties was that the assignee should stand merely in the place of the cedent, and take his risk of the sufficiency of the title, the Court is entitled and bound to look beyond the formal words of warrandice used, and give effect to the real bargain between the parties.[2]

Position of assignee.

In questions with the debtor, the assignee of a heritable security is entitled to exercise the rights which were open to the cedent, for the safeguarding and recovery of his debt. Thus he was held entitled to poind the ground, if the cedent was infeft, though no infeftment had followed upon the assignation.[3] Third parties or postponed bondholders have no title to question the right of the assignee, if the title and preference of the cedent are not impeached.[4]

Assignation of part of heritable security.

Where a part of a heritable security is assigned, the statutory forms should be used, and the whole lands conveyed. It would seem necessary to insert clauses providing for the *pari passu* ranking of the different portions of the security thus divided, and for the exercise of the power of sale. It is a question on which there would seem to be no authority what are the rights of the assignee of a part of a bond and disposition in security, especially if there is a question of realising, in the absence of any express provision in the assignation. It would seem that the assignee cannot be in a better position than a *pari passu* bondholder occupied at common law, that is, even if he is entitled to sell, he has no power to force the other bondholders to concur in the sale.[5]

Transmission *mortis causa*. Bond moveable in succession.

Before the Consolidation Act, 1868, came into operation, a bond and disposition in security formed, for all purposes, part of the heritable estate of the creditor. On his death intestate,

[1] *Ferrier* v. *Graham's Trs.*, 1828, 6 S. 818.

[2] *Leith Heritages Co.* v. *Edin. & Leith Glass Co.*, 1876, 3 R. 789.

[3] *Tweedie* v. *Beattie*, 1836, 14 S. 337.

[4] *Proctor* v. *Anderson*, 1837, 15 S. 1219.

[5] *Nicholson's Trs.* v. *M'Laughlin*, 1891, 19 R. 49. It is believed to be the custom in the case of large and heavily burdened estates, to take the whole burdens in the name of trustees, usually the law agents of the debtor, who grant a declaration of trust, and give to the actual creditors an obligation to assign to them a proportionate part of the security. It may be an important point whether trustees who have no power to invest on personal security, are justified in receiving such obligations. But it is also a difficult matter to decide how far an individual creditor, on demanding and obtaining an assignation, would be entitled to force a sale in opposition to the wishes of the other creditors.

it passed to his heir, who made up his title by special or general service. This is still the rule in successions which opened before 31st December 1868, at which date the Statute came into operation.[1] In successions which opened after that date, bonds and dispositions in security are declared to be moveable in succession, and to pass to the executors, whether the security was constituted before or after the passing of the Act.[2] Where, however, a security is expressly taken in favour of the creditor, and his heirs or assignees or successors, excluding executors, it remains heritable in succession. When a creditor in a bond and disposition in security, in which executors are not excluded, desires that it should be heritable in his succession, he can effect this, if the bond or a notarial instrument thereon is recorded in the Register of Sasines, by executing a minute in the form of Schedule DD of the Act, and recording it in the Register of Sasines. Where neither the security nor a notarial instrument thereon is recorded, executors may be excluded, and the security rendered heritable in succession, by endorsing a minute in the form of Schedule DD on the bond, and recording it with such endorsement in the Register of Sasines. In either of these two cases, *i.e.* where executors are expressly excluded in the bond, or subsequently excluded by minute, the bond remains heritable until the exclusion of executors is removed. This may be done (*a*) by the creditor executing a minute in the form of Schedule EE of the Consolidation Act, and recording it in the Register of Sasines, or (*b*) by the creditor assigning, conveying, or bequeathing the bond to himself or to any other person without repeating or expressing such exclusion of executors; when the security becomes moveable upon such assignation, conveyance, or bequest taking effect.

But not moveable in other respects.

Although bonds and dispositions in security have thus become, in the majority of cases, moveable in the succession of the creditor, it is provided in the Act that they are not to be reckoned part of the moveable estate upon which legitim is computed; that they shall remain heritable *quoad fiscum*, and as regards all rights of courtesy or terce competent to the husband or wife of the creditor; and that no heritable security, whether granted before or after the marriage, shall to any extent pertain to the husband of the creditor *jure mariti*, when the security is in favour of the wife, or to the wife *jure relictæ*, when the security is in favour of the husband. In a case where the

[1] *Brown* v. *Macdonald*, 1870, 8 Macp. 439.

[2] 31 & 32 Vict. c. 101, s. 117.

general effects of this section (117) came under consideration, it was stated that the Statute made no change on the law as to heritable securities, except in regard to the intestate succession of the creditor. Thus where a trustee held a bond and disposition in security under a destination to himself and his successors in office, it was held that the bond was heritable in his succession, and could be taken up by the other trustees by service to him as heirs of provision.[1]

Making up title of heir, executor, etc.

Under the provisions of this section with regard to intestate succession, and taking into account the additional cases where the creditor disposes of the bond by will, it will be seen that there are a considerable number of possible characters in which a person may acquire right to a bond and disposition in security upon the death of the creditor therein. The Acts of 1868 and 1874 provide methods to enable persons taking a bond as heirs, executors, legatees, or disponees, to complete their title thereto. These methods vary according as the creditor, by whose death the succession has opened, was or was not infeft in the security.

Heir.

The heir, under a succession which opened before 31st December 1868, or to a security in which executors are excluded, may complete his title, if the ancestor was infeft, either (1) by special or general service, and a notarial instrument thereon in form of Schedule JJ of the Consolidation Act of 1868, recorded in the Register of Sasines;[2] or (2) by a writ of acknowledgment from the debtor in the form of Schedule II of the said Act, recorded in the Register of Sasines.[3] If the ancestor was not infeft, the heir may complete his title by special or general service, and a notarial instrument in the form of Schedule MM of the Act of 1868 recorded in the Register of Sasines.[4]

Executor.

Where executors are not excluded, and the succession opens after 31st December 1868, the executor-nominate, where the creditor was infeft in the security and has died testate, may make up a title either (1) by recording in the Register of Sasines a writ of acknowledgment from the debtor, in the form of Schedule II of the Act of 1868;[5] or (2) by expeding and recording a notarial instrument in the form of Schedule KK of the said

[1] *Hare*, 1889, 17 R. 105; see also *Hodge* v. *Hodge*, 1879, 7 R. 259 (heritable securities to which a wife succeeds do not fall under *jus mariti*); *Guthrie*, 1880, 8 R. 34 (heritable securities found part of moveable estate under the terms of a will).

[2] Consolidation Act, 1868, s. 128.

[3] Conveyancing Act, 1874, s. 63.

[4] Consolidation Act, 1868, s. 130.

[5] Conveyancing Act, 1874, s. 63.

Act.[1] If the creditor dies infeft but intestate, the executor-dative may make up a title by expeding and recording a notarial instrument in the form of Schedule JJ of the Act of 1868.[2] If, however, the creditor was not infeft in the security, the executor, whether nominate or dative, may make up a title by expeding and recording a notarial instrument in the form of Schedule MM of the Act of 1868.[3] In all these cases the executor must be duly confirmed.

Legatee when testator infeft.

A legatee, if the creditor was infeft in the security, may make up his title either by recording, in the Register of Sasines, a writ of acknowledgment from the debtor in the form of Schedule II of the Act of 1868,[4] or by expeding and recording a notarial instrument. If he is a legatee of the particular security, the notarial instrument should be in the form of Schedule KK of the Consolidation Act, 1868;[5] if he is a general disponee of the whole estate, it may be either (1) in the form of Schedule KK;[6] or (2) in the form of Schedule L of the Consolidation Act, 1868;[7] or (3) in the form of Schedule N of the Conveyancing Act, 1874.[8]

Legatee when testator died uninfeft.

Where the creditor has died without being infeft in the security, the disponee or legatee may complete his title by expeding and recording in the Register of Sasines a notarial instrument in the form of Schedule MM of the Act, 1868.[9]

Restriction of security.

Where it is desired to restrict a security to a part of the lands originally burdened, advantage should be taken of sec. 133 of the Consolidation Act, 1868. A deed of restriction should be drawn up, in the form of Schedule OO of the Act, describing at full length the lands which it is proposed to disburden; and upon this deed being recorded in the Register of Sasines, the lands are declared to be released from the security to the same effect as if they had never been contained in such security at all.[10] It should, however, be noted, that if the lands covered by the security have been sold by the original debtor, any deed of restriction granted without his consent may seriously prejudice the creditor in his choice of remedies for the recovery of his debt. As has already been explained, the creditor, if he sues the granter of the bond personally, must, on payment, assign to him the bond in its entirety; and as any deed of restriction would put it out

[1] Conveyancing Act, 1874, s. 64.
[2] Consolidation Act, 1868, s. 126.
[3] *Ib.* s. 130.
[4] Conveyancing Act, 1874, s. 63.
[5] *Ib.* s. 64.
[6] *Ib.* s. 64.
[7] Consolidation Act, 1868, s. 19.
[8] Conveyancing Act, 1874, s. 53.
[9] Consolidation Act, 1868, s. 130.
[10] *Ib.* s. 133.

of his power to do so, he would thereby be precluded from proceeding on the personal obligation of the original debtor.[1]

Position of debtor in bond with regard to subjects.

There is not much authority as to the position and rights of the granter of a bond and disposition in security in relation to the subjects. His power of alienation, and the means which may be adopted to render the disponee an obligant in the security, have been already discussed. He is entitled to remain in the ordinary management of the subjects, unless the creditor enters into possession, and is therefore clearly entitled to grant leases of ordinary duration. But if a lease was entered into at an illusory rent, and a *grassum* was taken, the lessee would probably be bound to pay a fair rent in a question with a heritable creditor in possession under a decree of maills and duties. The debtor is of course entitled to feu the ground; but unless a special arrangement is made, or a deed of restriction of the security obtained, the part feued will be subject to the rights of the heritable creditor. It is therefore important, in arranging a security over ground which is intended to be feued, to insert a clause reserving power to the debtor to grant feus, ground-annuals, and long leases, and declaring that when such rights are granted the security shall extend only over the feu-duty, ground-annual, or rent.[2] It would also seem necessary that he should consent to an allocation of the feu-duty. In ordinary circumstances the granting of feus, by increasing the value of the subject, is beneficial to the creditor; but care should be taken that the debtor is restricted from undertaking obligations with regard to the feus, the non-fulfilment of which might entitle the feuars to retain the feu-duty. If such stipulations are entered into, and if the creditor has in any way consented to the feu, the plea of retention, if good against the debtor, will be good against him.[3] In *Arnott's Trs.* v. *Forbes* a bond and disposition in security was granted under an arrangement whereby the debtor reserved the right to feu the ground, and the creditor agreed that the security should be restricted to the feu-duty. Feus were granted, in which the debtor undertook the obligation to lay out certain streets and to make drains. He became bankrupt without fulfilling these obligations. It was held that in these circumstances the feuar was entitled to retain his feu-duty, in a question with the heritable creditor, until the obligations undertaken by the debtor in the feu contract were fulfilled.[4]

[1] See *ante*, p. 93.

[2] Mont. Bell, *Conveyancing*, p. 1177; *Juridical Styles*, 5th ed., i. 415.

[3] *Arnott's Trs.* v. *Forbes*, 1881, 9 R. 89.

[4] *Ib.*

If debtor enters into contracts with regard to the subjects, the creditor, if he is not a party to the contract, cannot enforce it.

If the debtor enters into contracts in connection with the subjects which fall entirely outside the ordinary powers of management, the creditor, if he is not a party to such contracts, is not as a rule bound by them, nor entitled to enforce them.[1] In *Heron* v. *Martin*, A. granted a bond and disposition in security over certain subjects in Dundee. He afterwards entered into a contract with B., the proprietor of the neighbouring subjects, whereby each party undertook certain obligations in order to form a private road as an access to their properties. A. failed to perform his part under this contract, and became bankrupt. B. brought an action for reduction of the disposition forming the contract, and for declarator that the bondholder was not entitled to avail herself thereof to any extent. The bondholder alone defended. It was held that she was not a party to the contract, was not bound by it, and had no title to object to the reduction.[2] And where a debtor, in feuing part of the lands covered by the security, laid himself under building restrictions in regard to the part still unfeued, it was held that the vassals could not enforce these restrictions in a question with a party who had bought the unfeued land at a sale by the creditor under the powers in the bond.[2] Again, if a security is granted over a subject which is feued, and the debtor allocates the feu-duty among the various feuars without the consent of the creditor to such allocation, it would appear that the creditor would not be bound by it.[3]

Redemption. Cases where obligation not to redeem for a fixed time.

In the ordinary bond the debtor is entitled to redeem at any time he pleases, on the adoption of procedure to be detailed presently. Occasionally, however, bonds are granted subject to the condition that the creditor shall not be obliged to accept payment until after the lapse of a certain time. This arrangement is usually made by a personal contract apart from the bond. No case has yet arisen in which such an agreement was an integral part of the bond, and appeared on the record. If it did so, it would seem clear that the agreement would be valid against all parties dealing with the lands. Where it remains merely personal, the debtor cannot insist on paying off the bond until the stipulated term has arrived.[4] But on his bankruptcy the personal contract, not appearing on the record, does not confer

[1] *Heron* v. *Martin*, 1893, 20 R. 1001; *Morier* v. *Brownlie & Watson*, 1895, 23 R. 67; *Smith* v. *Soeder*, 1895, 23 R. 60.

[2] *Morier*, *supra*.

[3] In the statutory form of allocation the rights of heritable creditors of the superior are expressly reserved—Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 8, Schedule D.

[4] *Ashburton* v. *Escombe*, 1892, 20 R. 187.

a real preference in a question with the trustee, and the creditor is bound to accept payment, if tendered, and cannot prevent a sale of the estate. But he is entitled to rank, as an ordinary personal creditor, for damages for loss of his investment.[1] In a question with postponed bondholders the creditor could not rank as a prior creditor on the estate for damages, or for contingent claims of interest.[2] But a postponed bondholder has no right, whether with or without the authority of the debtor, to insist on the prior bondholder accepting payment before the term of payment arrives.[3] In *Ashburton* v. *Escombe*, A. granted a bond and disposition in security over his estate of X. to B., in security of a loan of £20,000, at 10 per cent. By agreement, which did not enter the record, it was arranged that payment should be made by annual instalments of £2000, and that B. should not require, or be bound to accept, payment before the terms fixed for the payment of these instalments. A. afterwards conveyed his estates, including the estate of X., to trustees for payment of his debts. The trustees paid off a posterior bond, and tendered payment to B., who refused to accept it. The trustees maintained that the personal contract as to the mode of payment, not having entered the record, was not good against them. It was held that although the contract gave B. no real right over the land for the prospective interest in the bond, yet it was good as a personal contract; and as a personal contract subsequent bondholders had no title to challenge it.[4]

Methods of redemption.

In bonds granted prior to the Conveyancing Statutes the methods of redemption were usually specified in the bond. In the form given in the Consolidation Act, 1868, the phrase is: "I reserve power of redemption."[5] This, when inserted in any bond, whether granted before or after the Act came into operation, is declared to mean that the bond shall be redeemable at the term and place of payment, or at any subsequent term of Whitsunday or Martinmas, upon payment of the debt, interest, and expenses, upon three months' premonition of the intention to redeem. Premonition should properly be made to the creditor personally, or at his dwelling-place, if within Scotland, or, if furth thereof at the time, then at the office of Keeper of the Record of Edictal Citations, in the presence of a notary and witnesses. In practice, where

[1] *Don's Tr.* v. *Cameron*, 1885, 22 S. L. R. 348 (Outer House, Lord M'Laren).

[2] *Ashburton* v. *Escombe*, 1892, 20 R. 187, per Lord Kinnear, at p. 197.

[3] *Ashburton* v. *Escombe*, *supra*.

[4] *Ashburton* v. *Escombe*, 1892, 20 R. 187; see also *ante*, p. 80.

[5] 31 & 32 Vict. c. 101, s. 118, Schedule FF.

the debtor is known and within Scotland, premonition by letter is regarded as sufficient. But the full procedure should be carefully carried out if the creditor is unknown, or cannot be found, or if he declines to accept premonition by letter. In the case of the absence of the creditor, or his refusal to accept payment, the amount due may be consigned in the bank named in the bond, if any, and if not, in any Scotch bank incorporated by Royal Charter or Act of Parliament, and having an office or branch at the place of payment, to be made forthcoming at the peril of the consignee.[1] On redemption being made, the record may be cleared of the security, if payment has been accepted, by the registration in the Register of Sasines of a discharge granted by the creditor, which should be in the form of Schedule NN of the Consolidation Act, 1868.[2] If payment has been refused, and the money consigned in bank, the record may be cleared by the registration in the Register of Sasines of a notarial certificate in the form of Schedule L, No. 2, of the Conveyancing Act, 1874, setting forth the fact of consignation, and the reasons which led to the adoption of that course.[3] But as this will have the effect of clearing the record only if the whole amount due has actually been consigned, independent evidence of this should be preserved. The expense of preparing and recording the deeds necessary for the discharge of a bond and disposition in security fall upon the debtor (Consolidation Act, 1868, s. 119). But he is probably not liable for any extra expense occasioned by the creditor having assigned or split up the security.

Cases where creditor is bound to assign, instead of discharging, the bond.

In general, the obligation of the creditor, upon receiving payment of his debt, is to grant a discharge.[4] But the debtor has an equitable right to an assignation of the bond, instead of a discharge, if he can qualify an interest to ask it, and the creditor has no interest to refuse. Such an assignation may be required in order to transfer the bond to a third party, or where the debtor has a claim of relief, or where he has parted with the lands, and is called upon to pay under the personal obligation.[5] Again, an heir of entail, on payment of a bond affecting the entailed estate, is entitled to an assignation, so that he may keep it up against the entailed estate.[6] But in any case the creditor is entitled to refuse

[1] 31 & 32 Vict. c. 101, s. 119.

[2] *Ib.*, s. 132.

[3] 37 & 38 Vict. c. 94, s. 49.

[4] A discharge may be granted by the *curator bonis* to a lunatic, and, probably, by any judicial factor on the creditor's estate without obtaining special powers—*Wills, Petr.*, 1879, 6 R. 1096.

[5] *North Albion Prop. Invest. Co.* v. *Macbean's Curator*, 1893, 21 R. 90.

[6] *Macalister* v. *Macalister*, 1865, 4 Macp. 245.

to assign, or, rather, to qualify his assignation, if he has any further interest in the subjects which the assignation, if unqualified, might injuriously affect, or if there is any doubt about the validity of the bond.[1] As has already been explained, an assignation, unless specially qualified, imports warrandice *debitum subesse*.[2]

Discharge of security without formal redemption.

Although in almost every case it would be desirable to close a bond and disposition in security by obtaining and recording a formal discharge, or an assignation of the bond, yet the security is merely an accessory to the debt, and may therefore be extinguished by payment by the debtor, or by a third party; by the creditor's intromissions with the rents; by compensation; or by *confusio*, when the right to demand and the obligation to pay the debt merge in the same person in the same capacity.

By payment by debtor.

As a conveyance of lands in security is a mere accessory to a debt, it is obvious that payment of the debt extinguishes the security in a question with the creditor or his personal representatives, even although no formal discharge is granted.[3] But the security remains good in spite of partial payments, and will cover the residue of the debt until the whole is paid. Where partial payment was made, and a discharge *pro tanto* granted, and this discharge was given up on the contraction of a new debt, it was held, in a question with the other creditors of the granter of the bond, that the newly contracted debt was covered by the original security.[4] And a mere change in the nature of the debt, such as the renewal of bills on which it is founded, and which it is intended to cover, does not extinguish the security.[5]

Payment a good answer to demand by trustee in sequestration of creditor.

Where the creditor is sequestrated, payment of the debt is a good answer to a demand by the trustee in the sequestration, who in this respect takes *tantum et tale*. "*Tantum et tale*," says Lord President Campbell, "is good as to objections which go to the extinction of the debt adjudged, *e.g.* if heritable bond adjudged, extinction is a good answer."[6]

Payment, in question with assignee of bond.

If the security is assigned to a third party, the debtor is nevertheless entitled to prove that he has paid the debt upon which the security depends, provided that the payment was made before the assignation was intimated to him, and before the right

[1] *Fraser* v. *Carruthers*, 1875, 2 R. 595, see *ante*, p. 57.

[2] *Ante*, p. 125.

[3] Stair, ii. 3. 48; Menzies, *Conveyancing*, p. 856; Mont. Bell, *Conveyancing*, ii. 1185.

[4] *Campbell* v. *Crs. of Auchinleck*, 1745, 2 Ross's L. C. 714.

[5] *M'Nair* v. *M'Nair*, 1827, 5 S. 372.

[6] Per Lord Pres. Campbell in *Wylie* v. *Duncan*, 1803, 3 Ross's L. C., at p. 136; cf. Stair, ii. 3. 48.

of the original creditor was extinguished by the completion of the title of the assignee.[1] Thus in *Macdowal* v. *Fullerton*, A. granted a bond for 2000 merks over the estate of X. to B. B. assigned the bond to C. Subsequently, but before C. had completed his title, or intimated his assignation to A., B. purchased the lands of X., and deducted from the price paid the 2000 merks due under the bond by A. As between A. and B., the bond was therefore extinguished by payment. Thereafter B. granted a bond of corroboration to C., on which he was infeft. In a ranking of the creditors of B., C. claimed to be preferred to D., who was in right of bonds over the estate of X. which were subsequent to the original bond granted by A. to B., but were prior to the bond of corroboration granted by B. to C. It was held that the original bond was extinguished by the payment made by A. to B. before C. had completed his title or intimated his assignation, and therefore that C. could only rank as of the date of the bond of corroboration. Therefore it was decided that D., the holder of the intermediate right, was preferable to C.[2]

By payment by third party. Question whether this extinguishes the security.

When payments are made by a third party, and a discharge granted, the question whether the heritable security is or is not extinguished to the extent of these payments depends upon the character in which such third party acts. The point has arisen in cases where the interest of a bond has been paid by a third party, who has taken a receipt discharging it, but has afterwards obtained from the creditor an assignation *pro tanto* of the heritable security, and claimed to rank as a preferred creditor on the estate of the debtor. In *Tod* v. *Dunlop*, Tod, who acted as agent for both debtor and creditor in a bond, paid the interest for several years, and granted receipts stating that all parties concerned were thereby discharged. It was held that the interest was thereby discharged and extinguished, so that Tod could not, by obtaining an assignation of the heritable security from the creditor, rank as a preferred creditor on the debtor's estate.[3] In a later case it was held that the *ratio* of the decision in *Tod* v. *Dunlop* was that Tod, in paying the interest, was acting as the agent of the debtor, and that a discharge granted in his favour was in reality granted to the debtor. Therefore when payments of interest were made by the agents for the creditor, who was not also agent for the debtor, and

[1] Stair, ii. 5. 15, ii. 3. 48; *Ranken* v. *Arnot*, 1680, 2 Ross's L. C. 707; *Macdowal* v. *Fullerton*, 1714, M. 576, 2 Ross's L. C. 709; *Woodmass* v. *Hislop's Trs.*, 1825, 3 S. 476.

[2] *Macdowal* v. *Fullerton*, 1714, M. 576, 2 Ross's L. C. 709.

[3] *Tod* v. *Dunlop*, 1838, 1 D. 231.

receipts were granted by the creditor declaring that all parties concerned were thereby discharged, it was held that the agent, upon obtaining from the creditor an assignation *pro tanto* of the security, was entitled to rank as a heritable creditor on the debtor's estate. It was held that the terms of the receipts could not extinguish the debt, as they were never delivered to the debtor, nor to anyone on his behalf.[1] The rule would therefore seem to be, when payment is made by a third party, that the debt is not extinguished by the fact that a discharge instead of an assignation is taken, unless the discharge is delivered to the third party in the capacity of agent for the debtor.

By intromissions of creditor with rents.

It has already been pointed out that when a creditor enters into possession, and uplifts the rents, he is not bound to retain the whole amount thus obtained, and impute it, after payment of any interest that may be due, in reduction of the principal sum in the bond.[2] But he is entitled to do so, and the debt and security will thereby be partly or entirely extinguished, even in a question with an assignee of the security.[3] The fact and the extent of his intromissions may be ascertained by a proof. In *Baillie* v. *Menzies* a competition arose between a party having right by progress to an annualrent, and a posterior adjudger of the debtor's estate. The adjudger alleged that the annualrent was extinguished, on the ground that the original creditor had been in possession, and had drawn from the rents an amount sufficient to discharge the principal debt. A proof was allowed, and, on the intromissions of the original creditor being established, it was held "that the annualrenter's intromissions were not only to be applied for satisfying the annualrents of the principal sum in the infeftment, but even for extinguishing the said principal sum, notwithstanding that infeftment be now in the person of a singular successor."[4]

By compensation.

A bond and disposition in security may be extinguished by compensation, when the grantee of the bond becomes indebted to the granter in an amount equal to, or greater than, the principal sum in the bond.[5] Should he be indebted in a lesser sum, compensation to that extent would be a good answer to a demand for payment, but the security would still exist for the balance. Compensation, as a method of extinguishing obligations, may be pleaded between two debts, although one debt is merely

[1] *Wood* v. *Northern Reversion Co.*, 1848, 11 D. 254.

[2] *Ante*, p. 104.

[3] Stair, ii. 5. 15; *Wishart* v. *Arthur*, 1671, 2 Ross's L. C. 713; *Baillie* v. *Menzies*, 1711, 2 Ross's L. C. 713.

[4] *Baillie* v. *Menzies*, *supra*.

[5] See further, on compensation and retention, Chapter x.

a personal claim, and the other is fortified by a right in security.[1] It does not, however, extinguish the mutual debts *ipso facto*, but must be pleaded.[2] When pleaded, it operates *retro*, and the debts are extinguished, and the interest upon them is held to cease from the date when the *concursus crediti et debiti* commenced.[3] No difficulty occurs when the bond remains in the possession of the original creditor. If it is assigned by him, the debtor may nevertheless plead compensation on any debt due to him by the original creditor, provided that the debt was due and payable before the original creditor was divested by the completion of the title of the assignee.[4] If the assignee neglects to make up his title, but intimates his right to the debtor, the original creditor is not thereby divested, and *concursus* may still take place. The debtor might perhaps be barred, *personali exceptione*, from pleading compensation against the assignee, if he had recognised him as his creditor,[5] but a third party holding a posterior real right over the subjects would clearly be entitled to plead that the bond was extinguished by compensation.[6]

By confusion.

There is some doubt as to the exact circumstances which will result in the extinction of a bond and disposition, or other heritable security, *confusione*. It has been laid down that "when anyone is *pleno jure*, the ultimate debtor and creditor in the same debt without relief, that situation in general amounts to confusion, and extinguishes the debt."[7] But the application of this general rule presents some difficulties. It would seem quite clear that a proprietor cannot pay a prior debt affecting the lands, take an assignation to it, and set it up in his own interest in a question with a postponed bondholder. Similarly, if the creditor purchases the lands over which the bond is granted from the debtor, or if he succeeds to them in fee simple, the bond will be discharged *confusione*.[8] In *Murray* v. *Parlane's Tr.*, a proprietrix directed her trustees, by a trust disposition

[1] *Ranken* v. *Arnot*, 1682, 2 Ross's L. C. 707; *Hay* v. *Crawford*, 1712, M. 2571; *Keith* v. *Heriot*, 1633, M. 2601.

[2] Act 1592, c. 141; Bell, *Prin.* s. 575.

[3] Bell, *Prin.* s. 575; *Campbell* v. *Carruthers*, 1756, M. 2551, and App. *voce* Tack, No. 1.

[4] *Ranken* v. *Arnot*, 1680, 2 Ross's L. C. 707; *Keith* v. *Heriot*, 1633, M. 2601; cf. *Shiells* v. *Ferguson, Davidson, & Co.*, 1876, 4 R. 250.

[5] *Hamilton* v. *Earl of Kinghorn*, 1674, M. 2602.

[6] Cf. *Macdowal* v. *Fullerton*, 1714, M. 576, and 2 Ross's L.C. 709 (extinction by payment before title of assignee completed).

[7] *Love* v. *Storie*, 1863, 2 Macp. 22, per Lord Neaves, at p. 31.

[8] *Hogg* v. *Brack*, 1832, 11 S. 198; *Elder* v. *Watson*, 1859, 21 D. 1122; *Dennison* v. *Fea's Trs.*, 1873, 11 Macp. 392; *Murray* v. *Parlane's Tr.*, 1890, 18 R. 287.

and settlement, to convey certain subjects to A., "under burden of any heritable securities that may affect the same." Subsequent to the date of this settlement she paid the only bond affecting the subjects, and took an assignation to it. It was held that the bond was extinguished *confusione*, and that A. took the subjects unburdened.[1] Again, where the creditor purchased the lands over which his bond was secured, from the trustee in a trust settlement granted by the debtor for payment of his debts, and paid only the balance of the price, deducting the amount of the bond, it was held that the bond was extinguished *confusione*, though it was found undischarged in the repositories of the creditor after his death. He had conveyed the lands gratuitously to a third party, and it was held that his heir-at-law could not make the bond effectual as a real right over the lands.[2]

Cases where operation of *confusio* doubtful.

On the other hand, cases might be put in which the operation of the principle of *confusio* would be very doubtful. Suppose a creditor in a bond and disposition in security to purchase the lands from the debtor and grant a discharge, but to have omitted to notice an intermediate security duly constituted on the lands: Would such a second bondholder be entitled to maintain that the first bond was extinguished *confusione*, and therefore that his bond was the prior charge upon the land?[3] On a strict application of the principles of *confusio* it is clear that he would, but it is difficult to believe that a result so inequitable would be arrived at. Again, it is not clear that the proprietor of an estate burdened with several bonds, is not entitled to pay off one of them, take an assignation to it, and then assign it, with the priority attaching to it, to a third party. If a bond is called up, and paid by money advanced by a third party, the creditor is no doubt bound to assign the bond to that third party, or to a trustee for the debtor. If the assignation should, by an error in conveyancing, be taken in favour of the debtor himself, and by him conveyed to the party who had advanced the money, would that entitle posterior bondholders to maintain that the bond was extinguished *confusione*?

This latter question was discussed in the case of *Mackenzie* v. *Gordon*. There a proprietor granted a first bond to A., and a second bond to B. He afterwards executed a conveyance of his whole estates to a trustee for payment of his debts. The trustee

[1] *Murray* v. *Parlane's Tr.*, 1890, 18 R. 287.

[2] *Hogg* v. *Brack*, 1832, 11 S. 198.

[3] The bond might perhaps be revived by the equitable powers of the Court, on the principle of *Cleghorn* v. *Elliott*, narrated *infra*, p. 140.

paid the debt in the first bond, with money advanced by C., took an assignation to it in his own favour, and afterwards assigned it to C. In a ranking and sale it was held that C. was entitled to be ranked, in respect of the bond thus assigned to him, in preference to B.; and that the bond was not discharged *confusione*, because the trustee, although he was for a while debtor and creditor in it, was so in different capacities: as trustee for the granter, and as agent for C. to procure for him the best possible security for his advance.[1] It was not necessary to decide the question whether the same result would have followed had there been no trustee, and the bond had been assigned by A. to the debtor himself. But it would appear from the opinions given that the result would turn on the question whether the debtor, in taking the assignation, was acting merely as the hand of the third party who had advanced the money, in which case the bond would still subsist; or whether he was acting primarily for his own benefit, in which case it might be extinguished *confusione*.

Cases where *confusio* does not take place.

Where there is any distinction of character or interest in the person who, being debtor, becomes also creditor in the bond, or where any claim of relief against a third party exists, confusion will not take place, although for the time being debtor and creditor are merged in one person. "If by different successions," says Lord Stair, "the debtor and creditor should become distinct, the obligations would revive, as in many cases may occur; and so *confusio* is not an absolute extinction, but rather a suspension of obligations."[2] Thus where A. disponed certain subjects burdened with a heritable bond to B., on an agreement that the disposition should remain in the hands of his own agents, and should not be delivered until a certain condition had been fulfilled by B., and the testamentary trustees of A. acquired the bond while they were still in possession of the estate, it was held that, as they had a clear interest to keep it up against B., it was not extinguished *confusione*.[3] On a similar principle, an executor, on paying a heritable bond, may take an assignation to it in order to obtain relief against the heir;[4] and where there is a subsisting liferent, a fiar may take an assignation to a bond affecting the estate, and keep it up as a subsisting obligation.[5]

Right of heir of entail to keep up bond against the estate.

The chief illustration of this principle is the case of an heir

[1] *Mackenzie* v. *Gordon*, 1838, 16 S. 311; affd. 1839, M'L. & R. 117.

[2] Stair, i. 18. 9.

[3] *Fleming* v. *Imrie*, 1868, 6 Macp. 363.

[4] Stair, i. 18. 9.

[5] *Fraser* v. *Carruthers*, 1875, 2 R. 595

of entail becoming vested, by succession or payment, with the right of the creditor in bonds affecting the entailed estate. Such bonds he is entitled to keep up as burdens on the entailed estate, because, while he is debtor as heir of entail, he is creditor as an individual. He may assign the bond to a third party, or dispose of it by will; and the assignee or legatee will thereby acquire a real right over the lands, which he can make effectual in any way which was competent to the original grantee of the bond.[1] So where a bond of provision to younger children was granted under powers reserved in the entail, and the heir of entail acquired right to this bond, and afterwards assigned it to a third party, it was held that the assignee acquired a right over the rents of the estate which was preferable to the creditors of the heir in possession.[2] If, however, the heir of entail should take a discharge, instead of an assignation, of a bond affecting the estate, it would seem that the bond would be extinguished, unless there was very clear evidence of an intention to the contrary. Thus where an heir of entail paid a wadset, and took a discharge and renunciation, containing a procuratory of resignation, which he, as superior, executed in his own hands, and afterwards conveyed all his unentailed property to a trustee, who drew the rents in virtue of the wadset for many years, it was held that the wadset had been extinguished *confusione*, in spite of the intention to keep it up evinced in the conveyance to the trustee.[3]

In special circumstances a bond which has been discharged may be revived.

In very special circumstances it would appear that a bond which has been paid and discharged may be revived by the equitable jurisdiction of the Court. In *Cleghorn* v. *Elliott*, lands were sold by an heir of entail, in order to redeem the land-tax, under the powers conferred by 42 Geo. III. c. 116. The price obtained was considerably larger than the amount required, and the balance was expended in paying off debts affecting the entailed estate. In some cases these bonds were assigned to trustees, in others a simple discharge was taken. The sale was ultimately reduced by the succeeding heir of entail, on the ground that the formalities required by the Act had not been properly carried out. In an action by the purchaser, whose title was thus reduced, for *restitutio in integrum*, it was

[1] Ersk' iii. 4. 27; *Lawrie* v. *Donald*, 1830, 9 S. 147; *Welsh* v. *Barstow*, 1837, 15 S. 537 (earlier cases cited there); *Macalister* v. *Macalister*, 1865, 4 Macp. 245.

[2] *Welsh* v. *Barstow*, 1837, 15 S. 537.

[3] *Duke of Roxburgh* v. *Wauchope*, 1825, 1 W. & S. 41.

held that he was entitled to have the bonds which had been kept up assigned to him, and that the other bonds, which had been discharged, must still form real burdens on the estate in his favour, as if they had never been paid, but had still stood as outstanding debts against the estate. In order to make up a title, it was ordained that the decree should be recorded in the Register of Sasines.[1]

[1] *Cleghorn* v. *Elliott*, 1833, 11 S. 259; 1837, 3 D. 1.; affd. 1839, 1 M'L. & R. 1033.

CHAPTER IV

DISPOSITION *EX FACIE* ABSOLUTE

Nature of security.
Trust Act, 1696, c. 25.
Legal position of creditor.
Publication of back-bond.
Effect of assignation of remaining right of debtor.
Penal clauses in back-bonds.
Rights of possession, management, and sale.
Liabilities of creditor.
Transmission of interest of creditor.
Right of debtor.
Extinction of the security.

Uses of security by *ex facie* absolute disposition.

An *ex facie* absolute disposition with a back-bond is a form of security which has come into use partly in cases where a more complete right over the subjects than that given by a bond and disposition in security is required, but chiefly owing to the difficulty of giving security for debts to be contracted in future by any form of conveyance bearing *in gremio* to be a security. As has been already stated, a bond and disposition in security must contain a statement of the exact sum which the security is intended to cover; and will, except in the case of statutory provisions regarding cash credits, give no preference for advances made by the grantee after he has taken infeftment upon it.[1] The *ex facie* absolute disposition with back-bond was devised to meet the case where the owner of heritable property desired to give a security either for a debt or obligation of which the pecuniary amount could not at the moment be estimated, or for advances which the grantee was prepared to make him in future. Thus the form was specially adapted to securities granted for a cash credit opened with a bank, a purpose for which it has been largely employed.[2]

Method of granting.

The method by which this form of security is usually granted consists of an absolute conveyance to the grantee, without any qualification expressed therein. The registration of this convey-

[1] *Ante*, p. 69.

[2] An absolute disposition with a back-bond is not included under the term "Heritable Security" in the Consolidation Act, 1868, the Conveyancing Act, 1874, nor the Heritable Securities Act, 1894 (31 & 32 Vict. c. 101, s. 3, 37 & 38 Vict. c. 94, s. 3, 57 & 58 Vict. c. 44).

ance in the Register of Sasines completes the title of the security-holder. Evidence of the fact that the transaction is only a security is usually preserved by a back-bond or letter,[1] on the part of the grantee, by which he binds himself to reconvey the subjects on the payment of a particular debt, or on his being relieved of a certain obligation, or on all debts due to him by the granter being paid. As the registration of this back-bond or letter in the Register of Sasines, or its production in a court of justice, has the effect of seriously limiting the scope of the security obtained by the *ex facie* disponee, it is very common for banks or mortgage companies, on lending money on this form of security, either to refuse to grant a back-bond,—preserving evidence of the real nature of the transaction by a minute in their own books,—or, if a back-bond be granted, to retain it in their own custody. A back-bond should contain a declaration that the disposition is a security for all advances made or to be made by the disponee to the disponer, with interest at a specified rate, and an obligation by the disponee to reconvey on these advances being repaid. It should also provide that on failure of payment of the interest, the disponee should be entitled, on giving notice by registered letter, to enter into possession and uplift the rents; that he should have the power of sale by public roup or private bargain; and that, in the event of a sale producing a surplus, it should be paid to the disponer, or consigned in a bank named.

Proof of qualification where no back-bond taken.

Occasionally a security is constituted by an *ex facie* absolute conveyance, without a back-bond or other formal record being preserved to show the real nature of the transaction. In such cases a somewhat difficult and complicated question arises as to the mode of proof which may be competently used to instruct the fact that the apparently absolute conveyance is in reality a security. As the services of a law agent are usually obtained in the constitution of securities over heritable subjects, such questions will seldom arise; and many of the decisions by which the law has been illustrated have related to *ex facie* absolute transfers of moveable subjects held by written title. But the law as to the mode by which the real nature of a conveyance may be proved is the same whether the subject thereof is heritable or moveable.

Trust Act, 1696.

By the Trust Act, 1696, c. 25, "no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be trustee, and against whom

[1] See form of back-bond in *Jurid. Styles*, i. 430.

or his heirs or assignees the declarator shall be intended; or unless the same be referred to the oath of party simpliciter." At one time it would appear that this Act was not construed with much strictness, and proof of facts and circumstances pointing to a trust was allowed.[1] But this laxity was checked by the case of *Wight* v. *Duggan*.[2] The facts there alleged were that the pursuer, who was a Roman Catholic, and therefore disqualified from owning land, had instructed the defender, a law agent, to purchase land for him, and take the title in his own name. A pure case of trust was thus raised: and it was decided, after some hesitation, in the Court of Session, that the pursuer's averments could only be proved by the writ or oath of the defender. The case was carried to the House of Lords, where it was held that the Act undoubtedly applied. In later cases, as will be shown immediately, *Wight* v. *Duggan* has been regarded as a leading authority.

Application of this Act to *ex facie* absolute disposition.

It is not, perhaps, obvious that the Act was intended to apply to the case where an *ex facie* absolute disposition has been granted for the purpose of forming a security. The disponee or creditor in such a disposition is not exactly in the position of a trustee,—of a person, for instance, in whose name a conveyance has been taken for the beneficial use of some other party,—as the creditor in the security has a beneficial right in the subjects, and the trustee has none. But no distinction has ever been established as to the application of the Act to these two cases; and it is settled that, in the absence of specialties, a latent qualification in an *ex facie* absolute disposition can only be proved by the writ or oath of the disponee.[3] This, though implied in other cases, is most clearly decided in *Leckie* v. *Leckie*. In this case the pursuer had granted an *ex facie* absolute disposition of heritable property to the defender, nominally for a price narrated in the deed, but in reality in security of a cautionary obligation undertaken by the defender in a cash credit. The action concluded for declarator that the *ex facie* absolute disposition was really a security, and that the defender was bound, on receiving payment of the amount he had been obliged to pay under the cash credit, to execute a reconveyance. The defender, while expressing his readiness to reconvey on payment of his advances, maintained that any qualification of his apparently absolute right could only be proved by his writ or

[1] *Gilmour* v. *Arbuthnot*, 1765, M. 12758; *Stewart's Exrs.* v. *Stewart*, 1777, 5 Brown's Supp. 631.

[2] *Wight* v. *Duggan*, 1797, M. 12761; affd. 3 Pat. 610.

[3] Mont. Bell, *Conveyancing*, ii. 1173; *Leckie* v. *Leckie*, 1854, 17 D. 77; *Seth* v. *Hain*, 1855, 17 D. 1117; *Walker* v. *Buchanan, Kennedy, & Co.*, 1857, 20 D. 259.

oath. It was held that the Trust Act applied, and the defender was assoilzied.[1]

Interpretation of Trust Act.

In considering the application of this Act, then, no distinction need be drawn between cases of pure trust and cases of securities by *ex facie* absolute disposition. But the general words of the Act have been subjected to considerable limitations by the various decisions on the subject. It is proposed to consider, first, the class of cases to which it has been held to apply, and, secondly, the interpretation which has been given to the words "a declaration or back-bond of trust lawfully subscribed by the person alleged to be trustee."

Limits proof of trust in question between truster and trustee, not in questions between third parties.

Where the question is one between the truster or beneficiary, their heirs, or personal representatives, and the trustee, his heirs, or personal representatives, the Act applies, and the proof is limited. Such are cases where it is directly sought to have it declared that an apparently unqualified disposition or assignation is in reality a trust for the disponer or cedent, or in security of advances made by the disponee or assignee to him. In the same category are cases where the pursuer alleges that a subject, the title of which stands in the defender's name, is in reality held in trust for him.[2] But the Act does not apply in questions with third parties who have an interest in proving the trust for collateral purposes.[3] Thus where a question of jurisdiction depended on the ownership of land in Scotland, proof of a latent trust with regard to it was allowed to be *prout de jure*.[4] And where the declarator is brought against the trustee by a person who is neither the truster nor the person having the beneficial interest in the trust, the proof is not limited. Thus a bill which had been protested for non-payment was assigned, and the acceptor was charged upon it. He brought a suspension, alleging that the charger was a mere trustee, and that he had arranged with the true owner for the discharge of the bill. It was held that the trust might be proved by parole evidence.[5] Again, where the declarator of trust is raised at the instance of creditors of the truster, that is, where creditors challenge the *bona fides* of an apparently unqualified conveyance granted by their debtor, it would appear that the Act does not

[1] *Leckie* v. *Leckie*, 1854, 17 D. 77.

[2] *Wight* v. *Duggan*, 1787, M. 12761, affd. 3 Pat. 610; *Seth* v. *Hain*, 1855, 17 D. 1117; *Laird* v. *Laird & Rutherfurd*, 1884, 12 R. 294; *Parnell* v. *Shannon*, 1894, 22 R. 74.

[3] M'Laren, *Wills*, ii. 1070; *Lord Elibank* v. *Hamilton*, 1827, 6 S. 69; *Scott* v. *Miller*, 1832, 11 S. 21; *Middleton* v. *Rutherglen*, 1861, 23 D. 526; *Hastie* v. *Steel*, 1886, 13 R. 843.

[4] *Hastie* v. *Steel*, *supra*.

[5] *Middleton* v. *Rutherglen*, 1861, 23 D. 526.

apply.[1] So also the trustee may prove, *prout de jure*, that he is only a trustee, and not an absolute proprietor.[2]

Proof not limited where fraud is averred.

The limitations of proof do not apply where there is a relevant averment of fraud, as, for example, that the conveyance was fraudulently obtained, or was granted to defeat the rights of the creditors of the granter.[3] But the averment must be one of fraud in the constitution of the trust, as fraud in denying the existence of the trust is almost necessarily implied in every declarator of trust.[4]

Nor where truster has not consented to absolute title being taken in trustee's name.

Again, in order that the Act may apply, the *ex facie* absolute title must result from a contract between the truster and the trustee; that is, the truster must have consented to the trustee being invested with the absolute title of property.[5] On this rule, parole or other proof has been admitted in a considerable number of cases which at first sight appear to be cases of trust. Such are cases of *negotiorum gestio*, which may be proved *prout de jure*.[6] And parole proof is admissible in cases where the allegation is that the defender had acted on a mandate from the pursuer to purchase or otherwise acquire the property in question, and had, without authority, taken the title in his own name;[7] or where, having authority to take the title in his own name with a back-bond, he had taken it without one.[8]

Nor where truster and trustee are partners.

An exception of somewhat doubtful extent has been admitted in the case where the parties to the action are partners, and the allegation is that a subject which is held by one partner in his own name, and by an *ex facie* absolute title, is in reality held by him in trust for the firm. Thus the fact that a policy of insurance, standing in the name of one partner, was held by him in trust for the firm, has been allowed to be established by parole evidence.[9] The reason given is that the allegation is one of

[1] Bell, *Prin.* s. 1995; *Wink* v. *Spiers*, 1867, 6 Macp. 77, per Lord Benholme, at p. 82; *Wallace* v. *Sharp*, 1885, 12 R. 687.

[2] *Miller* v. *Oliphant*, 1843, 5 D. 856; *Hastie* v. *Steel*, 1886, 13 R. 843; *Liquidators of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689, per Lord Pres. (Inglis), at p. 692.

[3] *Wink* v. *Spiers*, 1867, 6 Macp. 77; *Tennent* v. *Tennent's Trs.*, 1868, 6 Macp. 840, per Lord Pres. (Inglis), at p. 876.

[4] Per L. J. C. (Inglis) in *Marshall* v. *Lyell*, 1859, 21 D. 514, at p. 521.

[5] *Pont Maur Quarry Co.* v. *Fleming*, 1883, 10 R. 457, opinion of Lord Pres.; *Horne* v. *Morrison*, 1877, 4 R. 977, opinion of Lord Shand.

[6] See observations by L. J. C. (Inglis) on *Spreul* v. *Crawford*, 1641, M. 16201, in *Marshall* v. *Lyell*, 1859, 21 D. 514, at p. 521.

[7] *Tweedie* v. *Loch*, 5 Brown's Supp. 630; *Mackay* v. *Ambrose*, 1829, 7 S. 699; *Boswell* v. *Selking*, 1811, Hume, 350; *Horne* v. *Morrison*, 1877, 4 R. 777.

[8] *Pont Maur Quarry Co.* v. *Fleming* 1883, 10 R. 457.

[9] *Forrester* v. *Robson's Trs.*, 1875, 2

partnership, and not of trust. The distinction is not very easy to follow, and would appear to have been abandoned in a later case. There a patent was held in the names of two persons, one of whom was a partner in a firm, and the other of whom had been manager of the firm at the date when the patent was taken out. A declarator was brought by the other partners that the patent was held in trust for the firm. Proof of this was limited to the writ or oath of the alleged trustee, even in the question with the patentee who was actually a partner.[1] The opinions given in this case profess to leave untouched the case of *Forrester* v. *Robson's Trs.*,[2] but it is very difficult to see how the two cases can stand together.

If fact of trust is admitted or proved, conditions may be proved by parole evidence.

The Act 1696, c. 25, only applies to the mode by which the existence of a trust may be proved: if the fact of the trust be admitted or proved, its conditions may be established by parole or other evidence. Thus where the defender, while denying the pursuer's averments, admits that the *ex facie* absolute disposition, or other written title, does not represent the true contract between the parties, the Act does not apply, and the proof may be *prout de jure*.[3] And where the case is put to the oath of the defender, and he admits that the consideration set forth in the deed was not the actual consideration for which the deed was granted, the questions whether he gave any and what consideration, and whether he made any and what advances, are questions extrinsic both of the deed and of the oath; and the defender, if he alleges a debt to be due to him, must establish that debt by evidence other than his own oath.[4]

Construction of "declaration or back-bond of trust," etc.

The construction of the words "declaration or back-bond of trust lawfully subscribed by the person alleged to be trustee," has been liberal. Thus it is not necessary that such declaration or back-bond should be a probative deed,[5] nor that it should expressly state the trust or other qualification of the absolute conveyance, provided that such a qualification is clearly implied, and not left merely as a probable inference.[6] Nor does it appear to be indispensable, in spite of the words of the Act, that the declaration

R. 755. See also *General Baptist Churches* v. *Taylor*, 1841, 3 D. 1030; *Lindsay* v. *Barmcotte*, 1851, 13 D. 718; *Horne* v. *Morrison*, 1877, 4 R. 977.

[1] *Laird* v. *Laird & Rutherfurd*, 1884, 12 R. 294.

[2] 1875, 2 R. 755.

[3] *Murray* v. *Wright*, 1870, 8 Macp. 722; *Grant's Trs.* v. *Morison*, 1875, 2 R. 377.

[4] *Fortune* v. *Luke*, 1831, 10 S. 115; *Murray* v. *Wright*, 1870, 8 Macp. 722; but see *Burnet* v. *Morrow*, 1864, 2 Macp. 929.

[5] *Taylor* v. *Crawford*, 1833, 12 S. 39.

[6] *Macfarlane* v. *Fisher*, 1837, 15 S. 978; *Watson* v. *Johnston*, 1848, 6 Bell, 245.

or back-bond should be actually subscribed by the alleged trustee. Thus, in two cases, a remit was made to an accountant to examine the books of the alleged trustee, in order to discover whether he regarded himself as a trustee, or an absolute proprietor.[1] An opinion has been expressed by Lord Benholme, that the writing which is founded on as a declaration or back-bond must have been in some way delivered to the person for whom the trust is held.[2] This, however, is negatived by the course adopted by the Court in *Seth* v. *Hain*, in procuring a report from an accountant on the defender's books. It would also render inadequate the usual method by which banks preserve evidence that a disposition made in their favour is in reality made in security, viz. by a minute made in the books of the bank.

Equivalents to "declaration or back-bond." Opinion of Lord Wood.

The general limits of the interpretation given to the Act have been described by Lord Wood in terms which may be reproduced here: "That, under the Statute, trust, to qualify the effect of a written title, can only be proved *scripto vel juramento* of the party, and that parole evidence is not admissible, I hold to be settled by clear authority. On the other hand, it appears that the strong words of the Statute have been, to some extent, modified, and that it is now fixed law that the words 'a declaration or back-bond of trust' which are 'to be lawfully subscribed by the person alleged to be trustee,' do not imply that a probative deed is necessary; and that, on the contrary, a trust may be competently proved by writings under the hand of the party, importing an admission or acknowledgment of the trust; as, for instance, a holograph writing signed by him, or by a writing to which his signature is adhibited, if its authenticity be not disputed or shall be instructed. And not only so, but the fact of the existence of a trust may also be competently instructed by the tenor of several writings taken together; and this, although there may, in terms, be no positive declaration of trust, or direct expression of that import. But then, while that latitude has been allowed, it has never, I apprehend, been so, without the restriction and limitation that the contents of the writings shall, although not in direct words, amount to an unambiguous acknowledgment of the existence of a trust, or shall be such as not to be capable of being explained in any other way than as an admission that the party holds in trust. They must be perfectly unequivocal."[3]

[1] *Seth* v. *Hain*, 1855, 17 D. 1117; *Walker* v. *Buchanan, Kennedy, & Co.*, 1857, 20 D. 259.

[2] *Evans* v. *Craig*, 1871, 9 Macp. 801, at p. 804.

[3] *Seth* v. *Hain*, 1855, 17 D. 1117, at p. 1124.

Later cases.

It is very difficult to collect from the cases any more definite rule as to what will be considered equivalent to a declaration of trust. An admission on record will of course establish it; and if facts and circumstances are admitted which cannot be explained except on the assumption of a trust, that is sufficient.[1] But where in an action of declarator that certain deeds, granted by a father in favour of his daughters, were really in trust for himself, the defenders admitted that the narrative declaring a price to have been paid was false, but added that the deeds were intended to form a provision for them, it was held that this was not an admission of trust.[2] In *Thomson* v. *Lindsay*, which was an action against the executor of a person deceased, for the recovery of a deposit alleged to have been made by the pursuer with the deceased for the purpose of securing him against loss under a cautionary obligation, it was held that the requirements of the Act were satisfied by the production of the bond of caution, with letters to the deceased on the subject, proved to have been delivered to him at the date of the transaction, and found in his repositories, together with certain entries in the books of the deceased in his own hand, showing that he had received the money.[3] Again, in *Lyon* v. *Reid*, the fact that an *ex facie* absolute assignation of a lease was in reality only a security, was held to be proved from the various circumstances of the case, as stated in the record, the most relevant being that the cedent had remained in possession, and that the assignee had delivered to the agent of the cedent a statement of the debts due to him by the latter, including therein the rent which he, the assignee, had paid to the landlord since he obtained the assignation.[4]

On the other hand, in *Seth* v. *Hain*, the report of an accountant that the books of an *ex facie* absolute proprietor showed, on the whole, that he was really a security-holder, was held not to be sufficient to prove the trust, as no definite entry could be founded on, and the report merely gave the impression left on the accountant's mind from the general manner in which the books were kept.[5] And, in another case, a letter by the agent of a deceased disponee, binding his client to reconvey property trans-

[1] See opinion of Lord Fullarton in *Chalmers*, *infra*, at p. 870.

[2] *Chalmers* v. *Chalmers*, 1845, 7 D. 865.

[3] *Thomson* v. *Lindsay*, 1873, 1 R. 65. See also *Scottish Union Insur. Co.* v. *Marquis of Queensberry*, 1839, 1 D. 1203; affd. 1842, 1 Bell's App. 183.

[4] *Lyon* v. *Reid*, 1830, 8 S. 789; affd. 1832, 6 W. & S. 114. See remarks on this case by Lord Deas in *Walker* v. *Buchanan, Kennedy, & Co.*, 1857, 20 D. 259, at p. 270.

[5] *Seth* v. *Hain*, 1855, 17 D. 1117. See also *Parnell* v. *Shannon*, 1894, 22 R. 74.

ferred to him by an *ex facie* absolute disposition, with parole evidence from the agent as to his authority to write such a letter, was held not to satisfy the requirements of the Act.[1]

Where writing founded on is ambiguous.

Where the writing founded upon as a back-bond is ambiguous in its terms, parole evidence has been admitted, though with considerable doubt, as to the circumstances in which it was executed and delivered.[2] But this does not mean that where there is a writing, which may mean a declaration of trust, parole proof is admissible to put that construction upon it.[3]

Where back-bond originally taken, but has been lost or given up.

If a back-letter has originally existed, but has been lost, it may be set up by an action of proving of the tenor, and parole proof is then admissible, not to prove the trust, but to prove what the missing document contained.[4] The mere fact that parties are agreed that some sort of back-letter existed, while they differ as to its contents, does not take the case out of the Statute, so as to allow the trust to be proved otherwise than by writ or oath.[5] But if the admitted fact is that a back-bond qualifying the absolute conveyance once existed, and was given up or destroyed, it would rather appear that the onus of proving an alteration in the original contract lies upon the party alleging such alteration. That is, assuming it to be proved that the defender was *ab origine* a trustee or security-holder, it is for him to prove that the back-bond was given up or destroyed in order to make his limited right absolute. Thus it has been laid down by Lord Ivory, in delivering the leading judgment in the case of *Walker*, that "the presumptions of Statute being intended for the protection of writs, in their constitution apparently absolute, and against which nothing but allegation exists, while the character of this writ has been proved to have been *ab origine* a security, the onus lies on the party making the allegation that it was changed to an absolute one, to prove that allegation."[6]

Trust cannot be referred to oath of trustee, if he is bankrupt.

The bankruptcy of the *ex facie* absolute disponee may still further limit the methods of proving a trust. In a case where the existence of an ordinary contract debt was proposed to be referred to the oath of a bankrupt, it was held that the reference was incompetent, because the bankrupt, divested of his estate, had no longer the chief adverse interest in the matter.[7] But it

[1] *Marshall* v. *Lyell*, 1859, 21 D. 514.
[2] *Evans* v. *Craig*, 1871, 9 Macp. 801.
[3] *Mackay* v. *Ambrose*, 1829, 7 S. 699.
[4] *Kennoway* v. *Ainslie*, 1752, M. 12438; *Chalmers* v. *Chalmers*, 1845, 7 D. 865.
[5] *Chalmers*, *supra*.
[6] *Walker* v. *Buchannan*, *Kennedy*, & *Co.*, 1857, 20 D. 259. Lord Deas dissented.
[7] *Mein* v. *Towers*, 1829, 7 S. 902; *Adam* v. *Maclauchlan*, 1847, 9 D. 561.

may be doubtful whether this rule would apply to a case where the ordinary method of proof, including the examination of the bankrupt as a witness, is restricted by Statute. Thus where the sexennial prescription was pleaded against a bill on which a bankrupt was liable, it was held that the pursuer was entitled to the benefit of a reference to the bankrupt's oath.[1] In the same way it might be maintained that as the Act 1696, c. 25, limits the proof of trust to the writ or oath of the alleged trustee, and thus prevents the examination of the bankrupt as a witness, a reference of the cause to his oath should be permitted.

Position of grantee of *ex facie* absolute disposition with back-bond.

When the disponee in an *ex facie* absolute disposition has taken infeftment, or when he has completed the equivalent proceeding of registering the disposition in the Register of Sasines, he becomes avowedly the absolute proprietor of the subjects, provided that his right is not qualified by the publication of a back-bond. Thus although in questions with the disponer he is a mere security-holder, yet in regard to feudal tenure, and in questions with third parties contracting on the faith of the records, he is regarded as an absolute owner; and, in most respects, it is from his apparent and not from his real position that his rights and liabilities result. "It is of the essence of a title *ex facie* absolute," says Lord Ivory, "that all the consequences lawfully deducible from such a title should receive effect, and that all other interests are merely dependent and subordinate rights, to be extricated in their own particular shape."[2] It is then largely from his feudal position that the powers of an *ex facie* absolute disponee in dealing with subjects of the disposition should be regarded.

He is placed in position to dispose of subjects.

The most far-reaching result of an *ex facie* absolute title is that the disponee is thereby placed in a position which enables him to dispose of the subjects, and to give an indefeasible title to a *bonâ fide* purchaser.[3] This does not depend on any right which he himself has in the subjects, as the same result will follow although the sale be a fraud, or even a crime, on his part; but upon the wide and general principle that the disponer, having chosen to invest the disponee with all the *indicia* of

[1] *Buchan* v. *Robertson-Barclay*, 1787, M. 11128.

[2] *M'Lelland* v. *Bank of Scotland*, 1857, 19 D. 574, per Lord Ivory, at p. 583.

[3] *Anderson* v. *Dempster*, 1704, 3 Ross's L. C. 115; *Fergusson* v. *M'Cubbin*, 1715, M. 10215, 3 Ross's L. C. 110; *Somerville* v. *Redfearn*, 1805, M. App. *voce* Pers. and Real, No. 3, revd. 1 June 1813, F. C., 5 Pat. App. 707; *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1116, revd. 1892, 19 R. (H. L.) 43; *Duncan* v. *Mitchell*, 1893, 21 R. 37.

ownership, cannot be allowed to challenge rights acquired from such disponee by innocent third parties for onerous causes.[1] This rule applies both to heritable and moveable property, and was finally settled in the law of Scotland by the judgment of the House of Lords in the very strong case of a trustee in whose name a share in a joint-stock company stood, and who fraudulently transferred it to a third party. The latter took it for onerous causes, and in good faith, relying on the *ex facie* absolute title; and the right he thus acquired was sustained against the true owner.[2] Similarly, if the *ex facie* absolute disponee of a heritable subject should grant a heritable security over it, this security will be valid against the true owner, provided that the security-holder had no notice of the limitation of the right of the party from whom his right in security proceeds.[3] The possibility that the disponee in an *ex facie* absolute disposition qualified by a latent back-bond may misuse his position, and attempt to convert the subjects of the security to his own use, has rendered this form of security comparatively rare between private borrower and lender, and almost confined its use to transactions with banks or other similar institutions, whose personal credit precludes the risk of their misusing the security given to them.

This limited by registration of back-bond.

The risk of a fraudulent sale by the disponee would no doubt be prevented by the registration of a back-bond in the Register of Sasines. This apparently does not prevent the *ex facie* absolute disponee from selling the subjects, and giving a title which the purchaser is safe in accepting.[4] But it would clearly affect such a purchaser with notice that the *ex facie* absolute title was not in reality that of a proprietor, and oblige him to inquire into the real state of the facts. But the publication of a back-bond, as will be shown immediately, alters the whole character of the security.

Question whether sequestration of grantee passes property in subjects to his trustee.

It is a further and more difficult question whether the sequestration of a person holding a security by an *ex facie* absolute disposition, with a latent back-bond, will transfer the property in the subjects to the trustee in his sequestration, leaving the disponer and true owner to rank as a personal creditor for the damage he thereby sustains. On the one hand it has recently been decided that where the title to a heritable

[1] See per Lord Watson in *Heritable Reversionary Co.* v. *Millar*, *supra*, 19 R. (H. L.) 43.

[2] *Somerville* v. *Redfearn*, 1805, M. App. *voce* Pers. and Real, No. 3; revd. 1 June 1813, F. C., 5 Pat. App. 707.

[3] *Thomson* v. *Douglas, Heron, & Co.*, 1786, M. 10229.

[4] *Duncan* v. *Mitchell*, 1893, 21 R. 37. Opinion of Lord Young.

subject has been taken in the name of a person who is a bare trustee, and he is sequestrated, his trustee in sequestration does not acquire the absolute property in the subject in question, but takes it *tantum et tale*, that is, subject to fulfilling the obligations regarding it which were binding on the bankrupt.[1] The grounds of this judgment were twofold: first, that personal creditors, whom the trustee in sequestration represents, are not in the same position as a purchaser or a lender on heritable security, as they trust to the personal credit of their debtor, and do not usually inquire what property stands in his name in the Register of Sasines; and, secondly, that the trustee in sequestration is entitled by Statute to the "property of the debtor,"[2] not to property of which he is only a trustee. On the other hand, where a heritable subject is sold subject to an obligation by the purchaser to resell it at any time at the same price, this obligation, if it remains merely personal, and does not enter the record, is not good in a question with the trustee in the sequestration of the purchaser.[3] The cases establishing this were recognised in the judgment of the House of Lords in *Heritable Reversionary Co.* v. *Millar*, but distinguished on the ground that in such cases the *ex facie* absolute owner had a real beneficial interest in the subject, while a trustee has none.[4] On this ground, therefore, the ordinary *ex facie* absolute disposition with back-bond would seem analogous to the second rather than the first of these cases, as the disponee has a real and beneficial interest in the property of which the title is taken in his name, to the extent of the debts which are thereby secured; and the existence of such a beneficial interest would appear to be the test by which Lord Watson distinguishes the two cases. Still it can hardly be said that subjects held by a bankrupt on an *ex facie* absolute title, and really in security, can pass to his trustee in sequestration as "the property of the debtor." Were the question actually to arise, it is probable that the *ratio* of the decision of the House of Lords in *Heritable Reversionary Co.* v. *Millar*,[5] proceeding, as it does, on commercial rather than feudal principles, would be held to extend to the case of a security-holder by disposition *ex facie absolute*.

Right to retain subjects until all debts due to him by debtor are paid.

Another very important result of a security by an *ex facie*

[1] *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1166; revd. 1892, 19 R. (H. L.) 43.

[2] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 102).

[3] *Mitchell* v. *Fergusson*, 1781, M. 10296, 3 Ross's L. C. 120; *Wylie* v. *Duncan*, 1803, M. 10269 3 Ross's L C. 134.

[4] See opinion of Lord Watson.

[5] 19 R. (H. L.) 43.

absolute disposition is, that the disponee is entitled to retain the subjects until all debts due to him by the disponer are paid, provided that such debts are contracted before the back-bond is recorded, or the remaining right of the disponer is transferred to a third party. This is a right which results from the absolute character of his title, and is of the nature of a right of retention.[1] It would seem to exist whether the statement in the back-bond is that the disposition is granted for a particular debt, or for all debts due and to become due.[2] But it is subject to any express contract limiting the right of retention. Thus if it were expressly stipulated in the back-bond that the conveyance was made in security of a particular debt, and that the subjects conveyed were to be restored on payment of that debt, it is conceived that, in a question with the disponer or with his creditors, the disponee could not claim the right to retain for debts afterwards contracted.[3] Thus in *Robertson* v. *Duff*, A. conveyed a heritable subject by an *ex facie* absolute disposition to B. It was proved that the conveyance was really intended to be used as a security in relief of certain obligations in which A. and B. were jointly liable to a bank, and that it was not intended that other debts due by A. to B. should be secured by it. In a question with the trustee in a trust disposition granted by A. for the benefit of his creditors, it was held that B. was barred from pleading retention for those debts which were due to him by A. at the date of the conveyance, although he might retain for debts subsequently contracted.[4] But the right of an *ex facie* absolute disponee to retain, at least for debts contracted after the constitution of the security, is not limited by the fact that the disposition was made in security of a particular specified debt, if there is no express contract that it should not cover other debts also.[5] It has never been actually decided whether an *ex facie* absolute disposition with a back-bond declaring generally that it was granted in security of a particular debt, will entitle the disponee to claim a preference over the subject, in a question with other creditors, for prior debts; that is, for debts due to him by the disponer before the disposition was granted. The opinion has been expressed that the fact that debts already existing are

[1] *Riddell* v. *Niblie's Crs.*, 1782, M. 1154; *Nelson* v. *Gordon*, 1874, 1 R. 1093—earlier authorities there collected by Lord Deas, at p. 1100. See also on this subject *infra* chapter on Retention (x.).

[2] *Russell* v. *Earl of Breadalbane*, 1829, 7 S. 767; affd. 1831, 5 W. & S. 256.

[3] *Robertson* v. *Duff*, 1840, 2 D. 279; *Lucas* v. *Gardner*, 1876, 4 R. 194.

[4] *Robertson* v. *Duff*, *supra*.

[5] *Hamilton* v. *Western Bank*, 1856, 19 D. 152, per Lord Ivory; *Maitland* v. *Cockerell*, 1827, 6 S. 109.

not mentioned in the back-bond will leave it more open to inquiry whether the intention of the parties was that such debts should be included in the security created by the absolute disposition.[1] If the creditor is put to expense in the maintenance, repair, or melioration of the subject, he is entitled, before denuding, to reimbursement of the amount so expended, in so far as the debtor has been *lucratus* thereby.[2] An *ex facie* absolute disposition does not give the disponee a right to enlarge the liability of a cautioner. Thus where A. agreed to guarantee a loan of £500 made to B., and to pay the premiums of policies of insurance which were to be assigned in security, it was held that an *ex facie* absolute assignation of those policies, though it gave the creditor the right to retain them until all debts due to him by B. had been paid, did not entitle him to demand payment of the premiums from A. after the £500 loan had been paid.[3]

This right limited by publication of back-bond.

The general right of the creditor in an *ex facie* absolute disposition with back-bond to retain the subjects until all advances made by him to the debtor are repaid, is limited either by the publication of the back-bond, or by notice that the right remaining in the debtor has been assigned by him to a third party. The back-bond may be published either by registration in the Register of Sasines, or by production in an action in Court. It is held that by each of these measures the limitation of the apparently absolute right is brought under the notice of third parties.[4]

Effect of publication of back-bond.

It has been said that the effect of the publication of the back-bond is to reduce the transaction from an *ex facie* absolute right to a right in security. Thus Lord President Inglis interprets the decision in *Bartlet* v. *Buchanan*[5]—a case where it was held that a widow was entitled to terce out of subjects which her husband had disponed by an *ex facie* absolute disposition with a recorded back-bond—as meaning that the recording of the back-bond not only qualifies the infeftment of the disponee, but preserves unimpaired the infeftment of the disponer.[6] As this view of the case presents considerable difficulties it may be observed that the actual reason given for the judgment in *Bartlet* v. *Buchanan* was not that the back-bond was recorded, but that any other decision would open

[1] Per Lords Mackenzie and Fullerton in *Robertson* v. *Duff*, 1840, 2 D. 279.

[2] *Nelson* v. *Gordon*, 1874, 1 R. 1093.

[3] *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907.

[4] *Keith* v. *Maxwell*, 1795, Bell, *Folio Cases*, 234.

[5] 21 Feb. 1811, F. C., and 27 Nov. 1812, F. C.

[6] See opinion of Lord Pres. in *Dundee Calendering Co.* v. *Duff*, 1869, 8 Macp. 289, at p. 294.

the road to the evasion of the law of terce.[1] It is not easy to understand how the mere publication of the back-bond, either by registration or by production in Court, could reduce the holder of an *ex facie* absolute disposition duly registered in the Register of Sasines from the position of a vassal infeft and entered with the superior to that of a mere security-holder. Would he no longer be liable for feu-duty?

Looking at the effects of the publication of the back-bond on the rights of the creditor in the management and disposal of the subjects, it does not appear that his position is reduced in all respects to that of the holder of a right *ex facie* in security. It has never been held that he is thereby prevented from entering into possession of the subjects, which he must do as an owner, and not as a security-holder endowed with particular powers. Nor does it render him the holder of a *debitum fundi*, so as to entitle him to poind the ground.[2] And, subject to any special restrictions contained in the back-bond as published, the *ex facie* absolute disponee remains in a position to dispose of the lands, and to give a title to them which a purchaser is in safety to accept.[3] From these considerations it is submitted that the true result of the publication of the back-bond is to reduce those rights of the *ex facie* absolute proprietor which are referable to the fact that he appears on the record to be an absolute owner, to the level of the rights which he would have possessed had the disposition been *ex facie* in security. Thus the qualification of his right being made public, though it does not prevent him from giving a good title to a disponee, would preclude his creditors from claiming the subjects on his sequestration. On the same principle, he cannot retain for future debts after it has been made public that his right is only a security for a particular debt. This was the case of *Keith* v. *Maxwell*, in which the rule was established.[4] There A. conveyed an estate to B. by an *ex facie* absolute disposition with a back-bond, declaring that it was to be used in security of a debt due by A. to C. In an unsuccessful action for the reduction of this security the back-bond was produced in Court. Thereafter A. incurred debts to B., and became bankrupt. It was held that B. was not entitled to retain the subjects in security of his claims against A., not on the ground that the disposition was originally granted to him as a trustee to secure a debt due to C., but because the limitation of his right was

[1] *Bartlet* v. *Buchanan*, 21 Feb. 1811, F. C., and 27 Nov. 1812, F. C.

[2] *Scottish Herit. Secur. Co.* v. *Allan*, 1876, 3 R. 333.

[3] *Duncan* v. *Mitchell*, 1893, 21 R. 37.

[4] 1795, Bell, *Folio Cases*, 234.

made public by the production of the back-bond in Court. No particular difficulty occurs so long as the back-bond states that the security was granted for a particular debt. It would then appear to be clear that the publication of the back-bond limits the right of the disponee to a right in security for that sum, as third parties are entitled to assume that the right is in fact what it is set forth publicly to be. But if the back-bond bears that the transaction is in security of all debts due and to become due, *quid juris* if it is recorded or otherwise published? There is no reason why the fact that the actual contract is published should prevent the creditor from taking the full benefit of that contract, by making the subjects available as a security for all debts due to him by the debtor. On the other hand, it is possible that it might be held that the publication of the back-bond, by making it clear that the transaction was really a security, would bring it under the operation of the second part of the Act 1696, c. 5, whereby rights in security for debts to be contracted in future are rendered ineffectual for all debts incurred after infeftment is taken upon the security.[1]

Right of grantee limited by notice that remaining right of granter has been transferred to a third party.

Again, the right of the creditor to make the *ex facie* absolute disposition available as a security for any debt due to him by the true owner is limited by the receipt of notice that the remaining right has been assigned to a third party. The remaining right of the person who has granted an *ex facie* absolute conveyance is indeed of a purely personal character, a *jus actionis*, or right to demand a reconveyance on the fulfilment of the terms of the contract.[2] But such a right is of a valuable character, and may be assigned. Upon receiving notice of an absolute assignation of the reversionary right, the creditor in a disposition *ex facie* absolute can no longer make advances on the faith of his security. He will obtain no preference over the subject for advances made after he became aware that the substantial right to the subjects no longer belonged to his debtor, but to a third party. And if the reversionary right is assigned in security, and notice thereof is given to the creditor, he will be postponed, in respect of advances made after the notice was received, to the claims of the person to whom the assignation in security was made.[3] Thus in *National Bank* v. *Union Bank*, A. disponed a heritable subject to the National Bank by a disposition *ex facie* absolute, with a back-bond declaring that it was in reality in security of advances made and to be made by

[1] This is the opinion of Prof. Menzies, *Conveyancing*, p. 861.

[2] See *infra*, p. 162.

[3] *National Bank* v. *Union Bank*, 1885, 13 R. 380; revd. 1886, 14 R. (H. L.) 1.

the Bank to a firm of which A. was a partner. This back-bond was not recorded. Afterwards A. assigned the right of reversion to the Union Bank, in reality in security, but by an *ex facie* absolute assignation. Notice of this assignation was sent to the National Bank, who, nevertheless, made further advances on the faith of their security. On the bankruptcy of the firm in question it was found that the subject conveyed was not sufficient to satisfy the debts due to the two banks, and the question arose whether the National Bank could claim a preference over the Union Bank for the advances they had made to the bankrupts after they had received notice that the right of reversion had been assigned to the Union Bank. In the Court of Session it was held, by a majority, that they were entitled to do so; and the decision was supported by much learned reasoning as to the nature of the right created by a disposition *ex facie* absolute. But this judgment was reversed in the House of Lords, where it was held, in accordance with a leading English case,[1] that the National Bank could not retain, in a question with the Union Bank, for advances which they had made after they had received notice that the Union Bank, and not their debtor, held the immediate substantial interest in the subject on which they claimed to be making advances. But the right to retain remains, in such a case, in a question with anyone except the person to whom the remaining right has been assigned in security.[2]

And by bankruptcy of granter.

On the same principle the right of the holder of an *ex facie* absolute disposition to retain the subjects for all debts subsequently contracted, is limited to those debts which were contracted by the disponer while solvent. On his bankruptcy, the right of reversion in the subjects is vested in his trustee, and therefore a person holding his property in security is precluded from burdening that property by any further advances to the bankrupt.[3]

Penal clauses in back-bonds.

Occasionally a security is constituted by an *ex facie* absolute disposition, with a back-bond containing a provision that, on the lapse of a certain period without payment, the right of the disponee shall become an absolute right of property, and the right of the disponer to a reconveyance shall cease. Such a provision will not be enforced by the Court in its literal interpretation, that is to say, the reversionary right of the debtor will not be held to expire

[1] *Hopkinson* v. *Rolt*, 1861, 9 Clark H. of L. Rep. 514.

[2] *National Bank* v. *Union Bank*, 1885, 13 R. 380; revd. 1886, 14 R. (H. L.) 1.

[3] *Callum* v. *Goldie*, 1885, 12 R. 1137, per Lord Pres. Inglis.

ipso facto by the mere lapse of the stipulated period, but will require to be definitely extinguished by a declarator of irritancy. And an offer to purge the irritancy, even beyond the stipulated period, is a good answer to such a declarator.[1] Even if no offer to purge the irritancy were made, it is doubtful whether the declarator would be granted, as it might be held that the contract was of a penal nature, which would be denied effect, on equitable grounds, except to the extent to which the disponee had suffered damage by non-payment.[2]

Rights of creditor to possession and management of subjects.

The rights of the creditor in a security of the kind under discussion in relation to the possession, management, and disposal of the subjects, are those of a proprietor rather than those of a mere security-holder. Thus, in contrast to an ordinary bond-holder, whose right to enter into possession depends upon the powers given in his bond, the *ex facie* absolute disponee has been invested with the right to assume the entire management of the subjects, as the proprietor. He may enter into possession and uplift the rents without an action of maills and duties, which, though competent, is unnecessary.[3] If his right to enter into possession is disputed by the disponer, an action of declarator in the Court of Session would seem to be his appropriate remedy. In one case the conclusions sustained were that the disponer had no power to grant leases of the subjects, and should be ordained to remove therefrom.[4] Once in possession, neither the disponer nor his trustee in bankruptcy can remove him without tendering payment of the debt.[5] But the disponee is bound to account for his intromissions with the rents and profits while in possession, though he is entitled to plead compensation, in a question with the trustee in the disponer's sequestration, for any debts still due to him by the bankrupt.[6] On the other hand, the creditor in a security by *ex facie* absolute disposition is not entitled to stipulate for a variety of remedies, which would not naturally be incident to the title by which he holds his security.[7] Thus where a Building Society made advances to one of its members, on an *ex facie* absolute disposition, without a back-bond, but subject to

[1] Stair, i. 13. 14; *Thomson* v. *Threshie*, 1844, 6 D. 1106; *Smith* v. *Smith*, 1879, 6 R. 794.

[2] *Thomson* v. *Threshie* and *Smith* v. *Smith*, *supra*; *Marquis of Northampton* v. *Salt*, L. R. (1892) A. C. 1.

[3] *Rankin* v. *Russell*, 1868, 7 Macp. 126.

[4] *Ib.*, *supra*.

[5] *Hay's Trs.* v. *Davidson*, 1853, 15 D. 583.

[6] *Sturgeon* v. *M'Lellan*, 20 Jan. 1813, F. C.; *Robertson* v. *Duff*, 1840, 2 D. 279, per Lord Fullerton, p. 293.

[7] *Scottish Prop. Invest. Build. Soc.* v. *Horne*, 1881, 8 R. 737; *Scottish Herit. Secur. Co.* v. *Allan*, 1876, 3 R. 333—opinion of Lord Deas.

rules which provided that the debtor should be allowed to remain in possession, and that the Society should have the right, if he fell into arrears with the interest, of entering into possession "without any warning or legal process of any kind whatever," it was nevertheless held that a petition to the Sheriff, at the instance of the Society, for summary ejection of their debtor, was incompetent. Such a petition, it was held, is properly applicable only against persons who are in possession without a title, and it was not competent for the Society to make rules of diligence for themselves.[1] Again, the holder of an *ex facie* absolute disposition is not entitled to poind the ground, whether the back-bond is recorded or not, because he is *ex facie* a proprietor, and not the holder of a *debitum fundi*, who alone is entitled to poind the ground.[2] This is a serious drawback to this form of security in cases, such as that of an hotel or manufactory, where the right to attach the moveables by diligence would form an important adjunct to the security in the event of the debtor becoming insolvent. An attempt to secure the same result, by granting a lease to the debtor, and then, on his bankruptcy, sequestrating the moveables as *invecta et illata* falling under the landlord's hypothec, failed, as it was held to be an attempt to create a security over moveables without possession, which was not recognised by the law of Scotland.[3]

Right of creditor to sell subjects.

As a final remedy, the creditor is entitled to sell the subjects. This he has a right to do on the ground that he has been invested with the title of a proprietor, and not in virtue of any powers which may be contained in the back-bond.[4] But in a question between the parties themselves, the right of the creditor to sell is of course subject to any special limitations contained in the back-bond. If he proposes to sell, in violation of any such limitations, the debtor is entitled to interdict the sale.[5] Thus where an *ex facie* absolute disposition was granted with a relative minute of agreement, by which it was arranged that the disposition was in security of a sum advanced and of sums to be advanced in future, and that the disponee should be entitled to sell upon giving one month's notice, it was held that this did not entitle him to sell on an unliquidated and disputed account, and that the debtor was entitled to interdict him from doing so.[6] If,

[1] *Scottish Prop. Invest. Build. Soc.* v. *Horne*, *supra*.

[2] *Scottish Herit. Secur. Co.* v. *Allan*, 1876, 3 R. 333.

[3] *Herit. Securities Invest. Assoc.* v. *Wingate & Co.'s Trs.*, 1880, 7 R. 1094, narrated *infra*, p. 233.

[4] *Duncan* v. *Mitchell*, 1893, 21 R. 37.

[5] *Lucas* v. *Gardner*, 1876, 4 R. 194.

[6] *Ib.*

however, the sale is actually carried out, the remedy of the debtor, at least if the back-bond is not recorded, is an action of damages against the creditor, and not a reduction of the sale.[1] The creditor, in virtue of the proprietor's title, can give a title which a purchaser is bound to accept, with or without an assignation of the reversionary right of the debtor.[2] The publication of the back-bond does not put an end to his authority to do so.[3] Therefore in the ordinary case the debtor has no power to reduce a sale in a question with a purchaser, who has no concern with the private arrangements between debtor and creditor, and has obtained a title which is complete on the face of the records. It may, however, be doubted whether, if the back-bond was recorded, and contained an agreement on the part of the creditor not to sell the subjects until a certain period had elapsed, or not to sell them in a particular manner, the purchaser, taking with due notice of this agreement and in disregard of it, would be entitled to object to a reduction of the sale.

Formalities of sale.

For his own protection the creditor should, in selling, observe the formalities as to intimation and advertisement which are provided by the Conveyancing Statutes for a sale under the powers in a bond and disposition in security. But he is probably entitled to sell without such formalities, or by private bargain, and is frequently authorised to do so in the back-bond.[4] He is, of course, bound to account for the price after satisfying his own debt.

Liabilities of creditor in *ex facie* absolute disposition.

As proprietor.

As the creditor, by taking infeftment on an *ex facie* absolute disposition, has obtained many of the rights of a proprietor, he has also become subject to many of his liabilities. He is entered with the superior, in virtue of his infeftment and of sec. 4 of the Conveyancing Act, 1874,[5] and is therefore liable for feu-duty, and for a composition, if such be due on the entry of singular successors.[6] In the same way he incurs liability for any real burden which has been imposed as an inherent condition of the feu-right, and which therefore imposes liability on singular successors.[7] Thus where there was an obligation on the vassal to keep a mill, which was built on the feu, insured for £900, and

[1] *Baillie* v. *Drew*, 1884, 12 R. 199.

[2] *Dundee Calendering Co.* v. *Duff*, 1869, 8 Macp. 289; *Duncan* v. *Mitchell*, 1893, 21 R. 37.

[3] *Duncan* v. *Mitchell*, *supra*.

[4] *Baillie* v. *Drew*, 1884, 12 R. 199; *Duncan* v. *Mitchell*, 1893, 21 R. 37.

[5] 37 & 38 Vict. c. 94.

[6] *Gardyne* v. *Royal Bank*, 1851, 13 D. 912, revd. 1853, 1 Macq. 358; *Liquidators of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.

[7] As to what real burdens are inherent conditions of the feu, see *infra*, p. 166. The obligations imposed by a contract of ground-annual

this was held to be of the nature of an inherent condition of the feu-right, it was held that an *ex facie* absolute disponee was liable to implement it, and, on the mill being burnt, was bound to expend £900 in its repair.[1]

In questions with other creditors his liabilities are those of a creditor.

But while in questions with third parties, or with the superior, the *ex facie* absolute disponee is a proprietor, in questions with other heritable creditors he is regarded as a creditor. Thus where an *ex facie* absolute disponee, with a back-bond unrecorded, brought a reduction of a sale which had been carried out by a prior heritable creditor, on the ground that certain formalities of the sale had not been properly carried out, and, in particular, that he had not received intimation, it was held that, in a question between creditors, the pursuer was only a postponed creditor, and therefore had no title to sue.[2] And, in consequence of this theory, the *ex facie* absolute disponee may have relief against prior heritable creditors for the liability he has incurred owing to his position as an entered vassal. In *Liquidators of City of Glasgow Bank* v. *Nicolson's Trs.*, A. granted a bond and disposition in security to B., and afterwards conveyed the subjects thus burdened to the bank by an *ex facie* absolute disposition with a back-bond. On this disposition the bank was infeft. B., in virtue of his bond and disposition in security, entered into possession and drew the rents. The bank, as the entered vassal, was held liable to the superior for feu-duty. It was held that the bank had a right of relief against B., on the ground that, in a question with a heritable creditor, the *ex facie* absolute disposition was only a security, and that, as between two creditors, the feu-duty ought to be paid out of the rents.[3]

Conveyance of interest of creditor.

The interest of the creditor in an *ex facie* absolute disposition should, it is conceived, be transferred by an ordinary disposition, as if he were actually the absolute owner of the subjects. As this form of security is not included in the interpretation clause of the Consolidation Act, 1868, under the words "heritable security,"[4] it is not affected by the provisions of that Act which render heritable securities moveable in the succession of the creditor, and it therefore passes to his heir.

Remaining right of debtor.

The right remaining in the debtor who has granted a security

do not impose liability on singular successors—*Gardyne* v. *Royal Bank*, 1853, 1 Macq. 358; *Marshall's Tr.* v. *Macneill & Co.*, 1888, 15 R. 762; *infra*, p. 174.

[1] *Clark* v. *City of Glasgow Life Assur. Co.*, 1850, 12 D. 1047; revd. 1854, 1 Macq. 668.

[2] *Stewart* v. *Brown*, 1882, 10 R. 192.

[3] *Liquidators of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.

[4] 31 & 32 Vict. c. 101, s. 3.

by an *ex facie* absolute disposition with a back-bond, though in substance, and between the parties, the substantial property in the subjects, is, in many of its legal characteristics, of a purely personal character. It is a *jus actionis*, or right to demand a reconveyance, on the fulfilment of the conditions, express and implied, upon which such reconveyance depends.[1] It is transmissible by assignation,[2] and may be attached by arrestment.[3] It may be cut off by the negative prescription, if no action be taken upon it for forty years.[4] On the other hand, it is heritable in the succession of the debtor.[5] And the real, as opposed to the nominal, nature of the debtor's right was recognised in a recent case, where it was held that the debtor, on obtaining a reconveyance, had a good title to sue a railway company for damage done to the subjects, although, at the date when the damage was done, the *ex facie* absolute disposition was the recorded and ostensible title to the lands.[6]

His acts of management, while left in possession, good against the creditor.

In granting a conveyance of an absolute character, the debtor has deprived himself of the right to possess as proprietor. So it was held that he had no right to challenge, by an action of removing, the possession of a party who set forth no right to possess at all, at least without setting forth clearly on record that he had the actual and substantial interest in the subjects.[7] In the ordinary case, however, of a security by an *ex facie* absolute character, in which the creditor is commonly a bank, building society, or some similar institution, the debtor remains in possession of the subjects. If he does so, the creditor is held to have consented to his continuing the ordinary powers of management, and neither he, nor his trustee in bankruptcy, can challenge a *bonâ fide* lease granted by the debtor while still in possession.[8]

Extinction of the security.

In the ordinary case, a security by *ex facie* absolute disposition is extinguished by a reconveyance. But it is a question of some practical importance what are the means by which the disponee

[1] See opinion of Lord Watson, *National Bank* v. *Union Bank*, 1886, 14 R. (H. L.), p. 4.

[2] *M'Callum's Trs.* v. *Macnab*, 1877, 4 R. 520; *National Bank* v. *Union Bank*, *supra*.

[3] *Cameron* v. *M'Ewan*, 1830, 8 S. 440.

[4] *Munro* v. *Munro*, 19 May 1812 F. C.; *Paul* v. *Reid*, 8 Feb. 1814, F. C.; *Chambers* v. *Law*, 1823, 2 S. 366.

[5] *Bartlet* v. *Buchanan*, 21 Feb. 1811, F. C., and 27 Nov. 1812, F. C.

[6] *M'Bride* v. *Caledonian Rwy. Co.*, 1894, 21 R. 620.

[7] *Traill* v. *Traill*, 1873, 1 R. 61; cf. *Hay's Tr.* v. *Davidson*, 1853, 15 D. 583. Both cases were special, and the right to possess is usually provided for in the back-bond.

[8] *Abbott* v. *Mitchell*, 1870, 8 Macp. 791.

How the creditor may put an end to his liability in respect of the subjects.

can get rid of his security, in the possible case of the feu-duty and other burdens exceeding the rental, if the disponer is bankrupt and the trustee refuses to have anything to do with it. The disponee, by taking infeftment on the *ex facie* absolute disposition, becomes an entered vassal, and is therefore liable for the feu-duty. The question how he could get rid of this liability was discussed in *Gardyne* v. *Royal Bank*.[1] There the question upon which the case was ultimately decided by the House of Lords, reversing the decision of the whole Court, was whether the onerous disponee of a burgage subject was liable to pay the ground-annual. But the main question discussed in the Court of Session was, what were the means by which a person who had accepted and recorded an *ex facie* absolute disposition of a burgage subject could yet get rid of the obligation (which, as the law then stood, he had undertaken) to pay the ground-annual, when the disponer was bankrupt, and his trustee refused to accept a reconveyance. Certain judges held that the disponee, by recording the back-bond, thus showing the transaction to be a security, and by executing and recording a discharge and renunciation, was freed from all further liability.[2] The majority were, however, of opinion that this was not sufficient. According to their view it was necessary that a new infeftment should take the place of that of the disponee, before he could get rid of his liability. This he could effect by executing a reconveyance in favour of the disponer, and obtaining decree in a declarator ordaining him to register it.[3] In a later case the creditor recorded the back-bond, executed a reconveyance, and obtained a decree in absence ordaining the debtor to register it. These proceedings were taken after an action had been raised against the disponee by a third party for the purpose of finding him liable to fulfil the obligations imposed by a contract of ground-annual as to the erection of buildings, and the reconveyance was executed, and the decree in absence obtained, after the record in that action was closed. It was held by the Lord Ordinary (Kinnear) that the *ex facie* absolute disposition was extinguished, and the liability of the disponee at an end, by this procedure. This judgment was affirmed by the First Division upon a different ground,[4] and no opinion was expressed as to the sufficiency of the divestiture.[5]

[1] *Gardyne* v. *Royal Bank*, 1851, 13 D. 912; revd. 1853, 1 Macq. 358.

[2] See opinion of Lord Moncreiff in *Gardyne*, at p. 928.

[3] See per L. J. C. (Hope) in *Gardyne*, at p. 923.

[4] *I.e.*, that the contract of ground-annual did not impose any personal obligation to build which could be enforced against singular successors.

[5] *Marshall's Tr.* v. *Macneill & Co.*, 1888, 15 R. 762.

It would seem to be clear that no lesser procedure would possibly be sufficient, because the disponee, if infeft, is, in virtue of the infeftment and sec. 4 of the Conveyancing Act, 1874, an entered vassal, and is therefore liable to the superior for feu-duty until another vassal has been entered in his place.[1]

Liability for conditions of the feu prestable before reconveyance.

The opinion of Lord Kinnear in *Marshall's Tr.*[2] is of importance in relation to a recent case, in which it was held that a feuar could not escape liability for an obligation which was a condition of the feu-right, by transferring the feu to a third party, after the obligation in question had become prestable.[3] A hydropathic company had taken a feu under the condition that they and their successors and assignees whomsoever should be bound to erect and maintain buildings to the value of £15,000, and to keep them insured to that amount, and, in the event of a fire, to rebuild or restore them so as to maintain the total value of £15,000. The company failed, and the feu was conveyed to another company, who carried on the hydropathic. While in their possession, the buildings were destroyed by fire, and the new company received the insurance money. They then conveyed the feu to a third party, and pleaded that their obligation was at an end, because the disponee, being infeft, was entered with the superior, and the obligations of the original vassals were therefore discharged. It was held that the implied entry of a new vassal which had been introduced by the 4th sec. of the Conveyancing Act, 1874, did not infer a discharge of the liability of the former vassal for obligations for which he had become liable before that entry took place, and therefore that the hydropathic company were bound to rebuild. In this case, had the second company been security-holders, infeft on an *ex facie* absolute disposition, it is clear that they would still, as singular successors in the feu, have been liable in the obligation to rebuild.[4] But on the principle of the decision of Lord Kinnear in *Marshall's Tr.* v. *Macneill & Co.*,[5] it would seem that they would have been entitled to get rid of their obligation by reconveying the subjects to the party by whom the *ex facie* absolute disposition had been granted.

[1] *Hyslop* v. *Shaw*, 1863, 1 Macp. 535.

[2] *Supra*, 15 R. 762.

[3] *Marshall* v. *Callander, etc., Hydropathic Co.*, 1895, 22 R. 954.

[4] *Clark* v. *City of Glasgow Insur. Co.*, 1850, 12 D. 1047; revd. 1854, 1 Macq. 668.

[5] 1888, 15 R. 762,

CHAPTER V

REAL BURDEN

Nature of security.
Real burdens as securities and as conditions of the feu.
Constitution of real burden.
Real burden as *debitum fundi*.
Personal obligation.
Transfer *inter vivos*.
Transfer *mortis causa*.
Restriction and discharge.

Nature of the security.

A REAL, or, as it is sometimes called, a reserved burden, is a form of heritable security differing from those already discussed in respect that it vests no feudal estate in the creditor, but only creates a qualification or burden on the estate of the debtor, or of a third party; and that the right of the creditor depends, not on any infeftment of his own, but on the infeftment of his debtor. It is a security analogous to a right of hypothec, and not to a right of pledge, because the subjects of the security are not conveyed to the creditor, as they are in the case of a bond and disposition in security, or an *ex facie* absolute disposition with back-bond, but he is nevertheless invested with a real right over them, entitling him primarily to a preference thereon on the bankruptcy of the debtor, and, consequently, to attach the subjects in satisfaction of his debt by the use of appropriate diligence.

Distinction between real burdens as securities and real burdens as conditions of the feu.

A real or reserved burden which forms a security for debt is to be distinguished in many respects from a real burden which forms an inherent condition of the feu-right; that is, a burden or obligation which is incumbent upon the owner of lands, as a condition of his tenure. Although the phrase real burden is indiscriminately applied to both cases, there would seem to be little similarity between them beyond the fact that both are burdens on the infeftment of a proprietor of land.[1] It is to burdens of the latter kind, *i.e.* to inherent conditions of the feu,

[1] *Mags. of Arbroath* v. *Dickson*, 1872, 10 Macp. 630; *Stewart* v. *Duke of Montrose*, 1860, 22 D. 755; affd. 1863, 1 Macp. (H. L.) 25. *Davidson* v. *Dalziel*, 1881, 8 R. 990; cf.

that the leading case of *Coutts* v. *Tailors of Aberdeen*[1] applies; and the opinion of Lord Corehouse there, which has since been regarded as the guiding rule as to the conditions necessary for the creation of a real burden, is to be taken as referring to real burdens which are conditions of tenure, and not to those which are debts secured upon land. "The particular matters dealt with in that case," says Lord President Inglis, "were rather conditions of the right than real burdens, and they were conditions peculiarly applicable to an urban tenement, which was the subject there in question. But these are of a totally different character from the burdens we are dealing with here, which are obligations to pay money; and, in the case of obligations to pay money, whether it be a principal sum, or an annual payment, or an occasional payment, I know of no authority in the law of Scotland for saying that these can be made to affect the lands, as distinguished from the personal obligation of the owner of the lands, by anything but a declaration that they shall be real burdens, or by the use of words plainly importing the same thing."[2] In certain exceptional cases, however, real burdens of the nature of inherent conditions of the feu may take the form of obligations to pay money. But they are then incidents of land tenure, of the same nature as the feu-duty, and in no sense rights in security. Thus an obligation in a feu-disposition to free and relieve the superior of the payment of forty bolls of victual due by him to the over-superior for the lands in question, has been upheld as a real burden of the nature of a condition of the right.[3] And an obligation *ad factum præstandum* may be made a real burden of this kind, even though it resolves itself into the payment of an indefinite or varying sum of money.[4] The distinguishing points of such real burdens are the necessity that the obligation should have some connection with the tenure of the land; that it should be enforceable by some person whose right depends upon feudal relations, such as a superior, or a co-feuar; and that it should have a *tractum futuri temporis*, and should not be terminable at the convenience of the vassal who is debtor therein.[5] Such

[1] 1834, 13 S. 226; 1840, 1 Rob. 296, 3 Ross's L. C. 269.

[2] *Mags. of Arbroath* v. *Dickson*, 1872, 10 Macp. 630, per Lord. Pres. Inglis, at p. 635.

[3] *Marquis of Tweeddale's Trs.* v. *Earl of Haddington*, 1880, 7 R. 620. See observations on this case in *Marshall's Tr.* v. *Macneill & Co.*, 1888, 15 R. 762.

[4] *Edmondstone* v. *Seton*, 1888, 16 R. 1.

[5] See opinions of Lord Deas in *Stewart* v. *Duke of Montrose*, 1860, 22 D. 755, affd. 1863, 1 Macp. (H. L.) 25, at 22 D. p. 803; and *Marquis of Tweeddale's Trs* v. *Earl of Haddington*, 1880, 7 R. 620, at p. 636; *Clark* v. *City of Glasgow Life Assur. Co.*,

a burden, as an inherent condition of the right, and not an encumbrance upon land, need not be of specified amount, nor need the name of the creditor be mentioned. It may also be enforced personally against anyone who is in right for the time being of the subjects to which the condition in question is attached.[1] In all these points, as will be presently explained, it is in contrast to a real burden constituted as a security for debt. Such burdens do not fall within the scope of the present work, as they are rather conditions of land tenure than rights in security; and therefore the following pages refer only to real burdens which consist of a monetary obligation, and which form a method of constituting a heritable security.

Real burden may be created by reservation or by constitution.

A real burden, as a heritable security, may be laid upon land, in a conveyance, either by reservation or constitution. Thus where an estate is sold, and part of the price remains unpaid, the insertion of the sum remaining unpaid as a real burden by reservation in the disposition to the purchaser, forms the readiest security for it. So where land is disponed to an heir or disponee, subject to provisions in favour of third parties, such provisions are usually made real burdens by constitution upon the right of the disponee. Again, an estate may be disponed, subject to a power or faculty to the disponer, or to some third party, to burden it with specified provisions, or to a specified extent.

Real burden must be inserted in dispositive clause.

The real burden must be inserted in the dispositive clause.[2] It follows that such a burden cannot be created as an independent right in a separate conveyance; it must be inserted as a qualification of the right of some person to whom the lands are disponed.

Conditions of creation of a security by real burden.

There are several conditions which have been decided to be necessary to the effectual creation of a security by real burden. These are: (1) That the burden must enter the infeftment. (2) That it must be clear that a real burden on the lands is created, and not merely a personal burden on the disponee. (3) That the burden must be of definite amount, and ascertainable, in all its particulars, from the Register of Sasines. (4) That the lands upon which it is laid must be specified.

(1) It must enter the infeftment, and appear upon record.

It is essential that a real burden should enter the infeftment of the lands upon which it is secured, and appear on the record as a burden thereon. So long as the disponee of the lands remains uninfeft, the burden imposed upon him will be good

1850, 12 D. 1047, revd. 1854, 1 Macq. 668; contrast *Marshall's Trs.* v. *Macneill & Co.* 1888, 15 R. 762.

[1] *Marquis of Tweeddale's Trs.* v. *Earl of Haddington.* Lord Deas, *supra.*

[2] Bell, *Prin.* s. 920.

against him or his creditors as an essential condition of the personal right. But if he should feudalise his title without entering the real burden in his infeftment, the preference of the creditor will be lost. Instead of being the holder of a real burden upon the lands, he can only rank as a personal creditor of the disponee in a question with other creditors or with a singular successor.[1]

An irritant clause necessary.

In order to prevent such a contingency, a real burden, whether created by reservation or by constitution, should be fenced with an irritant clause, declaring that any infeftment which does not engross the burden, or validly refer to it, shall be null. Such a clause is not a necessary solemnity in the creation of a real burden, nor will its insertion make a personal burden real.[2] It is of no particular importance if the disposition itself is recorded in the Register of Sasines, as the real burden must then necessarily appear on record. But if the disponee, instead of recording the disposition itself, should expede and record a notarial instrument upon it, and should omit to engross the real burden therein, such a notarial instrument, in the absence of an irritant clause, would form the title to the lands, and the burden would remain personal. In such a case the effect of an irritant clause would be to nullify the infeftment which omitted the real burden, and thus to preserve unimpaired the infeftment of the disponer.

Creditor, even without an irritant clause, entitled to a declarator of the burden.

Even without an irritant clause, it is conceived that a person in whose favour a real burden had been created would be entitled to a declarator that the real burden in question formed a valid qualification of the right of the disponee, and should be inserted in his infeftment.[3] But the right to such a declarator would be cut off by the negative prescription, if no action were taken on it for forty years.[4]

Burden may be imported by reference.

Where a real burden has been properly constituted, and appears on the record, it need not now be repeated at full length in any deed transferring or dealing with the lands, but may be imported by a reference to any deed affecting the lands, which is recorded in the appropriate Register of Sasines, and in which the real burden is set forth at full length.[5]

[1] Ersk. ii. iii. 51; Bell, *Com.* i. 728; *Allan* v. *Cameron's Crs.*, 1780, M. 10265, affd. 1781, 2 Paton's App. 572; *Macdonald* v. *Place*, 1821, Hume, 544.

[2] *Allan* v. *Crs. of Cameron*, 1780, *supra*.

[3] See opinion of Lord Shand in *Cowie's Trs.* v. *Cowie*, 1893, 20 R. (H. L.) 81, at p. 88.

[4] *Pearson* v. *Malachi*, 1892, 20 R. 167.

[5] 31 & 32 Vict. c. 101, s. 10; 37 & 38 Vict. c. 94, s. 32, Schedule H.

(2) It must be clearly a real burden and not a mere personal obligation.

In order to constitute an obligation to pay money a real burden upon land, it must be imposed in clear and distinct terms, in words which unequivocally state that the lands are to be burdened therewith in all time coming. There are no *voces signatæ* for the constitution of a real burden, but it must be perfectly clear that the lands themselves, and not merely the disponee, are burdened.[1] The mere fact that it is clear that the disponer intended to create a real burden is not sufficient; words must be used which definitely lay the burden on the lands.[2] Thus a distinction has been drawn between a statement, in a disposition, that the disponee shall be obliged to pay the disponer's debts, and a statement that the lands are disponed under burden of the disponer's debts. In the former case[3] the debts in question can never be more than a personal burden on the disponee; in the latter case, if their amount is duly specified, they form real burdens on the lands, which will give them a preference, on the proceeds of such lands, over the debts of the disponee.[4] So a disposition granted "subject to the payment by the said disponee" of certain legacies, was held to create only a personal obligation, and not a real burden.[5] Again, the magistrates of a burgh, in granting a burgage holding, stipulated for a certain annual payment as a feu-duty. It was clear that this could not be sustained as a feu-duty in a burgage holding, but it was argued for the magistrates that it had been created a real burden. It was held that this had not been effectually done, as there was no distinct expression that the burden was to be real upon the lands, although the intention that it should be so was clear.[6] If the words used do not constitute a real burden, but only a personal obligation, a clause ordaining that the burden shall enter the infeftment, under pain of nullity, does not render it real.[7]

(3) It must be of specific amount, and its nature must be ascertainable from the records.

Thirdly, the burden must be of specific amount, and this

[1] The usual phrase is that the lands are disponed "with and under the real and preferable burden."

[2] Ersk. ii. 3. 79; *Mags. of Arbroath* v. *Dickson*, 1872, 10 Macp. 630. Opinion of Lord Pres. (Inglis) at p. 635, quoted *ante*, p. 167.

[3] *Lord Ballantyne* v. *Dundas*, 1685, M. 10238; *Stewart* v. *Hoome*, 1792, M. 4649, 3 Ross's L. C. 13; *Martin* v. *Paterson*, 1808, M. App. *voce* Pers. and Real, No. 5; *M'Intyre* v. *Masterton*, 3 Feb. 1824, 2 S. 664.

[4] Ersk. ii. 3. 49 and 50; *Duff* v. *Gordon*, 1719, M. 10244; revd., on different ground, *Robertson*, 355, 3 Ross's L. C. 4.

[5] *Davidson* v. *Dalziel*, 1881, 8 R. 990.

[6] *Mags. of Arbroath* v. *Dickson*, 1872, 10 Macp. 630.

[7] *Allan* v. *Crs. of Cameron*, 1780, M. 10265; affd. 1781, 2 Pat. App. 572.

amount, and the name of the creditor, must be ascertainable from the record. It is held that there cannot be laid upon land any real burden of which the records do not give specific information, and the necessity of a precise statement has been illustrated in a variety of cases.[1] Thus where lands were disponed under burden of the disponer's debts, as contained in a list signed as relative thereto, and recorded in the Books of Council and Session, it was held that these debts had not been constituted real burdens, as their nature and extent did not appear in the Register of Sasines.[2] And where a disposition was granted under the burden of debts as contained in a heritable bond, granted of same date, and in which the names of the creditors were specified, but not the amounts due to them, it was held that this specification was not adequate, and that the debts were not made real.[3] More modern cases have tended to relax the strictness of this rule. Thus where an annuity was duly constituted as a real burden in favour of the children of the disponer *nominatim*, to be continued on their death in favour of their issue, it was held that the information given as to the name of the creditor was sufficiently precise, and the annuity was sustained as a real burden in favour of the issue.[4] And, in *Edmondstone* v. *Seton*, a bond and disposition in security, by which the granter, who had borrowed money from his marriage-contract trustees, bound himself to transfer to the trustees £5000 3 per Cent. Consols, and in the meantime to pay the interest which such an investment would produce, was sustained as a valid burden on the lands disponed in security.[5] It was contended that this burden, though of definite amount so far as regarded the obligation to pay interest, was indefinite as regards the payment of the principal, because the price of the stock varied from time to time. But it was held that this obligation, though it might result in the payment of an unspecified sum of money, was in reality an obligation *ad factum præstandum*, *i.e.* an obligation to transfer a certain amount of stock to the names of the marriage-contract trustees, and therefore was capable of being made a real burden on land. It is submitted that on the same reasoning an obligation to pay the disponer's debts is an obligation *ad factum præstandum*, and that, on the principle of

[1] Ersk. ii. iii. 50.

[2] *Macdonald* v. *Place*, 1821, Hume, 544; *Broughton's Crs.* v. *Gordon*, 1739, M. 10247.

[3] *Stenhouse* v. *Innes & Black*, 1765, M. 10264.

[4] *Erskine* v. *Wright*, 1846, 8 D. 863.

[5] *Edmondstone* v. *Seton*, 1888, 16 R. 1.

Edmondstone v. *Seton*, the obligation in *Macdonald* v. *Place*, or *Stenhouse* v. *Innes & Black*, would have been sustained as real burdens.

(4) The lands on which the burden is laid must be specified.

Finally, the lands upon which a real burden is laid must be definitely specified, either in the conveyance by which it is created, or in a notarial instrument following upon it. Thus a real burden cannot be created by a general disposition; that is, by a disposition in which the lands belonging to the granter are conveyed without being definitely specified. But if such a disposition is granted subject to the real burden of a money payment, it will form a warrant to the disponee to expede and record a notarial instrument, in the form of Schedule L of the Consolidation Act of 1868,[1] upon the general disposition and the conveyance upon which the disponer was infeft; and in such a notarial instrument the real burden may be inserted, and the lands upon which it is laid specified.[2] This result was not arrived at without some difficulty. In two cases it was held that where the deed was of the nature of a general disposition, declared to be subject to certain real burdens, these burdens could not be made real either by the general disposition, because it did not specify the lands, or by the notarial instrument, because such an instrument, although an appropriate method of feudalising a burden already created, was not a habile method for its creation.[3] But the latter of these cases was reversed in the House of Lords, where it was held that the burden, if otherwise unexceptionable, was duly made real by being inserted in the notarial instrument and published in the Register of Sasines.[4]

Real burden, when inserted in infeftment, becomes *debitum fundi*.

As a real burden creates no feudal estate in the person of the creditor, his right being, in legal theory, only a qualification of the infeftment of the person infeft in the lands over which the burden is secured, so the preference of such a burden, in a question with singular successors or with other creditors, depends on its being inserted in the infeftment of the disponee in the disposition by which it is created. So long as the disponee remains uninfeft, the real burden is preferable to his other creditors, as a condition of the personal right; but should that right be feudalised without the insertion of the real burden, that preference would no longer exist.[5] Against such a contingency

[1] 31 & 32 Vict. c. 101, s. 19.

[2] *Cowie's Trs.* v. *Cowie*, 1891, 18 R. 706; revd. 1893, 20 R. (H. L.) 81.

[3] *Williamson* v. *Begg*, 1887, 14 R. 720; *Cowie's Trs.* v. *Cowie*, *supra*.

[4] *Cowie's Trs.* v. *Cowie*, *supra*.

[5] Bell, *Com.* i. 732; *Crs. of Ross*, 1714, M. 10243.

the person in right of the real burden has his remedy, as already explained, by declarator and by the effect of an irritant clause. Assuming, then, that the burden has been duly made real, it becomes a *debitum fundi*, preferable to the personal creditors of the disponer or disponee, and to any posterior real right. Thus where lands were disponed subject to the real burden of certain debts, and subject also to a power to the disponer to burden them to a limited extent by granting heritable securities, it was held that the debts which formed the real burden, having been duly made real by the infeftment of the disponee, were preferable to any posterior heritable securities granted by the disponer.[1]

Preference of real burdens *inter se*.

Where there are several real burdens laid upon one subject, and it proves insufficient, it has been held that they are preferable *inter se* according to the diligence done upon them; that is, that those who have adjudged in virtue of their real right are preferable to those who have not.[2]

Remedies of creditor in real burden.

The remedies open to a creditor in a real burden differ from those which are open to creditors in the other forms of heritable security, mainly from the fact that the real burden, not being an estate in the lands, but only a burden on the estate of another, gives the creditor no direct right of entering into possession or of sale. Thus he cannot attach the rents by an action of maills and duties.[3] The burden is, however, a *debitum fundi*, and therefore gives the creditor the right to poind the ground,[4] or to attach the subjects by adjudication.[5] And a power of sale, which is not given by the mere creation of the burden, may be expressly conferred. When this is done, it is held that the right to sell implies, as a necessary corollary, the right to enter into possession. Thus where a real burden was created by reservation, with a power to the disponer, notwithstanding the infeftment of the disponee, to revert to the infeftment in his own favour, and, in virtue thereof, to sell and dispose of the lands, it was held that this provision entitled the disponer to decree in a declarator of removing against the disponee, as a consequence of the power of sale.[6]

Real burden creates no personal obligation on the disponee of the lands.

A disposition of lands, subject to a real burden, either by reservation in favour of the disponer or by constitution in favour

[1] *Barclay* v. *Gemmill*, 1731, M. 10245.

[2] *Crs. of Ross*, 1714, M. 10243. Note that sec. 30 of the Conveyancing Act, 1874, does not deal with the constitution of real burdens.

[3] Stair, iv. 35. 24, and iv. 23. 5.

[4] Stair, iv. 23. 5; Ersk. iv. 1. 11.

[5] Stair, iv. 35. 24; Ersk. ii. 3. 49.

[6] *Wilson* v. *Fraser*, 1822, 1 S. 316; affd. 2 Sh. App. 162.

of a third party, does not involve the disponee in any personal liability for payment. The right of the creditor is to attach the lands by adjudication or poinding of the ground, and not to sue the disponee personally. Therefore, in the case of a pure real burden, the disponee, if he disposes of the lands to a singular successor, has no further liability for the real burden.[1] But it is not inconsistent with the nature of a real burden that wider powers should be given to the creditor than those which the nature of the security implies. Thus where a real burden is created by reservation, a personal bond is usually granted by the disponee in order to simplify the remedies of the creditor. In such cases the personal bond is the principal obligation, and the real burden only an additional security; and it was therefore decided that where the bond only was assigned, the assignee obtained a good title to discharge the real burden.[2]

Effect of a personal obligation granted in addition to real burden.

Where a personal obligation on the part of the disponee is added to the security afforded by a real burden, there has been considerable discussion as to whether the disponee remains liable after he has parted with the lands, and whether a purchaser, by taking the lands subject to the real burden, subjects himself to personal liability. The cases on the subject related to ground-annuals, which were created real burdens by reservation, with a personal obligation on the disponee, his heir, and successors. In the Court of Session it was held that the personal liability ran with the land; and therefore that the disponee freed himself from it by a *bonâ fide* disposition to a person who was solvent, and not a mere man of straw, and that the latter, by acquiring the lands, became personally liable to pay the ground-annual. In both respects these decisions were reversed in the House of Lords, where it was held that the disponee, his heirs, and successors continued liable under the personal obligation even after they had parted with the lands, and that a purchaser from them incurred no personal liability.[3] This rule applies to real burdens *ad facta præstanda*, which, unless they are inherent conditions of the feu, cannot be enforced personally against singular successors.[4]

Transmission of such a personal obligation against singular successor in the lands.

As a real burden is included under the phrase "heritable

[1] Stair, ii. 3. 58; *Peddie* v. *Soot's Trs.*, 1846, 8 D. 560, per Lord Wood; *Scottish Drainage & Improvement Co.* v. *Campbell*, 1887, 15 R. 108, affd. 1889, 16 R. (H. L.) 16.

[2] *Baillie* v. *Laidlaw*, 1821, 1 S. 108.

[3] *Peddie* v. *Soot's Trs.*, 1846, 8 D. 560; *Small* v. *Millar*, 1849, 11 D. 495, revd. 1853, 1 Macq. 345; *Gardyne* v. *Royal Bank*, 1851, 13 D. 912, revd. 1853, 1 Macq. 358; *Brown's Trs.* v. *Elmsley*, 1855, 2 Macq. 40.

[4] *Marshall's Tr.* v. *Macneill & Co.*, 1888, 15 R. 762.

security" in the interpretation clause of the Conveyancing Act, 1874,[1] it would seem that the provisions of sec. 47 of that Act are applicable, and therefore that a personal obligation for payment of a real burden would transmit against a singular successor, when an agreement to that effect appears *in gremio* of his conveyance. But as a personal obligation is not an integral part of a security by real burden, as it is of a bond and disposition in security, it is probable that very clear terms would be required to transmit it.[2]

Transfer of real burden *inter vivos.*

At common law a real burden, unlike other heritable securities, was transmitted by assignation, and the criterion of preference, among competing assignations, was priority of intimation.[3] Assignations of real burdens were usually registered in the Register of Sasines, but the necessity of this was doubtful. The Consolidation Act, 1868, left the law on this point untouched, as real burdens were not included under the phrase "heritable security" in the interpretation clause.[4] But by sec. 30 of the Conveyancing Act, 1874, it is provided that it shall be lawful to record in the appropriate Register of Sasines any deed, instrument, or writing whereby any real burden is assigned, conveyed, or transferred, and that no such assignation shall be effectual in competition with third parties unless it is so recorded.[5] Where the assignation is thus recorded, intimation is unnecessary. It is also provided that the provisions of the Consolidation Act, 1868, relative to the assignation, conveyance, or transference of bonds and dispositions in security, and regulating the making up of titles thereto, shall apply to a security constituted by real burden.[6]

It is also declared by the same section of the Conveyancing Act, 1874,[7] that where a real burden has been transferred by any deed which has entered the appropriate Register of Sasines, it shall not be necessary to produce to any notary public expeding any notarial instrument applicable to such real burden, or to set forth in any notarial instrument, as a warrant thereof, the deed, instrument, or writing constituting the said real burden; but it shall be sufficient to produce to him, and to specify shortly in such notarial instrument, the deed, instrument, or writing, or the deeds,

[1] 37 & 38 Vict. c. 97, ss. 3 and 47.

[2] *Marshall's Tr.* v. *Macneill & Co.*, 1888, 15 R. 762, where the phrase, "with and under the real liens and burdens, conditions, provisions, and others contained in the said contract of ground-annual," was held not to transmit the personal obligation.

[3] Bell, *Com.* i. 731; *Lamont* v. *Lamont's Crs.*, 1789, 3 Ross's L. C. 35; *Brown* v. *Miller*, 1820, Hume, 540, 3 Ross's L. C. 29.

[4] 31 & 32 Vict. c. 101, s. 3.

[5] 37 & 38 Vict. c. 94, s. 30.

[6] See *ante*, pp. 123–129.

[7] Sec. 30.

instruments, or writings, whereby the said real burden shall have been assigned, conveyed, or transferred, and which, or one or more of which, if there are more than one, shall have entered the appropriate Register of Sasines.[1] This provision enables the assignee of a real burden to complete his title by a notarial instrument, without having in his possession the deed by which the real burden was constituted, which, as it is usually a disposition of the lands in favour of a third party, he would often be unable to obtain.

Transfer *mortis causa*.

Before the Conveyancing Act, 1874, came into operation, a real burden was heritable in the succession of the creditor, and his heir took it up by general service.[2] By sec. 30 of that Act, the provisions of sec. 117 of the Consolidation Act, 1868,[3] are declared to apply to all real burdens, with the exception of ground-annuals.[4] They are now therefore, unless executors are expressly excluded, moveable in the succession of the creditor. The title of the executors, of the legatee, or of the heir where executors are excluded, may be made up in any way that would be competent if the real burden were a bond and disposition in security.[5]

Restriction and discharge.

A real burden may be restricted, or may be discharged, in the forms provided by the Consolidation Act, 1868, for the restriction or discharge of other heritable securities.[6]

[1] 37 & 38 Vict. c. 94, s. 30.

[2] Bell, *Com.* i. 731; *Cuthbertson* v. *Barr*, 1806, M. App. Service and Conf. No. 2.

[3] 31 & 32 Vict. c. 101.

[4] 37 & 38 Vict. c. 94, s. 30.

[5] As to this, see *ante*, p. 128.

[6] 37 & 38 Vict. c. 94, s. 30; *ante*, p. 129.

CHAPTER VI

SECURITIES OVER LEASES

Lease granted as a security.
Assignation of unregistered lease in security.
Registration of Leases Act, 1857.
Assignation of registered lease in security.
Transfer of right of assignee.
Discharge of security.

LEASEHOLD subjects form a species of heritable property which is often of considerable value, and is largely used as a means of constituting a right in security. But the ordinary forms of heritable security are not applicable where the subject of the security is a lease, chiefly because ordinary leases are not registered, and therefore a security over a lease cannot be completed by registration, like an ordinary bond and disposition in security. By the Registration of Leases Act, 1857,[1] it has become possible to register certain leases in the Register of Sasines; and leases so registered may be dealt with, as a subject of security, very much as if they were rights of absolute property.

Ordinary forms of heritable security not applicable to leases.

Two distinct methods of granting a security, in each of which the subject-matter is a lease, must be distinguished: (1) an original lease may be granted as a security, and (2) an existing lease may be assigned in security.

Methods of creating security over lease.

A lease of heritable subjects, even although it is granted solely or principally for the purpose of creating a right in security for a separate debt, must, in order to be valid against singular successors of the lessor, have a definite rent, which must not be illusory, though it need not equal the annual value of the subjects.[2] This precludes the possibility of securing an advance by granting to the creditor a lease of heritable subjects without any rent, and leaving him to repay himself out of the proceeds. But the lease may be qualified by a back-letter arranging that the specified rent is to be retained by the lessee, and imputed by him in repayment

Lease may be granted in security of a debt. Rent must not be illusory.

[1] 21 & 22 Vict. c. 26.

[2] Ersk. ii. 6. 24; Bell, *Prin.* s. 1201; Rankine on *Leases*, 2nd ed., p. 137.

of the principal and interest of the debt for which the security is granted.[1]

Possession necessary.

The difficulty which besets a security in this form is, that, in order to make the right of a lessee available against singular successors of the lessor, or against his trustee in bankruptcy, he must take possession of the subjects. A mere lease on paper, not followed by any possession, is unavailing in a question with a singular successor of the lands. This rule, well established in the case of all ordinary leases, need not be enlarged upon.[2]

Constructive possession. Lessor manager for lessee.

Possession under the lease, however, may be constructive. Thus possession by a manager for the lessee, or by a sub-tenant on a sub-lease from him, would be sufficient. It is more difficult to say whether a lessee can, by written contract without any overt change of possession, constitute the lessor manager for him, and in this way obtain constructive possession. In *Macphail & Sons* v. *Maclean's Tr.*,[3] A. conveyed his whole estate to B., as trustee, for payment of his debts. The day before he had executed a lease of a farm which was in his own occupation in favour of B., and had sold to him the stock on the farm for a price named. By a separate agreement it was arranged that the rent and the price should not be paid by the trustee, but imputed in payment of advances made by him under the trust. The name of the trustee was entered as tenant in the valuation roll, but no overt change of possession followed. In an action against the trustee for furnishings supplied to the lessor, while in possession under this arrangement, the trustee stated that he had been advised that the security constituted by the lease and sale of stock was not a good one. It was unnecessary to decide the point; but the observations made by Lord Young show that, in his Lordship's opinion, the security was properly completed.

Possession unnecessary if lease registered under Registration of Leases Act.

Possession under a lease is unnecessary if the lease is registered in the Register of Sasines under the provisions of the Registration of Leases Act, 1857. By that Act a probative lease for thirty-one years or upwards may be registered in the Register of Sasines, and such registration is, in point of title, equivalent to possession, and renders the lease effectual in a question with any singular successor of the landlord whose infeftment is posterior in date to such registration.[4]

[1] See *Macphail & Sons* v. *Maclean's Tr.*, 1887, 15 R. 47.

[2] Bell, *Prin.* s. 1209—authorities cited there.

[3] 1887, 15 R. 47.

[4] 21 & 22 Vict. c. 26, s. 2.

Besides the difficulty with regard to possession, a lease in security is in many cases objectionable, because it will involve the security-holder, as lessee, in liability for the expenses of carrying on what may prove to be a very speculative business. If the subject proposed to be leased is a house, this objection does not so forcibly apply. But a lease of a farm or a mine is a dangerous form of security. If the lessee enters into possession and management, he cannot avoid becoming liable for the furnishings and expenses necessary in carrying on the business. Even if the proceedings remain secret, and the lessee employs the lessor as manager for him, this secrecy, while it jeopardises the creditor's security, does not exclude his liability for furnishings supplied to his manager. Thus in *Macphail & Sons* v. *Maclean's Tr.*, where the lessor remained in possession under circumstances already detailed, it was held that the lessee was liable for furnishings supplied, even though the parties supplying them were quite unaware of his connection with the subjects, and had supplied them on the personal credit of the lessor.[1] Liabilities of lessee.

An assignation of an existing lease is more common, as a method of constituting a security, than the granting of a new one. The methods to be adopted in the constitution and completion of such a security vary according as the lease is, or is not, recorded in the Register of Sasines. As has been already stated, the Registration of Leases Act, 1857, has rendered it possible to record in the Register of Sasines leases granted for thirty-one years or upwards. The effect of such registration is to enable the lessee to deal with the lease, so far as conveyancing is concerned, very much as if it were a right of property in which he was duly infeft. Securities therefore by assignation of a lease fall into two classes: those which must be completed in accordance with the rules of the common law, and those which must be completed under the provisions of the Act. Assignation of lease in security.

In order that a lease may be assigned in security, it must be assignable. Where this is not provided for in the particular lease, the rule is that agricultural leases are not assignable unless they are specially declared to be so, whilst urban leases are assignable unless assignation is specially prohibited.[2] In this connection an agricultural lease means one of which the subject is primarily the soil, for the purpose of its cultivation; an urban lease, one of which the subject is primarily the superficies of the soil, for the sake of the buildings erected or to be erected on it. In mining Assignability.

[1] *Macphall & Sons* v. *Maclean's Tr.*, 1887, 15 R. 47.

[2] Rankine on *Leases*, p. 167.

leases, the question whether they are to be assignable is invariably provided for in the individual contracts.[1]

Even where lease not assignable, assignation is good if landlord assents to it.

Even where a lease is declared not to be assignable, an assignation in security would be good if the landlord consented to it, as it is *jus tertii* for the creditors of the cedent, or his trustee in sequestration, to object to an assignation on the ground that their debtor had no power to assign.[2]

Assignation of unregistered lease. Title of assignee must be completed by possession.

Where an unregistered lease is assignable, a security may be constituted over it by an assignation *ex facie* absolute, with backletter, or by an assignation expressly in security. The completion of the title of the assignee may be considered from the point of view of the cedent, of the landlord, or of the creditors of the cedent. As against the cedent or his personal representatives, the mere assignation is sufficient. In questions with the landlord, the completion of the assignee's right depends upon intimation to him. If a lease is assignable, the landlord is bound to recognise an assignation duly intimated to him, and, of two competing assignations, to give effect to the one first intimated.[3] But in a question with the creditors of the cedent the preferential right of the assignee depends, not on the bare assignation of the lease, nor upon intimation thereof to the landlord, but upon possession. A lease is a real right in lands, and not an incorporeal personal right, and therefore its transference must be completed by possession and not by intimation.[4] This point, which was long considered to be doubtful, was evaded in two cases which reached the House of Lords,[5] but was at length settled by a judgment of the whole Court in *Inglis* v. *Paul*. There a sub-tenant of an urban lease for 999 years assigned it in security. The assignation was intimated to the principal tenant, but not to the possessors of the ground, and no overt change of possession followed. On the bankruptcy of the cedent, it was held that the assignation, not having been completed by possession, gave the assignee no preference over the lease, in a question with the trustee in the sequestration

[1] Rankine on *Leases*, 2nd ed., p. 166. A sporting lease is not assignable—*Mackintosh* v. *May*, 1895, 22 R. 345.

[2] *Ramsay* v. *Commercial Bank*, 1842, 4 D. 405.

[3] *Burnet* v. *Fraser*, 1673, M. 13470; *Inglis & Co.* v. *Paul*, 1829, 7 S. 469.

[4] Stair, iii. 1. 16; Ersk. ii. 6. 25; Bell, *Prin.* ss. 1209–12; *Inglis & Co.* v. *Paul*, 1829, 7 S. 469; *Roberts* v. *Wallace*, 1842, 5 D. 6; *Hamilton's Trs.* v. *Stewart*, 1830, 8 S. 799; *Renton* v. *Craig's Tr.*, 1864, 2 Macp. 1365; *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[5] *Russell* v. *Earl of Breadalbane*, 1822, 2 S. 62, 1 W. & S. 620; 1827, 5 S. 891, affd. 5 W. & S. 256; *Brock* v. *Cabbell*, 1822, 2 S. 52, 3 W. & S. 75, affd. 1831, 5 W. & S. 476.

of the sub-tenant.[1] Similarly, where certain mineral leases were assigned by a company to a trustee for debenture-holders, and no change of possession followed, it was decided that the debenture-holders had not thereby acquired any preference over the ordinary creditors in the liquidation of the company.[2]

What is sufficient possession?

It is not easy to gather from the decisions what will be held to be sufficient possession to complete the right of an assignee of a lease. If, indeed, the subjects are urban, and there are sub-tenants, the assignee can enter into possession, and complete his right, by assuming the management of the property, and uplifting the rents from the sub-tenants, provided that he does so before the sequestration of the cedent.[3] But where the cedent continues to occupy part of the subjects, it is doubtful whether the assignee can be held to have entered into possession by receiving the rent from the tenant of the other part.[4] If there are no sub-tenants, or if the lease is agricultural or mining, it would rather appear that the assignee must enter into actual possession of the subjects, by himself or his agent, in order to secure a preference in the event of the bankruptcy of the cedent. Civil possession, acquired by the assignee granting a sub-lease to the cedent, is not sufficient, as the whole transaction thereby remains secret; and third parties dealing with the cedent, and seeing him ostensibly in possession, are entitled to assume that the possession is for his own behoof.[5] In one case an assignation of an agricultural lease, granted by a father to his son, was held to have been completed, in a question with the creditors of the father, by intimation of the assignation to the landlord, recognition of the son as tenant by him, placing the name of the son on the carts used on the farm, and paying rates, taxes, and accounts in his name. This was held to be sufficient even although the son was a minor and non-resident on the farm.[6] But the case may be of doubtful authority, as some of the opinions seem to proceed on the assumption that the assignation was completed by intimation to the landlord, a point which was not then definitely fixed, but has since been settled in the negative.

Intimation to landlord, without possession, will carry personal claims connected with the lease.

Although an assignation of a lease must be completed, in a question with the creditors of the cedent, by possession, yet, if

[1] *Inglis & Co.* v. *Paul*, 1829, 7 S. 469.

[2] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[3] *Sime's Tr.* v. *Fiddler*, 23 May 1806, F. C.

[4] *Wright* v. *Walker*, 1839, 1 D. 641.

[5] *Roberts* v. *Wallace*, 1842, 5 D. 6.

[6] *Millar* v. *Duncan*, 1825, 4 S. 48; cf. *Orr* v. *Tullis*, 1870, 8 Macp. 936, and other cases, on change of possession in corporeal moveable subjects, collected in Chapter VII.

intimated to the landlord, it will carry the right to any subordinate claims against him, such as a claim for meliorations.[1] A claim of that nature is an incorporeal personal right, and not, like a lease, a real right in land, and therefore it is completely assigned, in a question with the creditors of the cedent, by an assignation duly intimated.

Liability of assignee for rent.

A creditor taking an assignation of a lease, and intimating to the landlord, incurs a liability for the rent, which he cannot get rid of without the consent of the landlord.[2] In *Ramsay* v. *Commercial Bank* an agricultural lease was granted, excluding assignees, except such as should be approved of by the landlord. The tenant assigned the lease to the Commercial Bank by an assignation *ex facie* absolute, explained by a back-letter to be merely a security. The landlord consented to this assignation. The tenant was afterwards sequestrated, and the question of the validity of the Bank's security was compromised, the Bank allowing decree of reduction of their assignation to be taken, and executing a retrocession in favour of the tenant. In an action at the instance of the landlord it was held that the Bank was nevertheless liable for the rent for the remainder of the lease, because, having accepted an assignation of the lease, and having been recognised by the landlord, they could not get rid of it without his consent.[3] As it was pointed out by Lord Fullerton, the Bank, instead of obtaining a security, had become security for the tenant. The case was special in this respect, that the form of security chosen was an assignation *ex facie* absolute, which did not therefore directly inform the landlord that the transaction was only a security. Had the assignation been expressly in security, the landlord, in the opinion of Lord Mackenzie, would have been bound to consent to a retrocession of the cedent when the security came to an end.[4]

Liability of assignee for furnishings.

It has been already explained that where a lease is granted, and the lessor remains in possession as manager for the lessee, the latter is liable for furnishings supplied to the lessor, even if the parties supplying them were in ignorance of the lease.[5] There would seem no reason to doubt that the same rule would be applied to the assignee of a lease, if the transaction were kept

[1] *Hamilton's Tr.* v. *Stewart*, 1830, 8 S. 799.

[2] *Ross* v. *Monteith*, 1786, M. 15290; *Ramsay* v. *Commercial Bank*, 1842, 4 D. 405.

[3] *Ramsay* v. *Commercial Bank*, 1842, 4 D. 405.

[4] *Ib.*, *supra*, per Lord Mackenzie, at p. 415.

[5] *Macphail & Sons* v. *Maclean's Tr.*, 1887, 15 R. 47.

secret, and the cedent remained in possession nominally as manager or sub-lessee.

Registration of Leases Act, 1857.

The difficulties above explained in the use of a lease as a subject of security led to the passing of the Registration of Leases Act, 1857.[1] By this Act, any probative lease, whether executed before or after the passing of the Act, if its duration is not less than thirty-one years, or any lease which contains an obligation on the granter to renew, provided that it is thus renewable for a period of not less than thirty-one years, may be registered in the General Register of Sasines, or, if of subjects formerly held burgage, in the Burgh Register.[2] When so registered, the lease is effectual against singular successors in the subjects let whose infeftment is posterior in date to the registration of the lease. It would thus appear that a registered lease may be effectual although there is no ish, or although there is no rent, or a rent entirely illusory. But the Act does not make any lease assignable which would not have been so before it was registered.[3]

Assignation in security of registered lease.

A registered lease may be assigned in security in the form of Schedule B of the Act.[4] This Schedule follows very closely the form of a bond and disposition in security, and gives the assignee the power of entering into possession and of sale.[5] The registration of an assignation in this form in the Register of Sasines, completes the right of the assignee to the same effect as if he had entered into possession at the date of such registration. Where an unregistered lease is assigned in security, the assignee, if he desires to avail himself of the provisions of the Act, must first procure the registration of the lease, and then register his assignation. It is indeed provided that a person "in right" of an unregistered lease may expede a notarial instrument under sec. 5, and in the form of Schedule C, and thereafter complete his title by recording the lease and the notarial instrument. But this process is not open to an assignee in security, as he is not a person "in right" of an unregistered lease.[6]

Priority between competing assignations.

Between two competing assignations of a registered lease, priority is declared to depend upon the date of their registration.[7] An assignee who had registered his assignation has been preferred to a prior assignee who had not registered nor entered into posses-

[1] 21 & 22 Vict. c. 26.
[2] Sec. 17.
[3] Secs. 3 and 4.
[4] Sec. 4.
[5] Subject, of course, to the rights of the landlord.
[6] *Russell* v. *Campbell*, 1888, 26 S. L. R. 209 (Outer House, Lord Kinnear).
[7] Registration of Leases Act, 1857, s. 12.

sion, but who had intimated his right to the landlord.[1] But it is conceived that an assignation completed by actual possession would, even if it were not registered, be preferable to a posterior registered assignation.[2]

Powers of assignee in security of registered lease.

The powers of an assignee in security of a lease registered under the Act are similar to those which are declared by Statute to belong to the holder of a bond and disposition in security. It is declared that the several short clauses in the scheduled form of such an assignation shall have the same meaning as the corresponding short clauses in a bond and disposition in security granted under, and in the form provided by, the Heritable Securities Act, 1847. That Act was repealed by sec. 4 of the Consolidation Act, 1868, but is nevertheless to be regarded as still in force in respect of any reference that may be made to it in any Statute not thus repealed.[3] The provisions of the Act are re-enacted, with slight alterations, by the Consolidation Act, 1868. The powers thereby given to the holder of a bond and disposition in security, and the meaning, as there explained, of the various short clauses in the bond, have already been fully detailed.[4] The assignee of a lease, however, though he has a real right in the lease, is not the holder of a *debitum fundi*, or real right affecting the lands, and therefore is not entitled to poind the ground.[5] By the Heritable Securities Act, 1894, it is enacted that the power of sale given in the assignation in security of a lease may be exercised by adopting the procedure provided in the Consolidation Act, 1868, and the Conveyancing Act, 1874, for sales under the powers of sale in bonds and dispositions in security; and any sale so carried out is declared to be as valid and effectual as if it had been carried out under the Registration of Leases Act.[6]

Application to Sheriff for warrant to enter into possession.

A special remedy is provided by sec. 6 of the Registration of Leases Act, the clause which regulates translations of assignations in security. By this clause the party in right of such translation is entitled, in default of payment of the capital sum in the security, or of a term's interest, for six months after such capital sum or term's interest is due, to apply to the Sheriff for a warrant to enter into possession of the lands and heritages leased. On such application, and after intimation to the landlord and to the lessee

[1] *Rodger* v. *Crawford*, 1867, 6 Macp. 24.

[2] See *Journal of Jurisprudence*, vol. ii. 175, 253, 255.

[3] Consolidation Act, 1868, s. 163.

[4] *Ante*, p. 89 *et seq.*

[5] *Luke* v. *Wallace*, 1896, 23 R. 634.

[6] Heritable Securities Act, 1894 (57 & 58 Vict. c. 44, s. 14).

for the time being, the Sheriff shall, if he see cause, grant such application. The warrant shall be a sufficient title to the creditor to enter into possession of such lands, to uplift the rents from any sub-tenants, or to sub-let the subjects as freely and to the like effect as the lessee might have done. It is not clear from the words of the Act whether this procedure is open to any assignee in security, or only to the holder of a translation of an assignation in security. There does not, however, seem to be any good ground for limiting it to the latter; and in one case, at least, it was employed by the original assignee without question.[1]

Registration of assignation does not import liability for rent.

An assignee of a registered lease does not incur liability for rent by merely registering his assignation. This is equivalent to entering into possession as a means of completing the title of the assignee, but it is specially provided by the Act that no creditor taking an assignation in security of a lease shall be liable to the landlord for any of the obligations or prestations of the lease, unless he has actually entered into possession of the subjects.[2]

Question as to liability for furnishings.

There is no provision in the Act limiting the liability of an assignee in security for furnishings supplied to the cedent for the purpose of carrying out the lease. As such liability may exist even where the assignation is secret and latent,[3] it would probably be held that it also existed in the case of a registered assignation. But leases of the duration of thirty-one years or upwards, to which alone the Act applies, are rarely granted for the carrying-on of any business in which it would be usual for the lessee to incur any serious liabilities to third parties.

Transfer of right of assignee *inter vivos*.

An assignation in security of a lease may be transferred *inter vivos*, in whole or in part, by a translation in the form of Schedule D of the Act. This translation, when duly registered, fully and effectually vests the party in whose favour it is granted with the rights possessed by the granter.[4] Where the assignee of a lease is sequestrated, his trustee may expede a notarial instrument in the form of Schedule F, and the recording of such instrument in the register in which the lease is recorded shall complete the title of the trustee to the assignation in security.[5]

Transfer *mortis causa*.

It has been held that an assignation in security of a lease is moveable in the succession to the creditor.[6] This was decided in

[1] *Fleming* v. *Burgess' Tr.*, 1867, 5 Macp. 856.

[2] Registration of Leases Act, s. 6.

[3] See *ante*, p. 179; *Macphail & Sons* v. *Maclean's Tr.*, 1887, 15 R. 47.

[4] Registration of Leases Act, 1857, s. 6.

[5] *Ib.* s. 11.

[6] *Stroyan* v. *Murray*, 1890, 17 R. 1170.

Stroyan v. *Murray*, where the security was constituted by an *ex facie* absolute assignation with a back-bond. Lord Young proceeded on the ground (which, it is submitted, is erroneous) that a lease is not a real right in lands, and therefore that an assignation in security is not a heritable security. The Lord Justice Clerk and Lord Lee concurred, on the ground that the security was rendered moveable by the 117th sec. of the Consolidation Act, 1868. Lord Rutherfurd Clark dissented, holding that the security was heritable. The decision raises a difficulty in the methods of making up a title on the succession of a party in right of a registered lease. Methods are provided in the Act whereby an heir may make up his title,[1] but no provision is made for the case of the security passing to executors. It would therefore seem that the only course open to an executor would be to make a special application by petition to the Court of Session. If, however, executors are excluded in the assignation, it will pass to the heir of the creditor. The heir may complete his title, if the assignation in security was registered, (*a*) by special or general service, and a notarial instrument in the form of Schedule F, recorded in the Register of Sasines;[2] or (*b*) by a writ of acknowledgment from the proprietor infeft in the lands leased, or from the party appearing on the register as in absolute right of the lease which has been assigned in security.[3] No defect in the title of the party granting the writ of acknowledgment shall affect the right of the heir who thereby makes up his title.[4] If the assignation in security was not recorded at the date of the death of the creditor, his heir or general disponee may make up his title by expeding a notarial instrument in the form of Schedule F, and the keeper of the register, on such notarial instrument being presented to him, but not otherwise, shall thereupon record such assignation in security, together with the said instrument.[5] A general disponee may make up his title to an assignation in security of a lease by recording a notarial instrument in the form of Schedule F of the Act.[6]

Discharge of assignation.

An assignation in security of a lease may be discharged by recording a discharge thereof, which may be endorsed on the lease, in the Register of Sasines, in the form of Schedule H of the Act.[7]

[1] Registration of Leases Act, 1857, ss. 7 and 8, Schedules E and F.

[2] *Ib.* s. 8.

[3] *Ib.* s. 7, Sched. E, No. 1. It requires a 5s. stamp—54 & 55 Vict. c. 39, Sched. I, *voce* Writ.

[4] Registration of Leases, Act 1857, s. 7.

[5] *Ib.* s. 9.

[6] *Ib.* s. 8.

[7] *Ib.* s. 13.

CHAPTER VII

SECURITIES OVER MOVEABLES

Security completed by possession.
Actual delivery.
Constructive delivery.
Sale of Goods Act, 1893.
Pledge.
Pawnbroking.
Securities in form of sales.
Reputed ownership.
Sales under suspensive conditions.

CORPOREAL moveable property is defined by Professor Bell as including "all things which, being themselves capable of motion or being moved, may be perceived by the senses,—seen, touched, taken possession of,—as ships; household furniture; goods and effects of all kinds; farm stock and implements; horses, cattle, and other animals; corn, money, jewels, wearing apparel."[1] It is proposed in this and the succeeding chapters to consider by what methods a party in possession of such property may convey or transfer it in security; that is, by what methods he may, while retaining the ownership in, or at least the ultimate right to, the subject, confer on a particular creditor a right over it, which will enable that creditor to vindicate that subordinate right in a question with the general creditors of his author, with particular creditors attaching the subject by diligence, or with a third party to whom it may have been transferred. In this chapter it is proposed to deal only with those rights in security which arise from express contract, leaving for future consideration the securities, in the nature of a right of retention or lien, which may be inferred by law from a title of property to moveable subjects, or from the fact of possession thereof. The law on the subject of security-rights over corporeal moveables is beset with difficulties; and is not, perhaps, in a very satisfactory state, as the result of its rules is often to deprive the owner of such property of the power to make use of it as a security for his debts. It is open to question whether the rigidity of the law of Scotland on this

[1] Bell, *Prin.* s. 1285.

subject should not now be relaxed by the adoption of a system analogous to the English bill of sale.

Transfer of moveables must be completed by delivery.

It is a cardinal rule of the common law of Scotland that no real right to corporeal moveable subjects can be transmitted by a voluntary conveyance, assignation, or other transfer, unless and until the transfer is completed by delivery of the subjects in question to the transferee. The brocard *traditionibus, non nudis pactis, dominia rerum transferuntur* implies that a mere contract to transfer corporeal moveable property, though made for valuable consideration, and though that consideration be duly given, will not vest a real right in the subject transferred, nor entitle the transferee to vindicate it in the hands of a third party or on the bankruptcy of the transferor, unless it has been delivered into his possession.[1] This rule has been expressed by Baron Hume as follows: "In the case of a moveable *corpus*, of which the owner is in the real possession, let him have come under what contracts he may with respect to the use or disposal of this thing, still none of these engagements, not followed with delivery of the *corpus*, divests him of, or at all impairs his natural power over, and command of the thing, or can hinder the ordinary effects in law from ensuing on his exercise of that power. The *corpus* is still under his hand: he can make delivery of it to anyone under contract of sale; and, if he do so deliver it, the purchaser thereby becomes owner of the *corpus*, and has nothing to do with his author's promises or engagements respecting it, of which he knew nothing, and about which he was not bound to inquire. These are the personal concern of his author only, who made those promises, and his heirs. The purchaser does not represent his author: he is an independent manager, who stands on his own ground, as singular successor in the real right or *jus in re* of the *corpus*; which right was not intrinsically limited or altered in his author by his personal engagement, and has now passed pure and unqualified from him to the party who bargained with him as the owner, having power and in possession."[2]

Security over moveables must be completed by delivery.

The application of this rule in the contract of sale, and the effect of legislation upon it in that contract, need not now be considered. It was at a very early period recognised that the

[1] Ersk. II. i. 19; Bell, *Prin.* s. 1300, and cases there cited. Property in ships is an exception, and may be transferred by written title; *infra*, p. 292. The rule is no longer applicable to a contract of sale, since the Sale of Goods Act (56 & 57 Vict. c. 71) came into operation (1 Jan. 1894). See *infra*, p. 196.

[2] *Calder* v. *Stewart*, 1806, Hume, 440. Reporter's note at p. 443.

rule applied equally to transfers of moveables in security, as to absolute sales, and that the necessary result was that a conveyance of corporeal moveable property in security of a debt conferred no preference on the creditor unless the property conveyed was actually or constructively delivered to him.[1] Thus the decision in a very early case, of which the facts have not been preserved, bore that "all assignatiouns and resignatiouns maid be ony man to his son, or to ony uther persoun, of landis, gudis, cowis, cattell, or utheris, are of nane avail be way of exceptioun, gif the maker thairof remane still in possessioun of the samen guidis or landis, or of the maist part thairof, likeas he did before the making of the samin *quia donans et retinens nihil agit.*"[2] And Stair, after reciting the hypothecs allowed by the civil law, proceeds, "but our custom hath taken away express hypothecations of all or part of the debtor's goods, without delivery, and of the tacit legal hypothecations has only allowed a few, allowing ordinarily parties to be preferred according to the priority of their legal diligence, that commerce may be the more sure, and everyone may know his condition with whom he contracts."[3] In a modern case, regarding the effect of an assignation of corporeal moveables in security, Lord Deas laid it down that "it is perfectly settled beyond all question in our law and practice that such an assignation, if not followed by possession, confers no security whatever," and the other judges expressed themselves to the same effect.[4]

A mere assignation is not a security.

The rule that a security over moveables *retenta possessione* is of no effect is so well settled that the cases where it has been attempted to uphold an express security resting merely on a verbal or written assignation, have not been very numerous. It has been held that a conveyance of furniture to a trustee for the creditors of the owner did not protect it from the diligence of an individual creditor, if it remained in the possession and use of the debtor, and the trustee never took delivery.[5] And where the tenant of a mill assigned the moveable machinery to a creditor, but remained in possession of it, the trustee in his sequestration

[1] Stair, i. 13. 14; Bell, *Com.* ii. 11; Bell, *Prin.* s. 1363; *Johnston* v. *Sprot*, 1814, Hume, 448; *Pattison's Tr.* v. *Liston*, 1893, 20 R. 806. Cases in next paragraph.

[2] *Thomsone* v. *Chirnside*, 1558, M. 827.

[3] Stair, i. 13. 14. See also iv. 25. 1.

[4] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017, at p. 1024–5.

[5] *Borthwick* v. *Urquhart*, 1829, 7 S. 420; *Fraser* v. *Frisby*, 1830, 8 S. 982; *Gibson* v. *Wilson*, 1841, 3 D. 974. See also *Campbell* v. *Stewart*, 1848, 10 D. 1280; *Brown* v. *Brown's Tr.*, 1850, 13 D. 373 (assignations in marriage contracts).

was preferred to the security-holder, although the latter had raised an action prior to the sequestration, to have the bankrupt ejected from possession.[1] Again, an assignation by a farmer of his crop and stocking, in security of a debt, has been held not to confer any preference, if not followed by delivery.[2] And where a company assigned to trustees for debenture-holders certain mineral leases, with the moveable plant and utensils, and no delivery followed, it was decided that the debenture-holders had no preference over the moveables assigned, in a question with the liquidator of the company.[3]

Symbolical delivery is not sufficient.

Erskine, in treating of assignations, says: "Assignations are either of debts, as bonds, and these are completed by intimation; or of moveable goods, which sometimes, though improperly, get the name of dispositions, and are completed by an instrument of possession."[4] But if the latter part of this sentence was intended to mean that a real right to corporeal moveable subjects could be completed by a symbolical act, followed by a written instrument of possession, on the analogy of the conveyance of heritable property by giving sasine, it is not borne out by the decisions.[5] Thus where a debtor assigned his furniture in security, and the security-holder went through a form of taking possession by having an inventory made out by his agent, it was held that this was not sufficient to vest a real right in him, and that the furniture was still liable to be poinded by a creditor of the granter of the security.[6] And an assignation of the crop and stocking of a farm, followed by symbolical delivery and an instrument of possession, was held to be ineffectual to confer any preference on the assignee in the sequestration of the farmer.[7] Again, in an attempt by a millowner to confer on his cautioner a right in security over his moveable machinery, the following form of delivery was adopted. The mill was stopped on a Friday night, and on the Saturday morning the cautioner appeared, produced an assignation in his favour of the mill and machinery, and took sasine *propriis manibus* from the millowner, in presence of a notary public, by whom a notarial instrument of sasine was drawn up. The cautioner then locked up the mill, and took away the keys. He returned them

[1] *Benton* v. *Craig*, 1864, 2 Macp. 1365.

[2] *Roberts* v. *Wallace*, 1842, 5 D. 6; cf. opinion of L. J. C. (Moncreiff) in *Newcastle Chemical Manure Co.* v. *Oliphant*, 1881, 9 R. 110, at p. 115.

[3] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[4] Ersk. iii. 5. 1.

[5] *Ker* v. *Scot & Elliot*, 1695, M. 9122; *Carse* v. *Haliburton*, M. 9125, and cases cited *infra*.

[6] *Fraser* v. *Frisby*, 1830, 8 S. 982.

[7] *Roberts* v. *Wallace*, 1842, 5 D. 6.

on the Sunday night, and the mill was opened and worked by the millowner as usual on the Monday, though nominally under a lease granted to him by the cautioner. It was held that the moveable machinery had not been delivered.[1]

Possible exception where delivery is physically impossible.

A possible exception to the rule that a security over moveables cannot be constituted *retenta possessione* might be found in the case where delivery was physically impossible. It is true that in the case above mentioned, the practical impossibility of delivering growing crops was not held to validate an assignation,[2] but it is not certain that this rule would be applied in all cases. Suppose that A. commissions a friend to bring home to him from Australia valuable jewellery to which he has acquired a right. During the voyage it would be impossible for A., if he wished to sell this jewellery to a third party, or to raise money upon it, to deliver it, since actual delivery would be out of the question, and constructive delivery, by intimation to the custodier, would be equally impossible for the time being. Supposing A. to assign the jewels by written assignation, in security of an advance, but to become bankrupt before they actually arrived, would the security-holder have a preferential right over them, or would they pass to the trustee in A.'s sequestration? The opinion of Lord Justice Clerk Moncreiff, in *Darling* v. *Wilson's Tr.*,[3] may be quoted in support of the theory that the security would be good. The subjects of the assignation in that case were pipes, which were laid underground to convey water to bleachworks. No actual delivery was attempted, but the right of the assignee was upheld mainly on the ground that the contract made the assignee the owner of the pipes, and placed the cedent in the position of a lessee from him, and thus operated constructive delivery. But Lord Moncreiff, in giving judgment, expressed himself as follows: "I think it is the result of the cases on this question that if all the possession is given of which the property is capable, and the contract is clear and unreserved, it is not sufficient ground for setting it aside that no delivery was given, because the object of sale was in a position inconsistent with its being delivered."

Delivery. Actual delivery.

The delivery by which the real right in a corporeal moveable subject may be transferred may be actual or constructive. Actual delivery takes place when the subject or thing is handed to the transferee, or to an agent for him, with the intention of transferring the *dominium* of the subject to him. It also takes place when the subject is delivered to a carrier to be transmitted to the

[1] *Stiven* (Watson's Tr.) v. *Cowan*, 1878, 15 S. L. R. 422.

[2] *Roberts* v. *Wallace*, *supra*.

[3] 1887, 15 R. 180, at p. 183.

transferee, unless, by the contract of carriage, the sender reserves control over the subject.[1] Thus while delivery of goods into a ship chartered by the purchaser is, as a rule, delivery to him,[2] yet, if the seller takes the bill of lading to his own order, delivery is suspended until the bill of lading has been indorsed by the seller to the purchaser, and accepted by him.[3] Again, if goods are delivered into a warehouse to be held in the name and subject to the order of the transferee, they are delivered to him.[4] The same result follows if the goods are situated in a house, cellar, or store, and the key is given to the transferee with the intention of giving him full control over them.[5] But goods sent to a warehouse to be stored in the name of the transferee, but under a contract by which the transferor retains a right to remove the whole, or a large part of them, are not delivered.[6]

Marking goods is not delivery.

It is not delivery to place a label on the goods bearing the name of the purchaser or other transferee. Thus where A. sent whisky in casks to a bonded warehouse, with labels addressed to the warehouse-keeper, but containing in the corner the name of B. (to whom it had been sold), it was held that this was not delivery to B., and that the warehouse-keeper was liable in damages to A. for delivering it to B.'s order without any further instructions.[7] And, in *Orr* v. *Tullis*, it was held that printing machinery which was sold to Tullis, but remained in the possession of the seller, was not delivered to him by putting labels upon it, with the inscription "R. Tullis, owner"; though there were other circumstances in the case sufficient to infer possession by the purchaser.[8]

Delivery by setting goods apart.

It is doubtful whether an article is delivered when it is set aside for a purchaser or other transferee, but remains in the premises of the transferor. In *Gibson* v. *Forbes*, a firm of wine merchants sold a pipe of wine, which was bottled and set apart in a particular binn for the purchaser, and marked in the binn-book as belonging to him. Some time afterwards it was exchanged, with the purchaser's consent, for another pipe of wine, which was dealt with in the same manner. It was not actually sent to the

[1] Benjamin on *Sale*, 4th ed., p. 164.

[2] Bell, *Com.* i. 183.

[3] *Van Casteel* v. *Booker*, 1848, 2 Ex. 691.

[4] Bell, *Com.* i. 185.

[5] *Maxwell & Co.* v. *Stevenson & Co.*, 1830, 8 S. 618, revd. 1831, 5 W. & S. 269; *Pattison's Tr.* v. *Liston*, 1893, 20 R. 806, per Lord Trayner, at p. 813. But in Addison on *Contracts*, 9th ed., p. 523, this is treated as constructive delivery.

[6] *Mackinnon* v. *Max Nansen & Co.*, 1868, 6 Macp. 974.

[7] *Smith* v. *Allan & Poynter*, 1859, 22 D. 208.

[8] *Orr* v. *Tullis*, 1870, 8 Macp. 936; cf. *Eadie* v. *Young*, 1815, Hume, 705. See *infra*, p. 231.

purchaser until within sixty days of the bankruptcy of the wine merchants. There were thus two questions in the case: (1) Was the wine delivered when set apart for the purchaser? and (2) Was the actual delivery reducible under the Act 1696, c. 5? The majority of the whole Court sustained the right of the purchaser; but of those who gave opinions on the first question, five judges held that the wine had been delivered, and five that it had not.[1] On a similar question in another case, the Court were again divided. Cattle were sold by auction, on a contract whereby the seller undertook to keep half of them in his field for fourteen days without charge. A lot were purchased by A., who drove away half of them, and left the others in the field. He did not place any mark upon them, but they were already marked so as to be easily distinguishable from the other cattle in the field. A few days afterwards A. sent for the remaining cattle; but the seller, who was on the verge of bankruptcy, refused to allow him to remove them. A. then at once applied to the Sheriff for a warrant for delivery, and a competition ensued between him and the trustee in the bankruptcy of the seller. The questions thereby raised were: (1) Were the cattle delivered at the date of the sale? and (2) Was the seller justified in refusing to allow them to be taken away? The Court, by a very narrow majority, decided for the purchaser on the second point, but the majority were of opinion that there had been no delivery at the date of the sale.[2] So far as these decisions can be said to have affirmed delivery by setting aside an article for a purchaser, they have been subjected to serious doubt. Thus in *Mathison* v. *Alison*,[3] where it was established that a mere entry in the seller's books did not constitute delivery, the decision in *Gibson* v. *Forbes* was questioned. In *Boak* v. *Megget*,[4] a party purchased from a tanner certain hides in course of tanning, which were lying in a separate pit, and were already marked so as to be distinguishable from the rest of the tanner's stock. Some of the hides were taken from the pit for inspection, and replaced, and the purchaser gave directions as to the manner in which they were to be treated. But no entry of the sale was made in the tanner's books. On the bankruptcy of the tanner occurring while the hides were still in the pit, it was held that there had

[1] *Gibson* v. *Forbes*, 1833, 11 S. 916. In England, where wine was put into casks bearing the purchaser's name, it was held that this was not delivery to deprive the vendor of his lien—*Proctor* v. *Jones*, 1826, 2 C. & P. 532; Addison on *Contracts*, 9th ed., p. 523; Benjamin, *Sale*, 4th ed., p. 817.

[2] *Lang* v. *Bruce*, 1832, 10 S. 777.

[3] 1854, 17 D. 274.

[4] 1844, 6 D. 662. See also *Anderson* v. *Ford*, 1844, 6 D. 1315.

been no delivery, and that the property passed to the trustee. In *Liquidator of West Lothian Oil Co.* v. *Mair*,[1] the directors of a company agreed that if Mair (a director) would advance money to the company, they would "hypothecate or sell" certain barrels to him. Mair made the advance, and received an invoice for the sale of the barrels, and a receipt for the price. The barrels were set aside and enclosed in a fence in the company's premises, of which Mair obtained the key. On the liquidation of the company the liquidator questioned Mair's right to the barrels; but it was held that the barrels had been actually delivered, and belonged to Mair.[2] The facts indicating delivery were here undoubtedly strong; but the case would seem to show that it is possible to give delivery by setting an article apart for a transferee.

Constructive delivery:

The phrase "constructive delivery"[3] would seem to be applicable to two sets of facts: (1) Where a person who has sold a subject remains in possession of it under a contract which makes him the servant or lessor of the purchaser, and where, therefore, his continued possession may be ascribed to this subordinate contract, and not to his original ownership. In certain cases, on this state of the facts, it may be held that the actual possession of the seller is the civil possession of the purchaser, and that the goods are thereby constructively delivered. (2) Where the ownership of goods is transferred by an order on a third party, in whose custody the goods happen to be.

(*a*) By change in nature of possession.

The first case appears rather to be an equivalent for delivery in passing the *dominium* or real right in goods. Where a plea of this character is sustained, what is decided would appear to be that as the goods have been placed in the civil possession of the purchaser without delivery, the sale is therefore complete, and no delivery is necessary. To this category would seem to belong a case which is put by Professor Bell. If a man goes into a goldsmith's shop, purchases a particular vase, and leaves it to have an

[1] 1892, 20 R. 64.

[2] Lord Trayner indicated an opinion that there had been a *bonâ fide* sale, followed by delivery, but that Mair's right would not have been good if the transaction had been merely a security. It is difficult to follow this. Assuming that the transaction was a security-contract, followed by delivery, it is submitted that the barrels were pledged to Mair.

[3] Lord M'Laren (Notes to Bell's *Com.* i. 183) objects to the use of the phrase "constructive delivery." There is, he says, no such thing as constructive delivery, though there may be actual and constructive possession. The phrase, however, is constantly employed in the decisions to denote the process or method by which a thing comes to be in the civil or constructive possession of a transferee, although he has not obtained actual or physical possession of it.

inscription put upon it, has the property in the vase passed to him? Professor Bell answers this question in the affirmative,[1] but doubts have been suggested by Lord Justice Clerk Hope.[2] It is submitted that in such a case the vase is in the civil possession of the purchaser, through the natural possession of the seller holding it for him on a contract of *locatio operis*.[3] Most of the actual cases which have been decided on this point have been cases of sale intended to operate as securities. These will be considered later.[4] In *Eadie* v. *Young*,[5] however, a case of an undoubted sale was presented. A horse and cart were sold to Eadie before witnesses, and the bargain was reduced to writing. A form of symbolical delivery was gone through, and a plate, with the name of Eadie, was affixed to the cart. The horse and cart were then let to the seller, before the same witnesses, at a rent or hire of 12s. a week, which was regularly paid. They were afterwards pointed by a creditor of the seller, and claimed from him by Eadie. The Court, after great dubiety, held that Eadie had established his right of property, and was entitled to recover the subjects. Baron Hume, in a note on this case, remarks that it was a narrow one, and open to difference of opinion. The points in favour of Eadie were the label bearing his name affixed to the cart, and the subordinate contract of hire to which the continued possession of the seller could be ascribed.

(*b*) By an order upon a custodier.

The normal case of constructive delivery occurs where goods are actually in the custody of a third party, and they are transferred by an order on him. In this state of facts the goods are held to be constructively delivered when the transferee is installed in the same position, with regard to the custodier, as the transferor had occupied.[6] This result is effected when the transferor has given an order on the custodier to hold the goods for the transferee, or to deliver them to him, and the transferee has intimated this order to the custodier, provided that the custodier is an independent third party, and not a mere servant or warehouseman employed by the transferor. For no entry in the books of the seller,

[1] *Com.* i. 189.

[2] *Boak* v. *Megget*, 1844, 6 D. 662, at p. 670. But see opinion of Lord Neaves in *Moore* v. *Gledden*, 1869, 7 Macp. 1016, at p. 1021.

[3] *North-Western Bank* v. *Poynter, Son, & Macdonalds*, 1894, 21 R. 513; revd. 1594, 22 R. (H. L.) 1 (discussed *infra*, p. 200).

[4] *Infra*, p. 229 *seq.*

[5] 1815, Hume, 705.

[6] Bell, *Com.* i. 198, Lord M'Laren's note; *Connal & Co.* v. *Loder*, 1886, 6 Macp. 1095; *Distiller's Co.* v. *Russell's Tr.*, 1889, 16 R. 479; *Pochin & Co.* v. *Robinow & Marjoribanks*, 1869, 7 Macp. 622. Affirmed (same facts), *Vickers* v. *Hertz*, 1871, 9 Macp. (H. L.) 65.

or of a warehouse kept by a servant of his, will operate constructive delivery.[1] The law of constructive delivery has been expressed by Lord President Inglis as follows: "Constructive delivery may take place, and generally does take place, when specified goods or other moveables, being in the custody of some party other than the owner, the owner gives to a purchaser of these goods a delivery order addressed to the custodier, ordering him to deliver to the purchaser these specific goods. When this delivery order is intimated to the custodier, constructive delivery is effected, because the custodier from that time becomes in law holder for the purchaser, just as before he was holder for the seller. But to the completion of such constructive delivery, two things are indispensable: that the custodier shall hold an independent position, and be neither the owner, nor in any way identified with the owner, of the goods; and that the goods themselves shall be specified in this sense, that they be capable of identification, either as one total undivided quantity stored in a particular place, or at least a specified quantity forming part of an identified whole."[2] The fact that the warehouse of the seller is to a certain extent under the control of an officer of excise, and that he keeps a book in which the transfer is entered, does not satisfy the rule thus laid down, as the officer of excise is not a custodier, and entries are made in his book for fiscal purposes, and not for the purpose of changing the possession of the goods.[3] Where goods are transferred by a delivery-order while they are in the custody of a third party, in whose hands they have been placed in order that some operation or manufacture may be performed upon them which will bring the actual subject of transfer into existence, as where wheat is sent to a mill in order to be ground, and the flour to be produced is transferred by a delivery-order upon the miller, such delivery-order, if intimated before the actual subject of transfer is produced, will operate constructive delivery of each portion of it as it comes into existence.[4]

Delivery is not now necessary to complete a contract of sale.

The importance of delivery in a contract of sale has been greatly lessened by the provisions of the Sale of Goods Act, 1893

[1] *Melrose* v. *Hastie*, 1851, 13 D. 880; *Mathison* v. *Alison*, 1854, 17 D. 274; *Anderson* v. *M'Call*, 1866, 4 Macp. 765; *Lindsay* v. *Shield*, 1862, 24 D. 821.

[2] *Pochin & Co.* v. *Robinow & Marjoribanks*, 1869, 7 Macp. 622, at p. 628. Lord Young, on the other hand, held, in a recent case, that goods were delivered by an order on the keeper of the seller's private warehouse—*Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173.

[3] *Rhind's Tr.* v. *Robertson & Baxter*, 1891, 18 R. 623; *Mathison* v. *Alison*, 1854, 17 D. 274.

[4] *Black* v. *Incorporation of Bakers*, 1867, 6 Macp. 136.

(56 & 57 Vict. c. 71). As the sections of this Act which govern the passing of the property in goods under a contract of sale have not yet been illustrated by decisions, and as they make a considerable change in the common law of sale, to which frequent reference will have to be made in the immediately ensuing pages, they are here printed *in extenso*.

Provisions of Sale of Goods Act, 1893, in this respect.

Sec. 16. When there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Sec. 17. (1) When there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Sec. 18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. When there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. When there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. When there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods, for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return," or other similar terms, the property therein passes to the buyer—(*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; (*b*) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration

of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. (1) When there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) When, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Sec. 19. (1) When there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract, or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) When goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3) When the seller of goods draws on the buyer for the price, and transmits the bill of exchange and the bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him.

Delivery is still necessary to complete a security.

From these sections it will be seen that the question whether goods have or have not been delivered is no longer of great importance in a contract of sale, as the passing of the property no longer depends on delivery. But as the Act does not apply to rights in security, and is expressly declared not to apply to "any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other

security,"[1] the question of delivery is still a crucial one in the constitution of security rights.

Form of security depends on whether goods are represented by document of title.

The actual methods by which a security can be constituted over a corporeal moveable subject vary according to the nature of the particular subject, and the method by which it may be transferred. The law regulating property in ships, and the methods of constituting securities over them, having been made the subject of special legislation, will be dealt with separately. In other subjects a leading distinction is to be observed between the case where the moveables are represented by documents of title, and the case where they are not. In the former case, the actual proceedings will take the form of a transfer of the document of title, together with such intimation as may be necessary to confer on the security-holder a right over the goods which it represents;[2] in the latter, the goods themselves must be put into the possession of the security-holder. There seems to be no difference in principle between securities constituted over goods which are represented by documents of title, and over those which are not so represented; in both cases the methods which are competent may be ultimately resolved into the contracts of pledge and *ex facie* absolute transfer. But the differences in detail, both in the actual constitution of the security, and in the rights flowing from it, render it advisable to treat them separately.

Where no document of title. Pledge.

The ordinary method by which securities are constituted over corporeal moveable subjects which are not represented by documents of title, is by that transference of them to the person in whose favour the security is granted which is known as the real contract of pledge. By this contract it is agreed by the parties that goods shall be transferred to or deposited with a creditor, to be retained by him until the advance for which they are pledged shall be repaid. The contract is completed by the delivery of the goods to the pledgee, or to an agent for him. The property in the goods is not thereby transferred, but remains vested in the pledger, who retains the right of disposing of them subject to the pledge. But the pledgee is put in possession of the goods, and this change of possession is necessary to the completion of his right.[3] Even where a party has the custody of goods as the servant of another, he cannot, by mere contract, obtain a right of pledge over them.[4] But the word possession, in its ordinary

[1] Sec. 61, subs. 4.

[2] As to the circumstances which justify the issue of a document of title, see *infra*, p. 249.

[3] Bell, *Prin.* s. 1364; *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[4] *Johnston* v. *Sprott*, 1814, Hume, 448.

sense, does not accurately represent the right obtained by the pledgee. In English law, he is said to have a "special property" in the goods, and this phrase, though unknown to Scotch law, would appear conveniently to represent the right, more than possession, though less than property, with which the pledgee is invested in Scotland.

Possession necessary to the contract of pledge.

Possibly owing to the use of the word possession to denote the condition of the right of the pledgee, it was until recently held that if the pledgee allowed the subjects to revert to the possession of the pledgor, even in the capacity of trustee or agent for himself, he lost his right over the subjects altogether, and exposed them to the diligence of the creditors of the pledgor. Thus in a recent case, where bills of lading representing a cargo were pledged by the shippers to a bank in security of an advance, and the bank returned them to the shippers as agents to dispose of the cargo, it was held that by thus giving up the possession of the bills of lading, and therefore of the cargo, to the pledgors, the bank had lost their right as pledgees. Consequently, a creditor of the shipper, who arrested the price of the cargo in the hands of the purchaser, was preferred to the bank. But in the House of Lords it was held that the pledgee might retain the civil possession of the goods, even although, by returning the bill of lading to the pledgor, he placed them in his natural possession, provided that the pledgor took them back in the capacity of agent for the pledgee.[1] Therefore it will now be held that a pledgee

[1] *North-Western Bank* v. *Poynter, Son, Macdonalds*, 1894, 21 R. 513, rever. 1894, 22 R. [H. L.] 1, and (1895) A. C. 56. It would appear that the result of this judgment is to relax very considerably the rule that a pledge or other security over moveables can only be constituted by placing the security-holder in possession of the subject. In this case, indeed, the rule was satisfied by the transfer of possession involved in the transfer of the bill of lading; but if the security is good, although the possession is at once given up, it would seem that such a transfer is only an unmeaning ceremony. If a tradesman can give a security by handing a bill of lading to a bank, and taking it back in the capacity of an agent for the bank, is there any reason why the same result should not be reached by a mere contract, that the goods represented by the bill of lading should be pledged to the bank, and that the tradesman should hold them merely as his agent. The virtue and effect of possession in completing a security must consist in the control over the subject which the security-holder thereby acquires, not in the mere fact that the subject, or a piece of paper by which the destination of the subject is controlled, has been momentarily placed in his hands. Again, if the *ratio* of this decision is applied to a case of pledge where there is no bill of lading or other document of title, it would seem to lead to the conclusion that if a shopkeeper desired to raise money on his stock, he could do so by handing each article to the lender, and taking it

may restore the subject to the pledgor on a definite sub-contract, and yet retain his right of pledge over it. But if he allows it to revert to the possession of the pledgor *de plano*, and without preserving his right by constituting the pledgor his agent, it is conceived that his right would be lost.[1] There is, however, authority for holding that a pledge may be civilly in the possession of the pledgee though actually in the custody of the pledgor. This has been held in England in the case where the relation of master and servant exists between the parties.[2] And in a Scotch case, where a railway company stipulated with a contractor "that all plant brought or left on or near the site of the said works contracted for" should, from the time of its being so brought or left, be held to be the property of and belong to the company, and should not, without their consent, be removed therefrom, it was held that on the plant being brought on to said site it was pledged to the railway company, and came thereby into their possession, though it was in the custody of the contractor, and used by him in his work on the line.[3]

Subjects of pledge.

In general, any corporeal moveable subject may be pledged, if it is of such a nature that it can be put into the possession of the pledgee. But documents of debt, title deeds, and similar writings which are not negotiable instruments, or documents of title, cannot be pledged as specific entities so as to justify the pledgee in retaining them against any onerous assignee of the pledgor, who has obtained a right to the debt or property of which they are the evidence.[4] The right of a law agent, and of other persons, such as accountants, who are similarly employed, to retain deeds intrusted to them in security of their business accounts, is only an apparent exception to this rule, as it is a right which depends not on pledge, but on special or general lien.[5]

Distinction between pledge, lien, and retention.

It is not easy, and may not in all cases be possible, to distinguish between pledge, lien, and retention.

back as the agent of that lender for the purpose of selling it. On the principle of *North-Western Bank* v. *Poynter*, the lender would then have a right of pledge over these articles, which would entitle him to vindicate them, or their price, if sold, in the bankruptcy of the shopkeeper. Attempts to create a security in this manner have hitherto been denied effect (*Rhind's Tr.* v. *Robertson & Baxter*, 1891, 18 R. 623), and it remains to be seen whether they will now be held good.

[1] Ersk. iii. 1. 33; Bell, *Com.* ii. 22.

[2] *Reeves* v. *Capper*, 1838, 5 Bing. N. C. 136, 8 L. J. C. P. 44.

[3] *Moore* v. *Gledden*, 1869, 7 M. 1016.

[4] *Christie* v. *Ruxton*, 1862, 24 D. 1182; *Robertson* v. *British Linen Co.*, 1891, 18 R. 1225.

[5] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69; *Robertson* v. *Ross*, 1887, 15 R. 67.

tinguish between pledge and the various rights known as retention or lien.[1] For a discussion of the nature of these rights the reader is referred to the chapter on "Retention or Lien." Summarising the results arrived at there, three rights of retention may be distinguished: (*a*) retention founded on a title of property in the subject retained; (*b*) general retention, or lien, founded on possession; (*c*) special retention, or lien, also founded on possession. The first of these rights is clearly distinguishable from a pledge in the fact that it is founded on a title of property, while pledge requires only possession. The second, general retention, or lien, is more analogous to pledge. It is a right which, in those cases in which it is applicable, gives the possessor of property the right to retain it until all debts due to him by the owner are paid. If this right had been recognised as a necessary consequence of the possession of the property of a debtor, there would have been no room for pledge as an independent source of right. But, as will be shown later, this form of general retention is only admitted in certain cases, where it is supported by a custom of trade. As a general rule a party in possession of the property of his debtor has no right of security over it, resulting from the mere fact of possession or the right to possess.[2] It is indeed perfectly competent for parties coming into possession of the property of others, to stipulate for a general lien over such property, but this is practically a pledge under a different name.[3]

Pledge and special lien.

Again, a special lien is the right of a party who has the custody of property belonging to another, in order that he may perform some work or manufacture upon it, to retain such property until he is paid for the work so performed.[4] The result is, that the article becomes pledged for the debt, and the possessor has the rights of a pledgee. But pledge and special lien are distinguished by the fact that in the former case the right of the creditor arises out of an independent contract; in the latter, that right arises as a quality or condition of a contract of *locatio operis faciendi*. Such a lien has been defined as a "contract of pledge collateral to another contract of which it is an incident."[5]

Right of pledgee depends on that of pledgor.

As a general rule, a pledge confers on the pledgee a right

[1] *Infra*, Chapter x.

[2] *Strong* v. *Philipps*, 1878, 5 R. 770; *Smiths* v. *Aikman*, 1859, 22 D. 344; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[3] *Scottish Central Ry. Co.* v. *Ferguson*, 1864, 2 M. 781; *Miller* v. *Hutcheson*, 1881, 8 R. 489; *Royal Bank* v. *Saunder's Tr.*, 1881, 8 R. 805, affd. 1882, 9 R. H. L. 67.

[4] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69.

[5] Per Lord Young, *Miller* v. *Hutcheson*, 1881, 8 R. 489.

subject to any limitation which may exist in the title of the pledgor. "The general rule is perfectly well settled, that the possessor of corporeal moveables can give no better title to a purchaser or pledgee than he has himself acquired from the owner."[1] Therefore, if it turns out that the pledgor was not the owner of the subject pledged, and had no authority to pledge it, the pledgee, although he took it in good faith, and for value, cannot in general assert any right to it in a question with the true owner.[2]

Exceptions to this rule.

But this rule is subject to exceptions in cases where the conduct of the true owner, or legislation based on the customs of trade, entitles the pledgee to maintain that the defect in the title of the pledgor cannot be pleaded against him. These cases may be considered from the point of view of the defences which a pledgee may state in opposition to the demand of the true owner for the restoration of his property. They may be divided into three heads: (1) that the true owner is estopped, or personally barred, by his actings in the matter, from denying that the pledgor had authority to pledge; (2) that the pledgor was a mercantile agent intrusted with the possession of the goods, with the consent of the owner; or, (3) that the pledgor was a person who had obtained possession of the goods with the consent of the owner, under a contract of sale, or an agreement to sell; or a person who had sold, or agreed to sell, the goods, but had remained in possession of them with the consent of the owner. The first of these defences must be based on common law, the second and third on Statute.

(1) Where the owner of the subject is barred from denying the authority of the pledgor to pledge it.

It may be laid down as a general rule that the principle of estoppel or personal bar, will very rarely be applied against the true owner of a corporeal moveable subject which has been pledged without authority by a person intrusted with the possession of it. The doctrine of estoppel has been defined by Lord Denman in terms which have been approved by Lord Selborne as a statement of the law of estoppel, and by Lord Kinnear as a statement of the law of personal bar. "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act in that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."[3] This, perhaps, should be taken with the

[1] Per Lord Kinnear, in *Mitchell* v. *Heys*, 1894, 21 R. 600, at p. 610.

[2] *Mitchell* v. *Heys*, 1894, 21 R. 600; cf. *Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459.

[3] Per Lord Denman in *Pickard* v.

qualification which Lord Selborne quotes from a judgment of Mr. Baron Parke: "By the term wilfully in that rule we must understand, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation will be equally precluded from contesting its truth."[1] Taking these *dicta* together, two things must concur in order to raise a case of personal bar; the one party must have conducted himself in a way calculated to mislead the other, and the other must, as a matter of fact, have been misled by reliance on that conduct.

Application of doctrine of personal bar to pledge of corporeal moveables.

Taking the law of personal bar as thus defined, it is rarely applicable to a pledge of moveables. Mere possession of a corporeal moveable subject does not confer on the possessor even an apparent authority to dispose of it.[2] Therefore the owner of such a corporeal moveable subject, by placing it in the possession of another party, does not act in a way calculated or intended to induce a third party to believe that the possessor is the owner of it. It is only, therefore, in very special cases that the pledgee can plead the doctrine of personal bar in a question with the true owner. But the case may be different when a document of title, representing a corporeal moveable subject, is pledged. Such instruments are usually framed so as to give at least an apparent power of disposal to the person in whose possession they happen to be; and a third party, taking them in pledge in good faith, may be entitled to say that the true owner, if he issued or transferred them in such a quasi-negotiable state, is barred from objecting to rights acquired in reliance on the character of the document he has

Sears, 1837, 6 A. & E. 469, at p. 474; approved Lord Cranworth in *Jordan* v. *Money*, 1854, 5 H. L. C. 185, at p. 213; Lord Selborne, *Citizen's Bank* v. *First National Bank*, 1873, 6 E. & I. App. 352, at p. 360; Lord Kinnear, *Mitchell* v. *Heys*, 1894, 21 R. 600, at p. 610.

[1] Per Parke, B., in *Freeman* v. *Cooke*, 2 Exch. 654, at p. 663; approved Lord Selborne in *Citizen's Bank* v. *First National Bank*, 1873, 6 E. & I. App. 352, at p. 360. As to the general law of estoppel in *pais* see *Beven on Negligence*, 2nd ed. II. 1565; *Smith's L. C.* (10th ed.); Note to *Doe* v. *Oliver*, II. 808; and see *Low* v. *Bouverie* (1891), 3 Ch. 82.

[2] *Mitchell* v. *Heys*, *supra*; *Mitchell's Trs.* v. *Gladstone*, 1894, 21 R. 586, per Lord M'Laren, at p. 593; *Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459; *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332; see also *infra*, p. 258.

issued.[1] This contrast is well brought out by the cases of *Pochin & Co.* v. *Robinow & Marjoribanks*, and *Mitchell* v. *Heys.*

Case of *Pochin & Co.* v. *Robinow & Marjoribanks.*

In the former case, the pursuers, merchants in Manchester, who had bought a certain amount of iron from the Carron Iron Co., applied to Campbell Brothers, brokers and merchants in iron in Glasgow, to find them a purchaser for this iron, which was still lying in the yard of the Carron Co., and not separated from the general stock there. Campbell Brothers wrote that they had obtained a purchaser; whereupon the pursuers obtained a delivery-order from the agents of the Carron Co. in Manchester, indorsed it to Campbell Brothers, and sent it to them. Some days afterwards they wrote asking the name of the purchaser, and were told that Campbell Brothers were themselves the purchasers. Notwithstanding this announcement, they took no action for five or six days, when they wrote disclaiming the contract, and instructed the Carron Co. not to deliver the iron. Meanwhile Campbell Brothers had fraudulently indorsed the delivery-order to the defenders in security of an advance, and the latter had obtained delivery of part of the iron. Campbell Brothers stopped payment, and the pursuers raised an action for the delivery of the iron to them, on the ground that the bankrupts had no authority to pledge it. In the Court of Session it was held that the pursuers, having by their negligence in indorsing the delivery-order to Campbell Brothers, whom they knew to be merchants as well as brokers, and thus vesting them with an apparently unqualified right of disposal, given occasion to the commission of the fraud, were barred from objecting to a right acquired by an innocent third party in consequence of their negligence.[2] In the House of Lords, in a case presenting the same facts, though with different parties, the case was affirmed on the ground that Campbell Brothers were, in the circumstances, mercantile agents in possession of the documents of title to goods with the consent of the owner, within the meaning of the Factors Act then in force (5 & 6 Vict. c. 39), and therefore that a *bonâ fide* transferee from them obtained a good title.[3]

Mitchell v. *Heys.*

In *Mitchell* v. *Heys*, Mitchell, Johnston, & Co. hired certain copper rollers for printing calico from William Mitchell, who was not interested in their firm. There was an agreement that the rollers were to be stamped with William Mitchell's initials, and that, if the rollers were placed in the hands of any third party, receipts should be taken in the name of William Mitchell. Mitchell,

[1] See this discussed, *infra*, p. 251.

[2] *Pochin & Co.* v. *Robinow & Marjoribanks*, 1869, 7 Macp. 622.

[3] *Vickers* v. *Herz*, 1871, 9 Macp. (H. L.) 65.

Johnston, & Co., who were calico printers without any printing works of their own, sent the rollers to Heys in order to have their calico printed. Heys took them under an express agreement that they were the property of Mitchell, Johnston, & Co., and that they should be subject to a general lien for all printing accounts due by that firm to him. This lien, it was admitted, a calico printer had at common law over any rollers which were the property of his customer. The effect of the agreement, therefore, was to substitute an express pledge for an implied lien. Mitchell, Johnston, & Co. failed while Heys was in possession of the rollers; Heys claimed a right to retain them for a large balance due by the bankrupts for printing he had executed for them, and William Mitchell brought an action against him for their restoration. It was held that the pursuer was entitled to recover the rollers. Lord Kinnear, in the course of a judgment in which the other judges concurred, quoted with approval the definition of the law of estoppel by Lord Cranworth which has already been given here, and founded his judgment on the ground that William Mitchell, in allowing Mitchell, Johnston, & Co. to obtain possession of the rollers, had not intended to induce Heys to believe that they were actually the property of that firm.[1] It is obvious that if the same ground of judgment had been applied to the case of *Pochin & Co.* v. *Robinow & Marjoribanks*, the result of that case would, apart from the Factors Act, have been different, as the pursuer there did not intend to deceive the defender by inducing him to suppose that the iron really belonged to Campbell Brothers.

Pledgee cannot plead personal bar if he did not, as a matter of fact, believe that pledgor had authority to pledge.

The question whether the pledgee has actually been misled by the conduct of the true owner is obviously a question of fact in each particular case. In *Cooke* v. *Eshelby*, A. bought cotton from B., whom he knew to act both as a merchant and as a broker. In his evidence, A. stated that he made no inquiry, and had no belief one way or the other, as to the capacity in which B. was acting in making this particular sale. It was held that he could not plead the law of estoppel against the true owner of the cotton, as, whatever representations the latter may have made, A. had not been induced to contract by any belief that they were true.[2]

Application of rule, that of two innocent parties the one who gave occasion to a fraud must bear the loss.

A principle which it is often sought to apply in questions of the nature of those now under discussion, is that where one of two innocent parties has to bear the consequence of a fraud practised on both by a third party, the loss must be laid upon that one whose conduct made the commission of the fraud

[1] *Mitchell* v. *Heys*, 1894, 21 R. 600. [2] *Cooke* v. *Eshelby*, 1887, 12 App. Cas. 271; cf. *Mitchell* v. *Heys*, *supra*.

possible.[1] Lord Kinnear has pointed out that this principle has no application to the case of a pledge of a corporeal moveable subject. It is a principle which only applies where the party committing the fraud has been invested by one party with an apparent authority to dispose of a subject, as in cases of transfers of documents of title.[2] But where, as in the case of a corporeal moveable subject, no such authority to dispose can be inferred from possession, "the rule is that stated by Lord Cairns in *Cundy* v. *Lindsay*,[3] that where it is necessary to determine, as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised on both must fall, the Court 'can do no more that apply rigorously the settled and well-known rules of law.'"[4]

Case where pledgor has no authority to pledge, and case where he has obtained such authority by a fraud.

In the application of the settled rules of law, however, a distinction must be drawn between the case where A. invests B. with the possession of goods, but with no authority to pledge them, and the case where A. has actually given B. authority to pledge or dispose of the goods, but has been induced to do so by a fraud on the part of B. In the former case, if B. pledges the goods, the principle of *Mitchell* v. *Heys*[5] applies, and A. can recover them from the pledgee, unless his own conduct in the matter has been collusive or grossly negligent. The latter case has been decided on the ground that although the authority given to B. may be voidable by A. on the ground of B.'s fraud, in a question between him and B., yet, until he takes steps to avoid it, it remains good to the extent of validating a pledge to a *bonâ fide* pledgee.[6] Thus where A. was induced by fraud to sell sheep to B. and B., resold them to C., who took them in good faith and without notice of the fraud, it was held that although B. was convicted on a criminal charge, C. had a good title to the sheep in a question with A.[7] The same principle was applied where a retail jeweller fraudulently obtained articles of jewellery from whole-

[1] See the application of this in *Rose* v. *Spavens*, 1880, 7 R. 925.

[2] The principle in question was, however, applied in an English case, where a person fraudulently acquired possession of sheep, and sold them to a *bonâ fide* purchaser. The right of the purchaser was sustained against the true owner—*Moyce* v. *Newington*, 1879, 4 Q. B. D. 32.

[3] 1878, 32 App. Cas. 463.

[4] Per Lord Kinnear, *Mitchell* v. *Heys*, 1894, 21 R. 600, at p. 613; but see *Henderson & Co.* v. *Williams* [1895], 1 Q. B. 521.

[5] 1894, 21 R. 600; *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332.

[6] *Kingsford* v. *Merry*, 1856, 11 Ex. 577; *Pease* v. *Gloahec*, 1866, L. R. 1 P. C. 219 (bill of lading); *Henderson & Co.* v. *Williams* [1895], 1 Q. B. 521, and cases narrated *infra*.

[7] *Moyce* v. *Newington*, 1879, 4 Q. B. D. 32.

sale houses, on the contract of sale or return, and then pawned them. It was held that the contract of sale or return was a sale under a resolutive condition, which, had it been entered into honestly, would have given the retail dealer the power to dispose of the goods. Therefore, although in this case the wholesale dealer had been induced to enter into the contract by fraudulent misrepresentations on the part of the retail dealer (for which he was tried and convicted), yet the authority given to him was sufficient to enable him to give a good title to the pawnbroker.[1] The same train of reasoning led to a similar decision in the case of *Babcock* v. *Lawson*.[2] There Daly got an advance from Babcock on the security of certain flour, which was warehoused in the name of Babcock, and in a room hired by him. Daly then procured an advance from Lawson on the same flour, on the condition that Lawson was to have absolute possession of it. Accordingly Daly went to Babcock and told him that he had sold the flour for his (Babcock's) benefit to Lawson. Babcock granted a delivery-order in favour of Lawson, and instructed the landlord of the store where it was warehoused to transfer the room to Lawson. On the failure of Daly, Babcock sued Lawson for recovery of the flour, or its value. It was held that plaintiff had granted authority to Daly to dispose of the flour, being induced to do so by the fraudulent misrepresentation that the flour had been sold, and therefore that, although undoubtedly in a question with Daly he could have revoked that authority, he could not interfere with the right acquired by the defendant in consequence of the authority he had given.[3]

Pledge by pledgor who has no right to possess the goods.

The case of the pledgee would seem to be hopeless if the pledgor had no right to be in possession of the goods at all. Thus in *Brown* v. *Marr, Barclay, etc.*,[4] the question was raised whether the conduct of the retail dealer in obtaining the goods which he pawned amounted to theft, and it was thought that if it had done so the pawnbrokers would have no title. Again, in *Cundy* v. *Lindsay*, A. ordered goods from a wholesale firm, signing his name so that it looked like the signature of a well-known firm who carried on business in the same street. The goods were supplied under the impression that that firm were the customers. A. received and sold them. It was held that the firm who had supplied the goods, having been deceived as to who their customer was, had never made

[1] *Brown* v. *Marr, Barclay, etc.*, 1880, 7 R. 427. See discussion of this case, p. 246.

[2] 1879, 4 Q. B. D. 394.

[3] *Babcock* v. *Lawson*, 1879, 4 Q. B. D. 394, and 5 Q. B. D. 284.

[4] 1880, 7 R. 427, *supra*, and *infra*, p. 246.

any contract with A. at all, and that he therefore had absolutely no title to possess, and gave no title to the party to whom he sold the goods.[1]

(2) Where pledgor is a mercantile agent in possession of goods with the consent of the owner. Provisions of Factors Act.

By the Factors Act, 1890, it is provided (s. 2): "Where a mercantile agent is, with the consent of the owner,[2] in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.[3] It is also provided by the same Act, that where a mercantile agent has been in possession of goods, or of the documents of title to goods, with the consent of the owner, any sale or pledge by him to a party in good faith which would have been valid had that consent been continued, shall be valid although the consent has been determined.[4] And if a mercantile agent has obtained possession of any documents of title to goods, by reason of his having been, with the consent of the owner, in possession of goods or of other documents of title, any sale or pledge by him to a party acting in good faith shall be valid.[5] A person is deemed to be in possession of goods, or of the documents of title to goods, when the goods or documents are in his actual custody, or are held by any other person subject to his control, or for him, or on his behalf.[6]

Meaning of "mercantile agent."

From these provisions it is clear that where a pledge is made by a mercantile agent, and there is no evidence that the owner had not consented to that agent being in possession of the subject pledged, the pledgee will obtain a good title, whether the mercantile agent had any authority to pledge or not, and the question of personal bar, or estoppel, will not arise. The question then is, What are the limits of the business or employment which will make a man a mercantile agent for another? The expression is defined very generally in the Factors Act, 1890, as follows: "The

[1] *Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459; see also *Gillman, Spence, & Co.* v. *Carbutt & Co.*, 1889, 61 L. T. 281.

[2] For the purpose of the Act, the consent of the owner is presumed in the absence of evidence to the contrary, s. 2, subs. 4; and see *infra*, p. 243, note 4.

[3] 52 & 53 Vict. c. 45, extended to Scotland by 53 & 54 Vict. c. 40, repealing all former Factors Acts.

[4] Factors Act, 1890, s. 2, subs. 2.

[5] *Ib.* s. 2, subs. 3.

[6] *Ib.* s. 1, subs. 2.

expression 'mercantile agent' shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." As a general rule it means an intermediary who is employed in arranging, or carrying out, sales or purchases of goods between one merchant and another: a person who is commonly described as a factor or broker.[1] Attempts to bring under the scope of the Act persons in different, but analogous, occupations have mostly failed. Thus, on a similar definition in the former Factors Acts, it has been held that where a person received goods in the capacity of a warehouseman, the fact that he also acted as a broker in the same commodities did not render him a mercantile agent for the owner of the goods sent to him as a warehouseman.[2] And where a broker fraudulently pretended to A. & Co. that he was an agent for B. & Co., and thereby induced A. & Co. to sell goods to him, and grant delivery-orders for them, which he then sold to B. & Co. under the pretence that he was agent for A. & Co., it was held that these proceedings did not render him a mercantile agent for A. & Co., so as to enable B. & Co. to appeal to the Factors Acts.[3] Again, the term does not include, and the Act does not apply to, persons who are employed solely as agents for the forwarding or safe custody of goods, such as a carrier, forwarding agent, or wharfinger.[4] Nor is a mere clerk, who in that capacity may have obtained possession of documents of title to goods, to be regarded as a mercantile agent for his employer.[5] And the term must be confined to agents employed in commerce of a certain importance; it does not include persons who are of the nature of pedlars. Thus where a traveller was employed by a firm of jewellers to sell jewellery by canvassing at private houses, it was held that he was not a mercantile agent within the meaning of the Factors Acts; and accordingly, that when he pawned jewellery without any authority to do so, the pawnbrokers could not retain it in a question with the firm who had employed him.[6] And the Act does not apply to advances made to a party

[1] *Vickers* v. *Herz*, 1871, 9 Macp. (H. L.) 65; L. R. 2 H. L. Sc. 113.

[2] *Hellings* v. *Russell*, 1875, 33 L. T. (N. S.) 380; *Cole* v. *North-Western Bank*, 1875, L. R. 10 C. P. 354; *City Bank* v. *Barrow*, 1880, 5 App. Cas. 664.

[3] *Gillman, Spence, & Co.* v. *Carbutt & Co.*, 1889, 61 L. T. 281.

[4] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332; *Heyman* v. *Fleuker*, 1863, 13 C. B. (N. S.) 519, per Willes, J., at p. 527; *Cole* v. *North-Western Bank*, 1875, L. R. 10 C. P. 354.

[5] *Lamb* v. *Attenborough*, 1862, 31 L. J. Q. B. 41.

[6] *Hastings* v. *Pearson*, 1893, 1 Q. B. 62.

who had in his house furniture belonging to another person, even although he was afterwards shown to be the agent of the true owner.[1]

Factors Act does not apply to pledge for antecedent debt of agent.

The scope of the Factors Act is limited to advances instantly made to the mercantile agent on the security of the goods, or documents of title, of which he is in possession. It does not protect a pledgee with whom they have been pledged in security of an antecedent debt of the agent. Sec. 4 of the Act of 1890 provides as follows: "Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge."[2] This section has been held to govern a case where a mercantile agent, who was liable in a bill, pledged his employer's goods with the creditor, and thereby induced him to take up the bill himself;[3] and also a case where the goods were pledged in security of a guarantee on which the mercantile agent was already liable.[4] In both cases it was held that the pledgee could not maintain his right against the true owner of the goods pledged.

(3) Where pledgor is a person who has sold goods, but continues in possession of them.

The Factors Act, 1890, and the Sale of Goods Act, 1893, provide, in terms almost identical, that where a person has sold goods, but continues in possession of them, the delivery or transfer by that person, or by a mercantile agent acting for him, under any sale or pledge of such goods made by him, to a person taking in good faith and without notice of the previous sale, shall have the same effect as if the seller had been a mercantile agent in possession of the goods with the consent of the owner. Similarly, it is provided that where a person has bought, or agreed to buy goods, and has obtained, with the consent of the seller, possession of the goods, or of the documents of title to them, the delivery or transfer by him under any sale, pledge, or other disposition thereof to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the transferor had been a mercantile agent in possession of the goods with the consent of the true owner.[5] The general effect of these provisions will be

[1] *Wood* v. *Rowcliffe*, 1847, 6 Hare, 183 and 191.

[2] 52 & 53 Vict. c. 45, s. 4; extended to Scotland by 53 & 54 Vict. c. 40.

[3] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332.

[4] *M'Nee* v. *Gorst*, 1867, L. R. 4 Eq. 315.

[5] Factors Act, 1890, s. 9; Sale of Goods Act, 1893, s. 25, subs. 2.

considered later in treating of securities constituted by sales under suspensive or resolutive conditions.[1] It may be sufficient to point out here that a pledge by a person in either of the above positions, even although a fraudulent act on his part, will confer a good title on the pledgee, provided that the latter takes in good faith and without notice of any prior right, and that the pledge is made in security of a debt contracted at or after the time of the pledge. But it has been held in England that where a person has sold goods situated in a warehouse, and afterwards pledges them to the warehouseman, the pledgee, even if he had no notice of the sale, cannot appeal to the Factors Act, because there has been no "delivery or transfer" of the goods to him.[2]

Sub-pledge.

There would seem to be no reason why a pledgee, in the absence of any special agreement to the contrary, should not be entitled to sub-pledge the subject. But he will not confer on the sub-pledgee any right to retain the subject for more than the amount of the original pledge.[3] It would appear that the original pledgor, except in a case where he has expressly recognised the right of the sub-pledgee, has no concern with the sub-pledge. Therefore if he pays the amount for which the subject was pledged to the pledgee, he will be entitled to recover it from the sub-pledgee, whether the latter has been paid by the pledgee or not. If the pledgee should sub-pledge for such an amount, or such a time, as to render himself unable to restore the subject on payment being offered in accordance with the contract between him and the pledgor, the question has been raised in England whether he thereby can be held to have renounced his right of pledge; and whether, therefore, the original pledgor can recover the subject from the sub-pledgee without tendering the amount for which he himself had pledged it. It has been held that, in a question with the sub-pledgee, the original pledgor is entitled to recover his property, but cannot do so without paying the amount for which he pledged it.[4] In a question with the pledgee, the pledgor is entitled to damages if the subject pledged has been injured owing to the sub-pledge, but he cannot sue for such damages without tendering payment of his debt; because, until he does so, he has no right to recover the possession of the subject.[5]

Rights of pledgee.

The primary right obtained by a pledgee is to retain the

[1] *Infra*, p. 240.

[2] *Nicholson* v. *Harper* [1895], 2 Ch. 415.

[3] Bell, *Prin.* s. 206.

[4] *Johnston* v. *Stear*, 1863, 15 C. B. (N. S.) 330; 33 L. J. C. P. 130; *Donald* v. *Suckling*, 1866, L. R. 1 Q. B. 585.

[5] *Halliday* v. *Holgate*, 1868, L. R. 3 Ex. 299.

subject pledged in security of his debt. In the absence of express agreement, he has no power to make use of it, unless it is of such a nature that it cannot be injured by use, or is a subject which occasions expense, such as a horse, cow, or other domestic animal, when, it would appear, the pledgee is entitled to make use of it.[1] If there are any profits or fruits from the subject of the pledge, these, if uplifted by the pledgee, must be applied by him towards payment of his debt or interest, or otherwise accounted for to the pledgor. He has no implied power to sell the subject, except in cases under the Pawnbrokers Act,[2] even if there is default in payment at the stipulated time; but a power to sell is not inconsistent with the contract of pledge, and is frequently conferred. Failing such a power, the pledgee can only sell by application to the Sheriff for a warrant.[3] In England, on the other hand, the pledgee is entitled to sell on the expiry of the time fixed for repayment, or, if no such time is fixed, upon giving due notice to the pledgor.[4]

Question whether pledgee can retain the pledge till all debts due to him by the pledgor are paid.

The pledgee is entitled to retain the subject until the whole debt for which it was pledged is repaid.[5] It seems never to have been settled whether he is entitled to retain it in security of other debts due to him by the pledgor, in the absence of any agreement by which the pledge is restricted to a particular debt. In *Hamilton* v. *Western Bank*,[6] the Lord Ordinary (Handyside), considering that the transfer of goods in security by indorsing a delivery-order created a right of pledge in the indorsee, held that this right could not be impliedly extended to cover debts afterwards contracted by the pledgor to the pledgee. This judgment was reversed, but on the ground that the right thus constituted was not pledge, but retention grounded on an absolute transfer of property. In delivering judgment, Lord Deas expressed an opinion that if the contract had really been one of pledge, he would have agreed with the Lord Ordinary; but this, in the circumstances, can only be regarded as *obiter*. In *Rintoul & Co.* v. *Bannatyne*, it seems to have been taken for granted that a right of pledge could not be extended to cover other debts, but the question was not presented for decision.[7] In a recent case the Lord Ordinary (Low) drew a distinction between a security by the

[1] See opinion of Holt, C. J., in *Coggs* v. *Bernard*, 1703, 1 Smith, L. C., 10th ed., p. 167.

[2] 35 & 36 Vict. c. 93, *infra*, p. 215.

[3] Bell, *Prin.* s. 207.

[4] Story on *Bailments*, s. 308; Chitty on *Contract*, 13th ed., p. 395.

[5] Bell, *Prin.* s. 1365.

[6] 1856, 19 D. 152.

[7] *Rintoul & Co.* v. *Bannatyne*, 1862, 1 Macp. 137.

transfer of the property in the subject, which would give the right to retain for other debts, and a security by the transfer of the possession only, which cannot be so extended.[1] This is in accordance with the analogy of securities over incorporeal subjects, where, if the assignation is expressly in security, the assignee can only use it as a security for the particular debt; if it is *ex facie* absolute, he can retain the subject until all debts due to him are paid.[2] In England it would appear that the question depends upon whether there is evidence of an understanding, amounting to an agreement, on the one hand to make, and on the other to receive, advances on the security of the subjects already pledged. If this is not proved, the pledgee cannot claim a preference over the subject for simple contract debt, in a question with the creditors of the pledgor.[3]

Liability of pledgee for safety of subject pledged.

The pledgee, as a depositary, must keep the subject with ordinary care, and will be liable in damages if it is injured or lost through his fault or gross negligence.[4] If it is lost by accident, without any fault of his, the pledgee can still exact the debt for which the security was constituted,[5] except in the case of pawnbrokers, whose liability is regulated by Statute. But if, after the debt has been paid or tendered, and a legitimate demand has been made for the return of the pledge, the pledgee fail to return it, he will be absolutely answerable in damages, if the subject is lost or injured, whether by accident or not.[6] It has been stated that the degree of care required from an ordinary pledgee is similar to that required from the finder of goods in preserving them for the owner, which may be taken to be that amount of care which a man of ordinary prudence exercises in the preservation of his own property.[7] It is not a good defence, if a loss through gross negligence is averred, for the pledgee to prove that his own property was lost at the same time and by the same means, if, as a matter of fact, that loss was occasioned by negligence which amounted to fault. Recent cases have tended to show that it is impossible or misleading to lay down rules as to what constitutes gross negligence, and that each case must be decided on its own merits; but a general distinction is still recognised, though its limits may be

[1] *Alston's Tr.* v. *Royal Bank*, 1893, 20 R. 887.

[2] *National Bank* v. *Forbes*, 1858, 21 D. 79; *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

[3] Turner on *Pawn*, 2nd ed., p. 85.

[4] Cf. *Dominion Bank* v. *Bank of Scotland*, 1889, 16 R. 1081; *Coupé Co.* v. *Maddick* [1891], 2 Q. B. 413 (negligence of servant).

[5] *Syred* v. *Carruthers*, 1858, El. B. & E. 469.

[6] *Yungmann* v. *Briesemann*, 1892, 67 L. T. 642; *Coggs* v. *Bernard*, *infra*.

[7] *Coggs* v. *Bernard*, 1703, 1 Smith, L. C., 10th ed., p. 167.

impossible to define, between the exact care required from one who has the gratuitous use of property belonging to another, and the ordinary diligence which must be shown by a depositary or pledgee.[1]

Pledge to a pawnbroker.

The contract of pledge, where the pledgee is a pawnbroker, has been the subject of considerable legislation. The earlier Statutes on the subject have been repealed by the Pawnbrokers Act, 1872.[2] It is proposed here to give a summary of the provisions of that Act, with the decisions by which it has been elucidated, without, however, entering into the detailed provisions as to the carrying on of a pawnbroker's business, for which reference must be made to the Act itself.

Definition of pawnbroker.

The word "pawnbroker" is defined as including "every person who carries on the business of taking goods and chattels in pawn."[3] It is also provided that "every person who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives or takes in goods or chattels, and pays or advances or lends thereon any sum of money not exceeding ten pounds, with or under an agreement or understanding, expressed or implied, or to be from the nature or character of the dealing reasonably inferred, that these goods or chattels may be afterwards redeemed or repurchased on any terms," shall be deemed to be a person carrying on the business of taking goods and chattels in pawn.[4]

Regulations as to business of pawnbroking.

In order to carry on the business of pawnbroking, a licence from the Commissioners of Inland Revenue is required, to be obtained on the production of a certificate from the Licensing Magistrates of the county or burgh in which the business is to be carried on.[5] Every pawnbroker is required to keep and use in his business certain documents and books specified in the third schedule of the Act,[6] and to keep exhibited in large characters over the outer door of his shop his Christian name and surname, with the word "Pawnbroker."[7] The effect of a similar provision in a former pawnbroking Statute was decided to be that it rendered a secret partnership in the business of a pawnbroker a *pactum illicitum*, and therefore that such a partnership was illegal and void.[8] But although the name of a party who alleges that he

[1] See opinion of Lord Herschell, *Raes* v. *Meek*, 1889, 16 R. (H. L.) 31.
[2] 35 & 36 Vict. c. 93.
[3] Pawnbrokers Act, 1872, s. 5.
[4] *Ib.* s. 6.
[5] *Ib.* ss. 37, 39, 40.
[6] *Ib.* s. 12.
[7] *Ib.* s. 13.
[8] *Gordon* v. *Howden*, 1843, 5 D. 698; revd. 1845, 4 Bell, 254.

is a partner in a pawnbroking business does not appear over the door, he may nevertheless prove the fact of his partnership, because the omission of his name may have been in violation of the terms of the contract of partnership.[1]

Regulations as to methods of pawning.

There is no limit to the amount which may be advanced by a pawnbroker on any single article, but the Act does not apply to advances over ten pounds, and no person is to be deemed a pawnbroker by reason of his advancing on any terms sums exceeding ten pounds.[2] In the case of such advances, therefore, the pawnbroker is in the position of an ordinary pledgee, and is not entitled to take advantage of the provisions of the Act relative to the disposal of the pledges. And where more than ten pounds is advanced on a single article, the pawnbroker does not bring the transaction within the Act by giving several pawn-tickets of ten pounds each.[3] In the case of advances of less than ten pounds, the pawnbroker is bound to give a pawn-ticket in a statutory form, with the conditions of the contract printed upon it.[4] He is guilty of an offence under the Act, and liable to a penalty of ten pounds, if he takes a pawn from a person appearing to be under the age of twelve, or to be intoxicated.[5] If he knowingly takes in pawn any linen or apparel intrusted to any person to be cleaned, or any unfinished goods sent to be worked up, he is liable, on conviction, to forfeit a sum not exceeding double the amount of the loan, which shall be paid to the inspector of poor of the parish.[6] In ordinary cases he may accept any article offered for sale either on the ordinary terms specified in the Act, or, if the amount advanced on it exceeds forty shillings, on a special contract.[7] In the former case he is not entitled to charge more than one halfpenny per month for every two shillings or part of two shillings advanced, if the total advance is under forty shillings, or, if it exceeds that sum, one halfpenny per month for every two shillings and sixpence or part of two shillings and sixpence advanced.[8]

Redemption of articles pawned.

Every article pledged without a special contract is redeemable for a year and seven days from the date at which it was pledged, exclusive of the day of pledging.[9] If the advance is under ten shillings, the article becomes the absolute property of the pawn-

[1] *Fraser* v. *Hill*, 1854, 16 D. 789.
[2] Pawnbrokers Act, 1872, s. 10.
[3] *Ross* v. *Equitable Loan Co.*, 1826, 5 S. 192.
[4] Pawnbrokers Act, 1872, s. 14, Sched. III.
[5] *Ib.* s. 32.
[6] *Ib.* ss. 35, 56.
[7] *Ib.* s. 24.
[8] *Ib.* s. 15, Sched. IV.
[9] *Ib.* s. 16; Turner, *Contract of Pawn*, 2nd ed., p. 100.

broker at the expiry of that time.[1] If the advance was more than ten shillings, the article remains redeemable until it is sold in accordance with the provisions of the Act relating to sales.[2] And the holder of the pawn-ticket is entitled, at any time within three years of the date of the sale, to inspect the sale-book; and if the amount obtained for the article exceeded the advance and the profit due at the date of the sale, under deduction of the cost of the sale, he may demand the surplus from the pawnbroker.[3] But the pawnbroker may set off against such surplus any deficit resulting from the sale of any article or articles pledged by the same person within a year before or after the date of the sale.[4] And there is nothing in the Act to limit the right of the pawnbroker, as a security-holder, to demand from the pledgor any deficit which may result from the sale of any article pledged.[5]

Holder of pawn-ticket is entitled to redeem, except against true owner.

It is provided that the holder of the pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker is therefore forced to deliver the pledge to the person producing the ticket, on payment of the loan and profit.[6] By sec. 25 he is declared to be indemnified for so doing. But this has been decided to mean that he is indemnified against any claim by the person by whom, or by whose authority, the article in question was pledged. If the true owner of any article which has been pawned without his authority should demand its restoration, the pawnbroker is bound to give it up; and if, after receiving notice of the claim of the owner, he delivers it to the person producing the pawn-ticket, he will be liable to the owner in damages, and the indemnity conferred by sec. 25 will not protect him.[7]

Declaration by person claiming the article pawned.

Where any person claims to be the owner of an article pawned, but is not possessed of a pawn-ticket, or alleges that he is the owner of a pawn-ticket, but that it has been lost or stolen from him, he may obtain from the pawnbroker a statutory form of declaration. For three days after such a form of declaration has been issued, the pawnbroker is safe in refusing to allow the pledge to be redeemed by any person producing the pawn-ticket. The person who obtains the declaration should fill it up before a justice of the peace, in presence of a party who is prepared to identify him, and return it to the pawnbroker. If he does this

[1] Pawnbrokers Act, 1872, s. 17.
[2] *Ib.* s. 18.
[3] *Ib.* ss. 21, 22.
[4] *Ib.* s. 22.
[5] *Jones* v. *Marshall*, 1889, 24 Q. B. D. 269.
[6] Pawnbrokers Act, 1872, s. 25.
[7] *Singer Manufacturing Co.* v. *Clark*, 1879, 5 Ex. Div. 37.

within three days after the form has been issued, he is placed in the same position as if he had a pawn-ticket.[1] He may therefore redeem the pawn, and, even if he delays to do so, the pawnbroker is not justified in parting with it to any person who may subsequently produce a pawn-ticket.[2] A person who knowingly makes a false declaration is guilty of a misdemeanour, and liable to punishment for perjury.[3]

Means by which owner of property unlawfully pawned may recover it.

The owner of property which has been pawned without his authority is entitled to recover it by making a declaration in the manner above detailed. By doing so, however, he is obliged to pay the amount for which it was pledged. He is also entitled to recover his property by an ordinary action, without tendering payment of the sum advanced upon it, as there is nothing in the contract of pawn, or in the Pawnbrokers Act, to entitle a pawnbroker to detain property unlawfully pledged to him against a demand by the true owner.[4] It is, however, provided that where a person has been convicted in a court of summary jurisdiction of knowingly pawning the property of another person without authority to do so, or if a person is convicted in any court of feloniously taking or fraudulently obtaining any goods, and it appears that they have been pledged with a pawnbroker, the Court, on proof of the ownership of the goods, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or any part thereof, or without payment, as may appear to the Court to be just, in view of the conduct of the owner and the other circumstances of the case.[5]

Sale of pledges.

In the case of articles pledged for more than ten shillings, the pawnbroker, at the expiration of one year and seven days from the date of the pledge in the case of ordinary pledges, or after the expiration of such period, not less than three months, as may be agreed upon, in the case of pledges by special contract,[6] may dispose of the article pledged by sale by public auction, and not otherwise.[7] The pawnbroker is entitled to attend and bid at the sale, and any article knocked down to him becomes his absolute property.[8] Books, pictures, and other works of art, philosophical

[1] Pawnbrokers Act, 1872, s. 29.

[2] *Burslem* v. *Attenborough*, 1873, L. R. 8 C. P. 122.

[3] Pawnbrokers Act, 1872. s. 29.

[4] *Singer Manufacturing Co.* v. *Clark*, 1879, 5 Ex. Div. 37 ; *Hastings* v. *Pearson* [1893], 1 Q. B. 62 ; cf. *Brown* v. *Marr, Barclay, etc.*, 1880, 7 R. 427.

[5] Pawnbrokers Act, 1872, s. 30. The decisions of Metropolitan Police Courts under this section are collected in Turner, *Contract of Pawn*, 2nd ed., p. 107.

[6] Pawnbrokers Act, 1872, s. 24, Sched. III., No. 7.

[7] *Ib.* s. 19. The conduct of the sale is regulated by Sched. V.

[8] *Ib.* s. 19.

and mathematical instruments, and china, must be sold separately on four specified days of the year, at sales at which no other articles shall be exposed.[1]

Liability of pawnbroker for damage to pledge.

Certain special liabilities, which are not incurred by an ordinary pledgee, are imposed upon pawnbrokers by the Act. Where a pledge is destroyed or damaged by fire, the pawnbroker is liable, on application within the period during which the pledge would have been redeemable, to pay the value of the pledge, after deducting the amount of the loan and profit. The value is to be estimated as the loan and profit, with the addition of twenty-five per cent. on the amount of the loan.[2] Although there is no express limitation in the Act, it is conceived that the period during which this liability extends is not more than a year and seven days, although, as has already been stated, pledges for more than ten shillings remain redeemable until they are actually disposed of. A pawnbroker is entitled to insure against fire to the extent of the value estimated as above.[3] Again, where a person entitled and offering to redeem a pledge shows, to the satisfaction of a court of summary jurisdiction, that the pledge has become of less value than it was at the time of pawning, through the default, neglect, or wilful misbehaviour of the pawnbroker, the Court may, if it thinks fit, award a reasonable satisfaction to the owner of the pledge in respect of the damage. The amount awarded shall be deducted from the amount due to the pawnbroker, or shall be paid by him, as the Court may direct.[4]

Securities over moveables which cannot be pledged.

The fact that it is often inconvenient to effect an actual transfer of the possession of a corporeal moveable subject which is proposed as a security, has led to many attempts to constitute such a security by change in title, without that delivery which is necessary to complete a right of pledge. Thus where it is proposed to constitute a right in security over a ship on the stocks, or over the machinery which is actually being used by the borrower in his business, or over the furniture in his house, the ordinary contract of pledge is inapplicable, as actual delivery is practically impossible. As has been explained in the commencement of this chapter, an ordinary assignation of a corporeal moveable, whether *ex facie* in security or *ex facie* absolute with a back-letter, is merely a personal obligation, and would give the assignee no preference over the subject on the bankruptcy of the cedent. The general rule is that there can be no security over corporeal moveable subjects *retenta possessione*.[5]

[1] Pawnbrokers Act, 1872, Sched. V.
[2] *Ib.* s. 27.
[3] *Ib.* s. 27.
[4] *Ib.* s. 28.
[5] *Ante*, p. 188.

In England this difficulty is met by the Bills of Sale Act; but as there is no similar Statute applicable to Scotland, it has been necessary to seek for some means whereby a lender of money may obtain a *nexus* or right over property belonging to the borrower which will give him a preference, on the bankruptcy of the latter, over the general creditors, without disturbing the borrower in his use and possession of the subject. As the risk to be guarded against is, as a rule, the insolvency and not the fraud of the borrower, such a security may serve all practical purposes even though it leaves the borrower in a position to defeat the lender's right by fraudulently transferring the subject to a third party.

Methods adopted.

It is not easy to group the various cases in which these attempts to create a security without possession have come up for decision, but it is conceived that they may be divided into two heads, namely: (1) those cases where the transaction has simply taken the form of a sale; and (2) those cases in which it has been attempted to operate constructive delivery by investing the lender with a title of property, and taking from him a lease of the subjects.

Securities in form of sale. Mercantile Law Amendment Act, s. 1.

The primary difficulty which besets a security in the form of a sale is that, at common law, the property in goods sold but not delivered remains in the seller, and such goods are therefore, until delivery, liable to the diligence of his creditors. This remained the theory of the law until the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), came into operation, but the practical effect of this theory was altered by the Mercantile Law Amendment Act, 1856.[1] By the first section of that Act, "where goods have been sold, but the same have not been delivered to the purchaser, but have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller to attach such goods as belonging to such seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from obtaining delivery of the same." The theory of the common law, that undelivered goods remain the property of the seller, was untouched by this enactment, and its practical consequences continued the same, except in so far as they were expressly modified thereby.[2] Thus although the purchaser of goods was protected against the diligence of the creditors of the seller, he remained exposed to the risk of a re-sale by the seller to a third party, who, if he bought the goods in good faith, and was the first to take delivery, would obtain a preferable right. It must also be noticed that the Act applied only to sales, and did not touch the rule that a right in security required to be completed

[1] 19 & 20 Vict. c. 60.

[2] *Wyper* v. *Harveys*, 1861, 23 D. 606.

by delivery. It therefore raised the question as to the difference between an actual sale and a mere colourable imitation.

Effect on such securities of Sale of Goods Act, 1893.

This section of the Mercantile Law Amendment Act has been repealed by the Sale of Goods Act, 1893,[1] by which the theory of the law of Scotland as to the passing of the property in goods on a contract of sale has been entirely altered. Under that Act the rule is that where specific goods are sold in a deliverable condition, the property therein passes to the buyer at the time when the parties to the contract intend that it should pass, and, in the absence of any indication of such intention, at the date of the completion of the contract.[2] The question of delivery is therefore of minor importance in a contract of sale. But the Act contains no similar provision as to the passing of a real right in the case of a contract of pledge or assignation in security; and it is declared that the provisions of the Act relating to contracts of sale do not apply "to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."[3] It would seem probable, from this section, that the test of the applicability of the provisions of the Sale of Goods Act to a doubtful contract is entirely different from the test as to the applicability of sec. 1 of the Mercantile Law Amendment Act. Under the Mercantile Law Amendment Act the question to be decided was, Had the parties entered into a contract of sale? Under the Sale of Goods Act the question would appear to be, Assuming that the contract was a sale, was it intended to operate as a security? If this is the present state of the law, it would appear that the cases decided on the Mercantile Law Amendment Act are now of little or no use as authorities, because the question which they decide is now of no importance. But as the interpretation of subsec. 4 of sec. 61 of the Sale of Goods Act has not yet been settled, a résumé of the cases under the Mercantile Law Amendment Act is still necessary.

Review of cases under Mercantile Law Amendment Act.

A particular class of cases, in which the question was whether sec. 1 of the Mercantile Law Amendment Act, 1856, applied to a case of sale where the seller retained, not only the possession, but the use of the subject sold, may, since the repeal of that section, be disregarded.[4] The cases which follow, and which may still be of importance, turned on the point whether the particular transaction in question was, or was not, a sale.

[1] 56 & 57 Vict. c. 71, s. 60, and Schedule.

[2] Sale of Goods Act, 1893, ss. 17, 18, *ante*, p. 197.

[3] Sale of Goods Act, 1893, s. 61, subs. 4.

[4] See *Sim* v. *Grant*, 1862, 24 D. 1033; *Edmond* v. *Mowat*, 1868; 7 Macp. 59.

Cases held to be sales. *M'Bain* v. *Wallace.*

The leading case on this subject is *M'Bain* v. *Wallace.*[1] There Roney applied to Wallace & Co. for an advance of money on the security of a ship which was in course of building. This advance Wallace & Co. were willing to grant; but as a solicitor explained to the parties that a security could not be constituted until the ship was registered, it was decided that Wallace & Co. should purchase the ship, and a formal contract of sale, at the price of £2500, payable in two instalments, was drawn up and signed by the parties. The price was paid by various advances to Roney, made by means of bills drawn by Wallace & Co., accepted by Roney, and discounted by Wallace & Co. Of these bills Roney received the proceeds. Stewart, a partner in Wallace & Co., admitted in evidence that, though he regarded his firm as the absolute owners of the ship, he considered that they were under a moral obligation, if they sold the ship for more than the amount they had paid for it, to account to Roney for the surplus. Roney failed after the whole price had been paid, but before the ship had been delivered, and a competition arose between his trustee (M'Bain) and Wallace & Co. In the Court of Session Wallace & Co. were preferred, on the ground that where a ship in course of building is bought for a price to be paid by instalments, the property passes to the buyer, *pro tanto*, on the payment of each instalment. In the House of Lords doubts were suggested as to this rule; but it was held that the transaction was a *bonâ fide* sale, and that the purchaser was therefore protected by the first section of the Mercantile Law Amendment Act, 1856, whatever the intention of the parties, in entering into the contract, might have been. The case was put by Lord Blackburn as follows:[2] "It seems to me that in this case the contract of sale was agreed upon probably with the motive and intention that the party should thereby be able safely to make advances, and have the security of the goods that had been sold to him; but whatever the motive and intention might be, it was as clear a contract of sale as anything could possibly be in its inception. I think that is perfectly plain. The evidence also leaves no doubt upon my mind that there was in this case a feeling of moral obligation on the part of Messrs. Wallace that, if this ship should turn out to be worth more than the £2500, they would not keep the surplus. . . . But supposing that there was this completed collateral contract—not only an honorary contract, which I have no doubt that there was, but a binding, legal, and enforceable contract—that this should be a security, I do not see the

[1] 1881, 8 R. 360; affd. 1881, 8 R. (H. L.) 106.

[2] 8 R. (H. L.), pp. 113–4.

slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act, which says that goods having been sold (as these were, although with a motive, no doubt, to produce this effect), as far as regards the rights of creditors of the vendor to prevent delivery of the goods, either by sequestration or poinding, they shall have none, but the matter shall stand as it would under the English law. That, I think, is the point that will be decided here." The opinion of Lord Watson, though more guarded, is substantially to the same effect. His Lordship puts the case as follows:[1] "Now, the contention of the appellant was twofold. He first maintained, upon the evidence, that he controlled the contract, and imported a new meaning into the contract by the evidence which he had led. The Lord Ordinary seems to have given effect to that view, and to have held that the contract did not set forth the true agreement between the parties: that their agreement, in reality, was one for a loan upon security, and not for a sale and purchase; and if that view were well founded, the judgment of the Lord Ordinary undoubtedly is equally so. But, my Lords, I find it impossible to accept that view, and I therefore turn to the alternative view which was presented in argument at the bar. It was to this effect: That although in form this might be a contract of sale, it was in substance intended thereby to give a security only. That really resolves itself into an allegation that the motive of the parties in making the contract was to effect that which might more directly, had the circumstances of the case rendered it advisable, have been effected by a loan on the security of the vessel. But, my Lords, I cannot conceive that the contract is not to take effect according to its legal terms and legal meaning, simply because it was thereby intended by the purchasers to give to the seller the benefits which they found it impracticable, with safety to themselves, to give him as a loan." In the succeeding cases the Court has attempted, with varying results, to apply the distinction indicated in this opinion.

Allan & Co.'s Tr. v. *Gunn.*

Again, in *Allan & Co.'s Tr.* v. *Gunn*, A. executed a stamped document in favour of B., to the effect that he had sold to B. certain nets then lying in his warehouse for £100, "the said nets to be returned to me upon repayment of the above amount." The nets remained in A.'s warehouse until he was sequestrated, when they were claimed by his trustee. A proof was led, in which the evidence of A. was that the transaction was a security, and that of B. that it was a sale. It was held, on the authority of *M'Bain* v.

[1] 8 R. (H. L.), p. 115.

Wallace, that it was a sale, that the first section of the Mercantile Law Amendment Act applied, and, therefore, that the nets did not fall under the sequestration.[1]

Darling v. *Wilson's Tr.*

A very strong case in the same direction is *Darling* v. *Wilson's Tr.* There Wilson, a bleacher, sold to Darling, his brother-in-law, certain pipes by which water was conveyed to his bleaching field, for a nominal price of £400, which was paid by Darling joining in a cash credit in favour of Wilson for that amount. Wilson took a lease of the pipes from Darling at a rent of £20 a year. The pipes, when laid down, had not cost £400, and the whole transaction looked very like a security, the efficacy of which lay in the inconvenience to which Wilson would have been put had the pipes been removed. In a question with the trustee in a voluntary trust deed granted by Wilson for the benefit of his creditors, the transaction was, however, upheld as a sale, and Darling was found entitled to the pipes.[2]

Liddell's Tr. v. *Warr.*

In *Liddell's Tr.* v. *Warr*, the defender, a money lender, advanced £300 on the security of an *ex facie* absolute assignation of the furniture in Liddell's house, with a lease of the furniture to Liddell for four years at a rent of £100, payable half-yearly, and a back-letter explaining that on the expiry of the lease, and on payment of the whole sum stipulated as rent, the furniture should be reassigned to Liddell. At the same time Warr took Liddell's acceptance for £400, under an agreement that it should be retired upon payment of each instalment, and renewed less the amount of the instalment paid. On failure in any such payment, Warr was to be entitled to realise the furniture, subject to an obligation to account for any surplus thereby obtained beyond the sum of £400 and expenses. A loan upon similar terms had been previously obtained and repaid by Liddell. Liddell continued in possession of the furniture, and was sequestrated after he had paid two instalments of the rent, when the furniture was claimed by his trustee. It was held that Warr was entitled to the furniture: by Lord Young, on the ground that a security in the form of a sale was perfectly valid, provided that both parties were *sui juris*, and that no rule of bankruptcy law was violated;[3] by the Lord Justice Clerk, Lords Rutherfurd Clark and Trayner, on the ground

[1] *Allan & Co.'s Tr.* v. *Gunn*, 1883, 10 R. 997; see also *Lindsay* v. *Shield*, 1862, 24 D. 821.

[2] *Darling* v. *Wilson's Tr.*, 1887, 15 R. 180.

[3] This view, it would appear, is expressly met by s. 60, subs. 4, of the Sale of Goods Act, by which sales intended to operate as securities are excluded from the provisions of the Act.

that the transaction was a sale, and fell under the category of *M'Bain* v. *Wallace*.[1]

Cases held to be mere securities.

On the other hand, there are cases which are difficult to distinguish from those just narrated, in which the facts have been held to point to a security and not a sale, and in which, therefore, it has been held that the Mercantile Law Amendment Act did not apply. Thus in *Seath & Co.* v. *Moore*,[2] an agreement was made between a firm of shipbuilders and a firm of ship engineers, with regard to all contracts made or that should be made between them, that when a payment to account was made under any contract for building ship's engines, "the portions of the subjects thereof, so far as constructed, and all materials laid down for the purpose of constructing the same" in the engineer's yard, should become the absolute property of the shipbuilders, subject only to "the lien" of the engineers for any part of the price that might remain due. Five contracts had been entered into between the parties, and this agreement was of even date with the last. In some contracts there were provisions for payment by instalments for the ship engines thereby ordered, in others there were not; but while on each contract advances were made to the engineers as they required money, in no case was payment by instalments regularly made. The engineers failed before they had completed any of these contracts, and while there were a number of unfinished engines and materials in their yard. It was held that the general agreement was not a *bonâ fide* contract of sale, but only a security, and that it was a security which the law of Scotland would not recognise.

Seath & Co. v. Moore.

Pattison's Tr. v. Liston.

Again, in *Pattison's Tr.* v. *Liston*, the effect of an *ex facie* absolute sale, qualified by a back-letter acknowledging it to be only a security, came up for decision. A loan was made by a house agent on the security of the furniture in a house belonging to one of his clients, by an absolute contract of sale, with a back-letter acknowledging that it was in reality a security. The furniture continued in possession of the seller; and though an attempt was made to argue that the purchaser had obtained possession, because he was intrusted with the keys of the house while the tenant was absent, yet, as it was held that he had those keys only in his capacity of house agent, it was clear that no delivery had been taken, and the case was argued on the authority of *M'Bain* v. *Wallace*. It was, however, decided that the transaction, though nominally a sale, was in reality a security, and that, on the

[1] *Liddell's Tr.* v. *Warr*, 1893, 20 R. 989.

[2] 1884, 12 R. 260; affd. 1886, 13 R. (H. L.) 57.

sequestration of the borrower, his trustee was entitled to the furniture.[1]

Anderson v. *Anderson's Tr.*

The case of *Anderson* v. *Anderson's Tr.*[2] shows a tendency to look to the intention of the parties as a test of the validity of the alleged sale. Eight months before his bankruptcy, Anderson granted to his wife a sale-note, by which, on the narrative that he had received from her at various times the sum of £225, out of her separate estate, he sold to her the furniture in his house. No delivery followed. In a question between the wife and the trustee it was held that the furniture fell under the sequestration. This result was arrived at partly on the ground that, even assuming that there was a regular sale, the furniture was "lent or intrusted to the husband" within the meaning of sec. 1, subs. 4, of the Married Women's Property Act, 1881,[3] and therefore fell to be treated as part of his assets in his bankruptcy; but opinions were intimated that the facts did not disclose a *bonâ fide* sale, and that the Mercantile Law Amendment Act did not apply.

In a case now pending, the following arrangement has been held by Lord Kincairney (Ordinary) not to constitute a sale: A. purchased an engine-making business, with the machinery, for a price to be paid in instalments, and took a lease of the premises for ten years. In order to pay the first instalment, he borrowed £400 from B. He granted a disposition whereby, in consideration of £400, he sold and disponed to B. "the fixed plant and articles enumerated in the inventory and valuation thereof, and situated in Dalry Engine Works." The articles thus sold for £400 were valued at £2112, 14s. 8d. By the disposition, power was given to B. to take possession of the subjects without any further authority, but the lease on which A. held the premises was not assigned. B. granted a back-letter, by which he agreed to re-sell the subjects at £400, with interest at 20 per cent., and by which he leased or hired the machinery to A., without fixing any term of endurance for the lease or hire. The words "hire" and "interest" were used as symonymous throughout the back-letter. A. undertook to pay £60 every six months until the £400 was repaid. Some of the articles were fungibles, which were used up by A. in carrying on his business. B. admitted in evidence that if he sold the subjects for more than £400, he was bound to account for the surplus. On the bankruptcy of A., the Lord Ordinary held that

[1] *Pattison's Tr.* v. *Liston*, 1893, 20 R. 806.

[2] 1892, 19 R. 684; contrast *Scott* v. *Scott's Tr.*, 1889, 16 R. 504.

[3] 44 & 45 Vict. c. 21.

this arrangement was not a sale, but an attempt to create a security. He distinguished the case from *Liddell's Tr.* v. *Warr*[1] mainly by the discrepancy between the nominal price and the real value of the subjects alleged to have been sold. He held, further, that constructive delivery had not been effected, and therefore that the security was unavailing in a question with A.'s trustee on bankruptcy.[2]

Cases of *ex facie* sale of stock of shop.

In certain cases it has been attempted to secure an advance of money by an *ex facie* sale to the lender of goods situated in the borrower's shop or store, reserving to the borrower the right to repurchase any particular article by paying cash for it as per stock-list. This process, had it been allowed the effect intended, would have enabled any tradesman to hypothecate his whole stock-in-trade, while still appearing to carry on business as the undivested owner. But a sale of this nature has never been held to be anything but an attempt to create a security without possession, and the creditors of the apparent seller have always been preferred.[3]

Result of the cases.

It is difficult, if not impossible, to reconcile these and similar cases, or to extract from them any definite rule as to the distinguishing points between a sale and a security in the form of a sale. The criterion might be proposed, that if the subject in question is conveyed to the purchaser as full satisfaction of the money he has paid, it is a sale; but if, besides the subject, he has also the personal obligation of the seller, it is a security. This may be often useful, but is not entirely satisfactory, as in several cases the facts have been held to indicate a sale even where the party held to be a seller continued personally liable. Thus the rule would not explain the opposite decisions arrived at in the cases of *Liddell's Tr.* v. *Warr* and *Pattison's Tr.* v. *Liston*, in each of which the apparent seller continued under a personal obligation, although the former case was held to be one of sale, and the latter of security. Nor does it seem very consistent with *Darling* v. *Wilson's Tr.*, which was upheld as a sale, though it would appear that the seller, as the principal in a cash credit in which the buyer was cautioner, might, if he had continued solvent, have been made liable to repay the whole advance.

It has been repeatedly laid down that the Court will look at

[1] 1893, 20 R. 989.

[2] *Robertson* v. *Walker*, 14 July 1896, 4 S. L. T. No. 139.

[3] *Mackinnon* v. *Max Nansen & Co.*, 1868, 6 Macp. 974; *Stiven* v. *Scott & Simson*, 1871, 9 Macp. 923; *Gourlay* v. *Hodge*, 1875, 2 R. 738; *Rhind's Tr.* v. *Robertson & Baxter*, 1891, 18 R. 623; *Paterson's Tr.* v. *Coyle*, 1891, 29 S. L. R. 87—a "lease" of a pawnbroker's stock. See, however, *ante*, p. 200, note.

the real nature of the transaction, and not at the name which the parties choose to give to it; but it is nevertheless difficult to understand, on this principle, how some of the cases could be held to be sales. But it would seem clearly not to be enough to call the transaction a sale, or to contract that an article, especially if unfinished, is to be held as sold on a certain payment being made, if all the other facts of the case point clearly to a security.[1] On the the other hand, the fact that the intention of the parties, in entering into the contract, was to secure an advance of money, will not prevent its being upheld as a sale under the Mercantile Law Amendment Act, if the Court is satisfied that a sale has really been carried out;[2] and it would also appear that a transaction may be valid as a sale although the purchaser is morally bound, or even under a legal and binding obligation, to account to the seller for any profit he may make by reselling the subject in question.[3] And a right of repurchase to the seller is not repugnant to the character of a sale, even, apparently, although it is conceived in terms which would prevent the purchaser from reselling during the period for which the right of repurchase is stipulated.[4] But in a sale there must be a price; and therefore if there is either no price, or a grossly inadequate one, the transaction is not a sale.[5]

The question in such cases now one of intention.

It is doubtful how far the cases above narrated will be held to be authoritative on similar facts arising under the Sale of Goods Act, 1893. The words of that Act are: "The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."[6] So that while under the Mercantile Law Amendment Act the question to be decided was whether the transaction was a *bona fide* sale or not, under the present law it will apparently be whether the nominal sale was intended by the parties to operate as a security. Now there is no doubt that in the case of *M'Bain* v. *Wallace*,[7] the parties, although they carried out a sale, intended the transaction to operate as a security for an advance of money. Even if the intention in that case had been doubtful, it was perfectly clear

[1] *Seath & Co.* v. *Moore*, 1884, 12 R. 260; affd. 1886, 13 R. (H. L.) 57.

[2] *M'Bain* v. *Wallace*, 1881, 8 R. 360; affd. 1881, 8 R. (H. L.) 106.

[3] *Ib.*

[4] *Liddell's Tr.* v. *Warr*, 1893, 20 R. 989.

[5] *Stiven* (Watson's Tr.) v. *Cowan*, 1878, 15 S. L. R. 422; *Robertson* v. *Walker*, 1896, 4 S. L. T. No. 139.

[6] Sale of Goods Act, 1893, s. 61, subs. 4.

[7] *Supra.*

in the more recent cases of *Allan*,[1] *Darling*,[2] and *Liddell's Tr.*[3] In all these cases the intention to enter into a sale for the purpose of creating a security was disclosed by the proof, the judgment in each case being that the intention had been successfully carried out. But if the criterion is in future to be, not whether a sale was actually carried out, but whether that sale was intended to operate as a security, it is submitted that cases of the class of *M'Bain* v. *Wallace*[4] will in future be held not to satisfy the test, and will not give the apparent purchaser any right to the goods on the bankruptcy of the seller. This has been held by Lord Kincairney (Ordinary) in a case at present before the Court.[5] It is probable that in cases under this section it will be competent to look at the antecedent communings of the parties in order to see what their intention was, even although the contract is reduced to writing. The competency of doing so in cases under the Mercantile Law Amendment Act was doubted by Lord Watson.[6]

Security cannot be completed by taking delivery in violation of the contract.

Where a security has been attempted by a sale without delivery, it would seem that the lender is not entitled, on apprehension of the borrower's bankruptcy, to turn it into a contract of pledge by taking possession under his title of ownership, unless the borrower distinctly agrees to such a change in the contract. Thus in *Pattison's Tr.* v. *Liston*,[7] it was held that the borrower obtained no valid possession of the furniture by using his position as house agent to take possession of some of it, without the knowledge or consent of the borrower.

Securities by sale followed by lease to the seller.

The difficulties which beset a security in the form of a sale have led to the adoption in many cases of a conveyance giving the creditor an absolute title of property, followed by a lease of the subjects to the debtor. The guiding principle in cases of this form of security is not the application of the Mercantile Law Amendment Act, but the question whether constructive delivery has or has not been effected. In cases falling under the class of *M'Bain* v. *Wallace*, it was usually admitted that no delivery had taken place, but contended that this was of no importance under the Mercantile Law Amendment Act; while in the class of cases now to be considered it is usually argued that delivery has taken

[1] *Allan & Co.'s Tr.* v. *Gunn*, 1883, 10 R. 997.

[2] *Darling* v. *Wilson's Tr.*, 1887, 15 R. 180.

[3] *Liddell's Tr.* v. *Warr*, 1893, 20 R. 989.

[4] 1881, 8 R. 360; affd. 8 R. (H. L.) 106.

[5] *Robertson* v. *Walker*, 14 July 1896, 4 S. L. T. No. 139.

[6] *M'Bain* v. *Wallace*, 1881, 8 R. 360: affd. 1881, 8 R. (H. L.) 106, at p. 115.

[7] 1893, 20 R. 806, *ante*, p. 225.

place, and that although the subject may, as a matter of fact, remain in the natural possession of the transferor, yet he possesses as the agent or servant of the transferee, and therefore that the subject has come to be in the civil possession of such transferee.[1] In view of the fact that the 1st section of the Mercantile Law Amendment Act is now repealed, this latter argument is likely to be more frequently put forward. If the circumstances admit of this argument being successfully maintained, the security is good, because it is completed by constructive delivery of the subject to the security-holder. To effect this result, it would appear to be indispensable that the continued natural possession of the transferor should be ascribable to some subordinate title, such as lease or hire, derived from the transferee.[2]

Cases to which this form of security is applicable.

This form of right in security is more particularly applicable in cases where moveable subjects, such as furniture or machinery, are situated in premises which either belong to the transferee or creditor, or which are conveyed to him by *ex facie* absolute disposition by the transferor or debtor. In the latter case, the right over the moveables is an accessory to the heritable security, and supplies the place of the right to poind the ground, which a heritable creditor with an *ex facie* absolute title does not possess.[3]

Review of the cases.

As the cases on this point are not numerous, and are all marked by special features, a short résumé of them is given here.

Union Bank v. *Mackenzie.*

In *Union Bank* v. *Mackenzie*,[4] Cameron & Co., the proprietors of a mill and machinery, had granted to the bank an *ex facie* absolute disposition of the mill, but no right to the machinery. They were sequestrated, and an arrangement was arrived at between their trustee and the bank by which the mill and machinery were to be purchased by one M'Murray with money advanced by the bank, and an absolute title to both was to be taken in favour of the bank, under an obligation to grant a lease to M'Murray or his assignee, and to convey the whole premises to him upon repayment of the sum advanced. M'Murray conveyed his right to Durham & Sons, and they carried on business and were in possession of the mill and machinery under this arrangement, though without any actual lease. On their sequestration, the question arose whether the right of the bank to the machinery, which they had obtained by the *ex facie* absolute con-

[1] *Ante*, p. 194.

[2] It is not suggested that the distinction holds good in every case, as in certain cases, notably in *Darling* v. *Wilson's Tr.* (1887, 15 R. 180), both arguments were open to the security-holder.

[3] *Scottish Herit. Secur. Co.* v. *Allan*, 1875, 3 R. 333.

[4] 1865, 3 Macp. 765.

veyance, had been perfected by possession. The Court answered the question in the affirmative, holding that the natural possession of Durham & Sons, virtually as lessees from the bank, must be held to be the civil possession of the bank. The Lord President (Inglis) put the case as follows: "An absolute disposition with back-bond is a well-known mode of constituting a security over heritable subjects. It is different in its character and effects from a bond and disposition in security. In the one case the absolute title is with the creditor, under an obligation to make it over upon being repaid his advances; in the other case it remains with the debtor. Can this kind of thing be extended to moveables? I see no reason why it should not be so, if the creditor is put in possession. But what constitutes possession of moveables? Machinery may be possessed personally, or it may be possessed by being let to a tenant or a third party, as, for instance, a custodier, who is neither owner nor tenant, may be in possession of it."[1]

Duncanson v. *Jefferis.*

A somewhat analogous case is *Duncanson* v. *Jefferis' Tr.*[2] There the proprietor of an hotel, letting it to a tenant unfurnished, advanced £10,000 to him in order to furnish it, under an arrangement by which half the furniture (which cost in all £20,000) was to be invoiced to him and let to the tenant, and the loan was to be paid off in ten instalments, a proportionate part of the furniture becoming the property of the tenant on the payment of each instalment. After three instalments had been paid, the tenant failed, and the proprietor was held entitled to the proportion of the furniture that still remained to him under the agreement, on the ground that it was his property, and that the possession of the tenant was to be ascribed to the subordinate title of lease.

These cases, it must be observed, only go the length of recognising the civil possession of the creditor through the natural possession of the debtor, in cases where the debtor had no antecedent right to possess. The Court has hesitated to sustain arrangements of a similar kind to that made in *Union Bank* v. *Mackenzie*,[3] where the debtor has been in possession of the subjects as owner, and afterwards conveys them to the creditor, continuing to possess on the title of a lessee from him.

Orr's Tr. v. *Tullis.*

In *Orr's Tr.* v. *Tullis*,[4] Orr was the proprietor of a newspaper and of printing plant, which he kept and used in premises belonging to Tullis. Being in want of money, he sold to Tullis the

[1] *Union Bank* v. *Mackenzie*, 1865, 3 Macp. 765, per Lord President, at p. 772.

[2] 1881, 8 R. 563.

[3] 1865, 3 Macp. 765.

[4] 1870, 8 Macp. 936.

newspaper and plant, and entered into a new lease with him, paying rent for them as well as for the premises. In the documents of transfer it was expressly stated that the transaction was a *bonâ fide* sale, and that Orr should have no right of repurchase. Tullis was registered as owner of the newspaper under the Act 6 Will. IV. c. 76, and labels "R. Tullis, owner," were affixed to the machinery. It was held by Lord Gifford (Ordinary), in Orr's sequestration, and acquiesced in, that registration under the Act was equivalent to delivery of the newspaper. With regard to the machinery, it was held that it had been delivered by passing into the civil possession of the transferee, Tullis, because Orr, at the date of the new lease ceased to possess as owner, and in future possessed as lessee. It was, however, stated that the transaction was upheld because it was a *bonâ fide* sale, and would not have been good had it been merely a security. The reason of this is not clear, as if the delivery involved in the change of the title of possession was sufficient to pass the property on a contract of sale, it ought to have been sufficient to complete the right of the creditor on a contract creating a security.[1]

Robertson v. *M'Intyre.*

A similar decision was arrived at in the case of *Robertson* v. *M'Intyre*.[2] There Robertson, who rented from his sisters a mill and part of the machinery, the rest being his own, sold his part to them, and five months afterwards entered upon a new lease of the whole subjects at the same rent. On his bankruptcy, the title of his sisters to the whole machinery was sustained, on the ground that the transaction was a *bonâ fide* sale, and that the machinery sold had come into the civil possession of the sisters through the natural possession of Robertson under the lease. But it was remarked that in such cases it must be proved that the transaction was really a sale.[3]

Stiven v. *Cowan.*

In *Stiven* v. *Cowan*—a case of a security over machinery in favour of a cautioner—the security-holder mainly relied on an elaborate form of symbolical delivery, by taking sasine, which had been gone through; but he also argued, that as he had granted a lease to the debtor, the machinery had come to be in his civil possession, through the natural possession of the debtor under the lease. The circumstances which militated against this view were: (1) that as the assignation in favour of the cautioner bore to be for certain good causes and considerations, but not for any price paid, it could not be regarded as a sale; and (2) that the lease had remained merely on paper, and had never been followed

[1] *Orr's Tr.* v. *Tullis*, 1870, 8 Macp. 936.
[2] 1882, 9 R. 772.
[3] *Robertson* v. *M'Intyre*, 1882, 9 R. 772.

by any payment of rent. The Court declined to admit the argument that constructive delivery had been effected, and held that the security was ineffectual.[1]

Heritable Securities Invest. Assoc. v. *Wingate & Co.'s Tr.*

In *Heritable Securities Invest. Assoc.* v. *Wingate & Co.'s Tr.*[2] a somewhat complicated arrangement was entered into, in order to create a security over moveables, by placing the creditor in the position of a landlord, and the debtor in that of a tenant. The association made a loan to Wingate & Co., a firm of shipbuilders, under the following four deeds:—

1. An *ex facie* absolute disposition of the shipbuilding-yard, and the machinery therein.

2. A personal bond for the sum lent, with provisions for repayment.

3. A lease of the yard and machinery to the borrower for ten years, at a rent greatly in excess of the rental of the subjects in the valuation roll, and

4. A back-letter, explaining that the absolute disposition was truly only a security, and that all sums paid as rent were to be deemed as payments to account of the loan, principal and interest. Wingate & Co. continued to possess the subjects under these titles until they were sequestrated, when the association presented a petition for sequestration of the *invecta et illata* in the yard, on the ground that they were entitled to a hypothec, as landlords, for the rent. In a question with the trustee in the sequestration, it was held (diss. Lord Young) that the relation of landlord and tenant had never been created between the parties, and that the so-called lease was merely an attempt to create a security over moveables, which was of the nature of a fraud on the bankruptcy laws. It should be observed that although the creditors in this case chose to proceed on the landlord's hypothec, as giving the widest possible right over the moveables, yet the decision would have been the same had they claimed the machinery as conveyed to them by the *ex facie* absolute disposition, because the only ground on which they could have maintained that they were in possession under that disposition would have been that the continued possession of the disponer and borrower was to be ascribed to his right under the lease, and therefore that they, the creditors, possessed as landlords through the possession of their tenant.

Mitchell's Tr. v. *Gladstone.*

In *Mitchell's Tr.* v. *Gladstone*, the question was not with the creditors, but with a subsequent assignee of the person who had

[1] *Stiven* (Watson's Tr.) v. *Cowan*, 1878, 15 S. L. R. 422, narrated *ante*, p. 190–1.

[2] 1880, 7 R. 1094.

granted the right of which the validity was in dispute. Mitchell was sequestrated; but before a trustee was appointed, an arrangement was made whereby his father-in-law, Blackwood, undertook to pay the creditors 1s. 6d. in the pound. In respect of the composition, Mitchell assigned his furniture to Blackwood. After the sequestration was closed, Blackwood assigned the furniture to the marriage-contract trustees of Mr. and Mrs. Mitchell, for behoof of Mrs. Mitchell in liferent, free from the *jus mariti* of her husband. The furniture remained in a house tenanted by Mitchell, and was used by him as before. Thereafter Mitchell obtained an advance of £130 from Gladstone, and in security thereof sold the furniture to him, and took it on hire at a rent of £10 every three months. As this rent fell into arrears, Gladstone proposed to remove the furniture, and the marriage-contract trustees brought an action of interdict against him. Gladstone pleaded that the assignations by Mitchell to Blackwood, and by Blackwood to the marriage-contract trustees, had never been completed by any delivery or change of possession; while in the case of the assignation in his own favour, the furniture had been placed in his civil possession through the natural possession of Mitchell on a contract of hire. It was held that the right of the marriage-contract trustees was complete, as, assuming the *bonâ fides* of the transaction, the furniture was afterwards in the possession, not of Mitchell, but of his wife, and her possession was to be considered the civil possession of the marriage-contract trustees. Therefore, at the time when Mitchell sold the furniture to Gladstone, he was neither the owner nor in possession of it, and therefore could transfer no right to the purchaser.[1]

Robertson v. *Walker*.

In *Robertson* v. *Walker*, the latest of this class of cases, the machinery in a mill occupied by the borrower was assigned to the lender, and retained by the borrower nominally on hire. The lender was not the owner of the mill, and no attempt was made to give him the title of an owner. It was held (by Lord Kincairney, Ordinary) that the transaction was not a sale, and that the continued possession of the borrower was to be ascribed to his ownership, and not to the lease. The security was therefore held ineffectual.[2]

Result of the cases.

From these cases it would appear that the natural possession of a borrower will be held to be the civil possession of a lender (1) where the loan is antecedent to the borrower's possession, and

[1] *Mitchell's Tr.* v. *Gladstone*, 1894, 21 R. 586.

[2] *Robertson* v. *Walker*, 14 July 1896, 4 S. L. T. No. 139, narrated *ante*, p. 226.

the title is so arranged that the borrower possesses *ab initio* as the tenant of the lender; and (2) where the subjects are sold to the lender, and the borrower continues to possess as his tenant. Thus if A., proposing to purchase a mill and machinery, desires to borrow money on both, the first method may be adopted. The title to the mill and the machinery will then be taken in the name of the lender, he will grant a lease to A., and provision may be made for the conveyance of the mill and machinery to A. when the loan is paid. The lender's security will be good in A.'s bankruptcy, unless perhaps in the case where the bankruptcy occurs within sixty days of the transaction.[1] Assuming, however, that A. is already in possession of the mill and machinery, and wishes to borrow money upon them, the transaction, in order to give a security over the machinery, must probably take the form of a sale to the lender, and a lease by him to A. If the transaction is held to be a sale, which it apparently may be, even although it was intended to form a security,[2] the lender may in this way obtain a preference over the machinery, on the ground that he has obtained civil possession of it, through the natural possession of A. under the lease from him.[3] The cases seem to lead to the conclusion that this method will be unavailing unless the right of the lender is founded on a sale.[4] But supposing that A. should grant an *ex facie* absolute disposition of the mill and machinery to the lender, and take a lease of both from him, would the same reasoning not be applicable? A. is placed in the position, in point of title, of a lessee of the mill and machinery; and it would seem at least arguable that his continued possession of them is to be ascribed to the lease, and therefore to be held to be the civil possession of the lender.

Moore v. *Gledden*.

The somewhat anomalous case of *Moore* v. *Gledden*,[5] the facts of which have been already narrated, may be mentioned here, as a contrast to those above detailed. It was there held that contractor's plant, brought on to the railway under a contract by which the company stipulated for a security over it, was in the natural possession of the company by being brought on to their ground, though it was in the custody of the contractor. This

[1] *Union Bank* v. *MacKenzie*, 1865, 3 Macp. 765. Opinion of Lord Gifford (Ordinary) in *Stiven* v. *Watson*, 1878, 15 S. L. R. 422, at p. 423.

[2] *Ante*, p. 227.

[3] *Orr's Tr.* v. *Tullis*, 1870, 8 Macp. 936; *Robertson* v. *Macintyre*, 1882, 9 R. 772; *Darling* v. *Wilson's Tr.*, 1887, 15 R. 180.

[4] Cases in note 3, and *Stiven* v. *Watson*, 1878, 15 S. L. R. 422.

[5] 1869, 7 Macp. 1016; narrated *ante*, p. 201.

was held on the ground that a railway company is in the natural as well as the civil possession of the line. Similar agreements between landlord and tenant have been held to be attempts to create a security over moveables without possession, because the landlord is not in the natural possession of the land let to the tenant.[1]

Securities over trade fixtures.

When the subjects over which the security is proposed are trade fixtures, the security may be sustained, without actual possession, on a different principle. Such fixtures, on being affixed by the tenant, are held to become *partes soli*, and therefore to be in the meanwhile the property of the landlord, subject to the right of the tenant to remove them at the end of the lease. Therefore the tenant, in assigning such fixtures in security, assigns only an incorporeal right, *i.e.* the right to remove the fixtures at the end of the lease, and therefore an assignation of that right may be completed by intimation to the landlord, who is in the position of debtor in the obligation to restore the fixture.[2]

Reputed ownership.

Although the circumstances of a security may be such that the subject has passed into the possession of the lender by delivery, actual or constructive, yet, if it is afterwards suffered to revert to the possession of the borrower, and to remain in his possession, it may be held to be subject to the diligence of his creditors on the ground of reputed ownership. The nature of this doctrine was discussed at length in the case of *Anderson* v. *Buchanan*.[3] There Anderson purchased furniture belonging to Gordon from the trustee in the sequestration of the latter. He allowed it to remain in the possession of Gordon, and to be used by him, and it was poinded by a creditor of his. In these circumstances it was held by the majority of the Court that long-continued possession of moveable property for personal or family use infers property in them for the benefit of the creditors of the possessor, in a question with the party who, as owner, had allowed that possession. But the opinion of Lord Moncreiff, who dissented, has since been held to be the more correct statement of the law.[4] The decision in *Anderson* v. *Buchanan* resulted from a failure to distinguish reputed ownership from the presumption of property arising from possession of moveables. The mere fact of possession of moveables raises a presumption that the possessor is the owner,

[1] *M'Gavin* v. *Sturrock's Tr.*, 1891, 18 R. 576; *Johnston* v. *Sprott*, 1814, Hume, p. 448.

[2] *Miller* v. *Muirhead*, 1894, 21 R. 658; cf. *Brand's Trs.* v. *Brand's Trs.*, 1874, 2 R. 258; revd. 1876, 3 R. (H. L.) 16.

[3] 1848, 11 D. 270.

[4] Bell, *Com.* i. 269; *Marston* v. *Kerr's Tr.*, 1879, 6 R. 898; *Orr's Tr.* v. *Tullis*, 1870, 8 M. 936.

to the extent, in a question between a possessor and a non-possessor, of laying upon the latter the *onus* of proving that the moveables belong to him. But this presumption goes no further, and does not bar the true owner, in a question with the possessor, with his creditors, or with anyone deriving right from him, from proving the fact that the moveables belong to him. Proof of the fact of ownership at once displaces the presumption arising from possession. A plea of reputed ownership, on the other hand, is founded on estoppel or personal bar, and is in effect a plea that the true owner is barred, by his conduct in the matter, from proving the fact that the moveables in question are his. It must be supported by an allegation that the owner has collusively enabled the possessor to maintain an appearance of ownership.[1] Thus reputed ownership can have no place except in cases where the property in the moveables is separated from the possession. If A. has sold moveables to B., and the property has passed, but B. has allowed them to remain in, or to revert to, the possession of A., creditors of A. may be entitled to plead reputed ownership, if the conduct of B. amounted to collusion. But if A. has sold moveables to B., and the property has not passed, A. is not merely the reputed, but the real owner, of the goods, and therefore no question of reputed ownership can arise, because the property and the possession are not separated.[2] Thus the 1st section of the Mercantile Law Amendment Act, 1856, which prevented the creditors of a seller from attaching goods sold but not delivered, had no bearing on a question of reputed ownership, as it referred to a state of facts in which the possessor had also the title of property. Under the provisions of the Sale of Goods Act, 1893, property in goods sold may pass without delivery, and in such cases the plea of reputed ownership may be applicable, because the property and possession are separated. The answer to such a plea will in all ordinary cases be, that the buyer left the seller in possession, in accordance with the provisions of the contract of sale, and without any intention to raise a collusive semblance of property in him.

It may now be laid down as a general rule, though some expressions in Bell's *Commentaries* are not consistent with it,[3] that a plea of reputed ownership is not applicable to cases where moveables have been placed by one party in the possession of another on deposit, lease, hire, or any similar contract, even

Does not apply where there is a subordinate title.

[1] See Lord M'Laren's Note to Bell, *Com.* i. 305.

[2] See opinion of consulted judges in *Shearer* v. *Christie*, 1842, 5 D. 132, at p. 141.

[3] i. 304; but see also p. 269.

although the possessor had at one time a title of property in those moveables.[1] It has been pointed out that it must be obvious to all persons dealing with others, that there must be many cases in which the property and possession of moveables may be quite legitimately separated.[2] Thus in no ordinary case will goods be held to fall under the reputed ownership of a party who possesses them on a contract of hire, or agency, even although he has an option to purchase. So where a cabowner was sequestrated, and a coachbuilder claimed a right to recover a cab which the cabowner had the use of, on a written contract of hire with option to purchase, it was held that the possession could be ascribed to the contract of hire, and did not raise a case of reputed ownership.[3] Where, again, A. erected a threshing-mill on a farm occupied by B., on a verbal agreement that the property should not pass until the price was paid, and that B. should pay a reasonable rent for it in the meantime, it was held, in a question with the trustee in a private trust for behoof of the creditors of B., that the doctrine of reputed ownership did not apply, as the possession obtained by B. might be ascribed to the subordinate title of lease or hire.[4] But this was observed to be a very narrow case.

Limited application in recent cases.

The plea of reputed ownership may still occasionally be applicable where goods have been sold, and are allowed by the buyer to remain in possession of the seller, under circumstances which give him at least an apparently unrestricted power of disposal of them. The normal, though not the only, case is where furniture belonging to a bankrupt has been sold by his trustee, and the buyer has allowed the bankrupt to remain in the undisturbed possession of it.[5] In *Edmond* v. *Mowat*, A. sold certain bathing-machines to his father, who executed a *mortis causa* deed, leaving them to a son of A., then a child, and directing that A. should continue to have the management of them. No delivery followed on this sale. A. was sequestrated and afterwards discharged, but continued until his death in possession of the bathing-machines, which were not claimed by his trustee in sequestration. On his death, the

[1] Bell, *Prin.* 1317; *Orr's Tr.* v. *Tullis* and *Marston* v. *Kerr's Tr.*, *supra*; *Robertson* v. *M'Intyre*, 1882, 9 R. 772; *Hogarth* v. *Smart's Tr.*, 1882, 9 R. 964; *Scott* v. *Price*, 1837, 15 S. 916 (liferenter).

[2] See opinion of Lord Ivory in *Shearer* v. *Christie*, 1842, 5 D. 132; approved in *Orr's Tr.* v. *Tullis*, *supra*.

[3] *Marston* v. *Kerr's Tr.*, 1879, 6 R. 898.

[4] *Hogarth* v. *Smart's Tr.*, 1882, 9 R. 964. See also cases of sale under suspensive conditions, *infra*, p. 240.

[5] *Anderson* v. *Buchanan*, 1848, 11 D. 270; *Edmond* v. *Mowat*, 1868, 7 Macp. 59; *Thomson* v. *Scoular*, 1882, 9 R. 430; cf. *M'Dougall* v. *Whitelaw*, 1840, 2 D 500.

machines were claimed by his son, in virtue of the above-mentioned deed, and by his creditors. It was held that as there had been no delivery to his father, A. remained the owner of the machines until his sequestration, when they passed to his trustee. After his discharge, as he was not retrocessed, he never became again the owner of the machines. They were, however, subject to his creditors on the ground of reputed ownership.[1] This, however, was a very special case, and it is not very easy to discover, either from the facts or from the judgments, who was the owner of the machines at the date of A.'s death. In ordinary cases, it would appear that furniture bought from the trustee in a sequestration may be left in the possession of the bankrupt without any danger of its being subjected to the diligence of his creditors on the ground of reputed ownership.[2] In *Thomson* v. *Scoular*, A. purchased furniture from a trustee in sequestration, and allowed the bankrupt to remove it from the house where it then was to a house where he had gone to reside. It was there poinded by a creditor on a bond and disposition in security granted by the bankrupt, under a poinding of the ground. It was held that A. was entitled to reclaim it from the poinder, as there was nothing in his conduct, in allowing the bankrupt to obtain possession of it, which amounted to collusion, and therefore he could not be barred by reputed ownership from asserting the title he had obtained by the purchase from the trustee.[3] In a recent case much stronger facts were held insufficient to raise a case of reputed ownership. A party died, leaving his furniture to his widow. On her death intestate, no title was made up to the property by the children (of whom there were five), and no definite arrangement was made as to the furniture. Three of the daughters, however, took a house, to which the furniture was removed. Two of these daughters granted a bill, in respect of which the creditor poinded the furniture. The other three children appeared and objected, on the ground that they were joint owners. It was proved that the daughters had on one occasion acted as owners of the furniture, and had assigned it in security of a loan which they afterwards paid. It was held that the furniture was not subject to the poinding, because, whatever assumption of ownership the

[1] *Edmond* v. *Mowat*, *supra*.

[2] *Fyfe* v. *Woodman*, 1841, 4 D. 255; *Thomson* v. *Scoular*, *infra*; *Scott* v. *Scott's Tr.*, 1889, 16 R. 504.

[3] *Thomson* v. *Scoular*, 1882, 9 R. 430. Some stress was here laid on the fact that the furniture was delivered, by removal from the one house to the other, but, since the passing of the Sale of Goods Act, this is unimportant.

daughters may have made, there was no evidence that the other children had collusively assented to it.[1] Cases like these greatly diminish the importance of the doctrine of reputed ownership, but cases may still arise in which the plea will be relevant. Thus where in an antenuptial contract of marriage the furniture and pictures belonging to the husband were conveyed to trustees, but he remained in possession of them, it was decided that a party who lent him money on the security of the pictures, and obtained possession of them, acquired a good title in a question with the marriage-contract trustees, on the ground of reputed ownership.[2]

Reputed ownership under Married Women's Property Act, 1881.

A new form of reputed ownership has been introduced by the Married Women's Property Act, 1881.[3] It is there provided that any money or other estate of the wife lent or intrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend after the other creditors have been satisfied. On this provision it has been held that where a husband sold to his wife (who was possessed of separate estate) the furniture in the house, and continued to use it as before, it was to be regarded as part of his estate on his bankruptcy.[4]

English cases on reputed ownership rest upon statute.

The English law of reputed ownership is the creation of Statute, and is apparently applicable only in bankruptcy proceedings It has a different and wider application than the common-law rule in Scotland, and extends to all goods left in the "order and disposition" of a bankrupt in the course of his business, unless justified by a custom of trade.[5] The English authorities would therefore appear to be of little use, except as illustrations, in a case arising in Scotland.

Sales under suspensive conditions.

The importance of the law of reputed ownership has been greatly diminished by the effect which has been given to sales under suspensive conditions. A suspensive condition in a contract of sale is, in the words of Lord Stair, a condition "so conceived and meant that thereby the bargain is truly conditional and pendant, and so is not a perfect bargain till the condition be existent; neither doth the property of the thing sold pass thereby, though possession follow, till it be performed; as if the bargain be conditional only upon payment of the price at such a time, till

[1] *Glen* v. *Cameron*, 1896, 3 S. L. T. No. 361 (Outer House, Lord Kincairney).

[2] *Hewat's Tr.* v. *Smith*, 1892, 19 R. 403.

[3] 44 & 45 Vict. c. 21, s. 1, subs. 4.

[4] *Anderson* v. *Anderson's Tr.*, 1892, 19 R. 684.

[5] Bankruptcy Act, 1883, s. 44; Robson on *Bankruptcy*, 7th ed., p. 513.

payment the property passeth not to the buyer."[1] The effect of such conditions when validly stipulated is practically to create a security over moveables without possession in favour of a seller of goods. To this class of contract belong sales upon the systems known as hire-purchase and sale or return. The extent and limitations of the right of the seller in such contracts may be considered in two cases: (1) on the bankruptcy of the purchaser, and (2) when the purchaser improperly or fraudulently sells or pledges the subject to a third party.

Rights of seller in such sale. (*a*) In bankruptcy of purchaser.

It would seem to be competent, both at common law and under the Sale of Goods Act, 1893, for a seller of goods to deliver them at once to the purchaser, and yet to retain the right to vindicate them as his property, on the bankruptcy of the purchaser, if the sale is made under the express condition that the property should not pass until after the expiry of a certain period, or until some act is done; as, for instance, until a bill given for the price is honoured, or, in the case of payment by instalments, until all the instalments are paid. In such cases it would appear that the trustee in sequestration takes *tantum et tale*, and therefore, if the condition is not purified, the property in the thing sold remains in the seller, and it will not fall under the sequestration. Thus where a person who had sold cattle, and taken the purchaser's bill at three months for the price, stopped them on the road, and then allowed delivery to be made, on an agreement that if the bill were not honoured at maturity he should be entitled, on payment of grass-mail, to take back his cattle, it was held, on the bankruptcy of the purchaser before the bill became payable, that the seller was entitled to recover the cattle.[2] This case has been doubted, but would seem, on the latest decision on the subject, to be good law.[3] Again, an agreement for the purchase of machinery, of which the purchaser was already in possession, for a price payable in several instalments, and on the

[1] Stair, i. 14. 4. As to the distinction between a sale on credit and a sale on a suspensive condition, see *Wright* v. *Mitchell*, 1871, 9 Macp. 516; *Brandt & Co.* v. *Dickson*, 1876, 3 R. 375; *Clarke & Co.* v. *Miller & Son's Tr.*, 1885, 12 R. 1035. The distinction between the two last cases is very narrow. As to the effect of sending bill of exchange with bill of lading, *infra*, p. 275.

[2] *Macartney* v. *Macredie's Crs.*, 1799, M. App., Sale, No. 1. In *British Linen Co.* v. *Paterson*, 1894, 10 S. L. Rev. 353, A. sold B. a stallion, on the condition that the property should not pass until a bill given by B. for the price should be paid. B. travelled with the stallion for two years, getting the bill renewed. On his bankruptcy, it was held (Sheriff Blair, Inverness) that the property had not passed, and that A. could reclaim the stallion.

[3] More, *Notes to Stair*, p. 88; *Murdoch* v. *Greig*, 1889, 16 R. 396.

condition that the property should not pass until the price was paid, has been held to secure the seller against the risk of the purchaser's bankruptcy.[1] Some doubt was thrown on these cases by the decision in *Cropper* v. *Donaldson*.[2] There a printing machine was delivered upon an agreement which, though nominally one of hire, was held to be in reality a sale with a provision for payment by three instalments, and a condition that the property should not pass until all the instalments were paid. A bill was drawn on the purchaser, on delivery, for the whole price, and the arrangement was that the bill should be renewed on the payment of each instalment, deducting the amount so paid. After one instalment had been paid, a creditor of the purchaser poinded and sold the machine. It was held that the poinding was effectual in a question with the seller of the machine, as the contract was really one of sale, and the agreement that the property should not pass was an attempt to create a security over moveables without possession, which would not be allowed effect by the law of Scotland. In more recent cases, however, the Court has reverted to the principle of the former decisions, and sustained the right of the seller under the suspensive conditions, in a question with the creditors of the purchaser.[3] In *Murdoch* v. *Greig*, the contract known as hire-purchase, or the "three years' system," came up for discussion. A firm of piano makers delivered a harmonium, on an agreement that the customer should take it on hire, paying the sum of £1, 10s. as a deposit on delivery, and £1 every four weeks thereafter, until the amount of £15, 15s. should have been paid, when the harmonium should become the property of the hirer without any further payment. After one instalment had been paid, the purchaser left the country, and the harmonium was sold by public auction under instructions left by her. In these circumstances the piano makers were held to be entitled to recover the harmonium from the person who had bought it at the auction. It was held that the customer had come under a definite obligation, from which she could not resile, to pay the instalments agreed upon; that the contract, though nominally one of hire, was in reality a sale under the suspensive condition that the property should not pass until the price was paid; and that this condition was a perfectly lawful

[1] *Cowan* v. *Spence*, 1824, 3 S. 42; *Wight* v. *Forman*, 1828, 7 S. 175.

[2] 1880, 7 R. 1108.

[3] *Duncanson* v. *Jefferis' Tr.*, 1881, 8 R. 563; *Hogarth* v. *Smart's Tr.*, 1882, 9 R. 964; *Murdoch* v. *Greig*, 1889, 16 R. 396. But see *Liquidator of Brechin Auction Mart Co.* v. *Reid*, 1895, 22 R. 711.

one for the parties to make, and left the property of the article in the seller until the whole price was paid.[1] The actual result in this case would probably now be altered by the provisions of the Factors Act, 1890, as will be shown in the next paragraph, as the question was with a sub-purchaser; but the case remains good as an authority to the effect that a suspensive condition will protect the article sold from the diligence of the creditors of the purchaser. The Sale of Goods Act, 1893, by which, as has already been stated, the property in goods sold passes to the buyer at the time when the parties to the contract intend it to pass, would seem, in this particular, to be merely a statement of the common law as to sales under suspensive conditions.[2]

(*b*) In question with sub-purchaser or sub-pledgee. Title given by Factor's Act, 1890.

It is a further question how far a seller of goods can protect himself, by selling under the suspensive condition that the property shall not pass until the price is paid, from the risk of the purchaser pledging or selling the goods before the price is paid. In *Murdoch* v. *Greig*,[3] such a condition was held effectual even in a question with a purchaser at public auction. But since that decision it has been enacted, by the Factors Act, 1890, and the Sale of Goods Act, 1893, that "where a person having bought or agreed to buy goods, obtains with the consent of the seller,[4] possession of the goods or of the document of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of

[1] *Murdoch* v. *Greig*, 1889, 16 R. 396.

[2] *MacEntire* v. *Crossley* [1895], App. Ca. 457.

[3] 1889, 16 R. 396.

[4] The consent of the seller is a question of fact. It is presumed, in the absence of evidence to the contrary (Factors Act, 1890, s. 2, subs. 4). In a recent English case the leading facts were as follows: A. sold wine, which was lying in a cellar rented by him, to B., to be paid by cash on delivery. Negotiations were entered into to make B. the tenant of the cellar, but it was held, on the evidence, that they had come to nothing. B., without paying the price, induced the keeper of the cellar to allow him to remove the wine, which he stored elsewhere. He then obtained an advance from C. on the security of the wine. It was held that A. had never consented to B. being in possession of the wine, and therefore that C. had obtained no title to it under the Factors Act—*Robinson* v. *Restell*, 1896, 12 T. L. R. 174.

the owner."[1] This differs from similar sections of the former Factors Acts, by including the case of a person obtaining actual possession of goods when he has bought or agreed to buy them, the case previously contemplated having been that of a person obtaining possession of the documents of title to goods.

Effect on contracts of hire-purchase.

On this provision it has been held in England, and would doubtless be held in Scotland if the case should arise, that where there is a sale, or an agreement to buy, the purchaser, when he has obtained possession, is placed in a position in which he has the power to confer a good title on any *bonâ fide* purchaser or pledgee from him, although the sale may have been made under a suspensive condition which would have been sufficient to prevent the goods passing to his trustee in bankruptcy. In *Lee* v. *Butler*, A. obtained possession of furniture on a hire-and-purchase agreement by which he came under an obligation to pay £1 on receiving it, and £96, 4s. three months afterwards, when the furniture should become his own property. He re-sold the goods before the second instalment was paid. It was held that the purchaser was protected, in an action at the instance of the original seller of the furniture, by the provisions of the Factors Act.[2] The question in these cases then comes to be, What is an agreement to buy? For if there is an agreement to buy, it is clear that sec. 9 of the Factors Act, 1890, which is also sec. 25 of the Sale of Goods Act, 1893, applies, and any sale or pledge by the buyer will defeat the right of the seller. In two cases in England this section has been applied where the contract was framed as one of hire, with an option to the hirer to become the owner of the subject by paying a certain number of instalments, but no obligation upon him to continue to pay them.[3] But on one of these cases being appealed to the House of Lords, it was held that a contract of this kind was not an agreement to buy, but only a hire, with an option to the hirer to purchase, and therefore that sec. 25 of the Sale of Goods Act, 1893, did not apply.[4] To make the contract an agreement to buy, it would appear to be necessary that the seller should be under an obligation to sell, and the buyer under an obligation to buy. If either of these

[1] Factors Act, 1890, s. 9; Sale of Goods Act, 1893, s. 25, subs. 2.

[2] *Lee* v. *Butler* [1893], 2 Q. B. 318. *Murdoch* v. *Greig*, 1889, 16 R. 396, *ante*, p. 242, was decided before the Act, and would now probably be held to be governed by its provisions.

[3] *Shenstone* v. *Hilton* [1894], 2 Q. B. 452; *Helby* v. *Mathews* [1894], 2 Q. B. 262.

[4] *Helby* v. *Mathews* [1895], App. Cas. 471.

conditions fail, the contract is not an agreement to buy. In *Helby* v. *Mathews*, a piano was hired on the agreement that the hirer was to pay 10s. 6d. monthly until the sum of 18 guineas was reached, when the piano should become his own property. He was bound to keep it at an address named, and not to remove it without the consent of the owner, but he was entitled to terminate the contract of hire at any time by delivering the piano to the owner. After paying seven instalments, the hirer pawned the piano, and it was held that the owner might recover it from the pawnbroker, because the contract made by the hirer was not an agreement to buy.[1]

Hire with option to purchase.

In *Helby* v. *Mathews* the argument was pressed that the hirer, by improperly pawning the piano, had put it out of his power to return it, and therefore must be held to have agreed to buy it, and pay the remaining instalments. This argument was repelled, on the ground that, as the hirer had only a right to buy by complying with the prescribed conditions, he could not be converted into a purchaser by disposing of the piano in violation of the conditions of his contract. But the case may be different if the contract confers on the hirer an option to purchase at any time by payment of the whole price. It would then appear that by re-selling, or possibly by pawning, the article, he would be held to have exercised his option to purchase, and thus to have become the owner of the article. In *Liquidator of Brechin Auction Mart Co.* v. *Reid*,[2] A. sold to B. by private bargain nine heifers, which were for sale in the premises of the Auction Mart Company, at the price of £58, 5s. B. applied to the company to advance him this sum, which they did upon his signing a printed agreement, of which the main provisions were that the company sent the heifers to be grazed on the farm occupied by B., for which they agreed to pay 1s. 3d. per week for each heifer, and that B. should have the power to become the purchaser at any time at the price of £58, 5s., with interest at five per cent. from the date of the agreement. It was

[1] *Helby* v. *Mathews* [1895], App. Cas. 471. It is probable that in future hire-purchase agreements will be framed in terms which place the hirer or purchaser under no obligation to complete the purchase of the article by paying all the instalments, and leave it open to him to return the article and close the contract at his pleasure. In contracts so framed, provided that they express the real agreement between the parties, the seller will apparently be entitled to recover his property from anyone to whom it is improperly sold or pawned by the hirer, until the last instalment of the hire-purchase money is paid.

[2] 1895, 22 R. 711. The Sale of Goods Act, 1893, was not applicable, as the contract took place before 1st January 1894.

proved that the provisions of this contract, with regard to the payments to be made in name of grass-mail, were never carried out, and had never been carried out in similar agreements formerly made by the company with other parties. B. took possession of the cattle under this arrangement, and re-sold them to C. without giving notice to the company. They were claimed by the liquidator as the property of the company, on the ground that B. had no authority to dispose of them. It was held that the cattle had become the property of the company when they paid the price to A., that they were in B.'s possession on a grazing contract, with an option to purchase them at any time, and that B. must be held to have exercised this option, and to have become the purchaser, when he re-sold them to C. The title of C. was therefore sustained.

Sale or return.

The contract of "sale or return" is another example of a sale under a suspensive condition. By this contract goods are sent by a wholesale to a retail dealer, on the understanding, express or implied, that the latter is to purchase those articles for which he can himself find a customer, and to return the remainder within a fixed or a reasonable time. The leading points of this contract are that the buyer pays a fixed price for the goods; and if he re-sells them, does so for his own benefit, and at his own price.[1] Thus the wholesale dealer, who is the original seller, is not a creditor of the customer who buys the goods from the retail dealer, and has no right to demand, on the bankruptcy of the retail dealer, that the customer should pay the price to him.[2] In one case it was held that the contract of sale or return was a sale under a resolutive condition; that is, that the property in the goods passed to the retail dealer on delivery, but reverted to the wholesale dealer on their being returned unsold.[3] It was also held that the wholesale dealer had no right to demand the return of the goods either before or after the time fixed for their return, because, before that time expired, he was under contract to allow the retail dealer to keep them; after that time, the retail dealer, by keeping, had elected to purchase them, and the wholesale dealer was a personal creditor for the price.[4] The practical application of this theory was that if the retail dealer pawned the goods, the wholesale

[1] Compare opinion of L. J. C. Moncreiff in *Brown* v. *Marr, Barclay, etc.*, *infra*, at p. 453, and opinion of Lord Young in *Macdonald* v. *Westren*, *infra*, at p. 989.

[2] *Ex p. White*, 1870, L. R. 6 Ch. 397. See distinction between purchaser on sale or return and *del credere* agent drawn in this case per Mellish, C. J., at p. 403.

[3] *Brown* v. *Marr, Barclay, etc.*, 1880, 7 R. 427.

[4] *Ib.*

dealer could not reclaim them from the pawnbroker as his property. The logical conclusion would seem to be, that if the wholesale dealer had no right to reclaim the goods, they must fall under the bankruptcy of the retail dealer. But when this point actually arose, in *Macdonald* v. *Westren*, it was held that the contract of "sale or return" was a sale under a suspensive condition, by which the property did not pass to the retail dealer until he re-sold the goods; and therefore that if he was sequestrated while they were still in his possession, the wholesale dealer could reclaim them from the trustee.[1] The grounds of judgment in these two cases are, it is submitted, irreconcilable; but this is of the less importance since the effect of this contract in passing the property of the goods has been dealt with in the Sale of Goods Act. It is there provided: "Where goods are delivered to the buyer on approval or 'on sale or return,' or other similar terms, the property therein passes to the buyer: (*a*) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; (*b*) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, at the expiration of that time, and, if no time has been fixed, at the expiration of a reasonable time. What is a reasonable time is a question of fact."[2]

Effect of Sale of Goods Act, 1893.

On this Statute it would seem clear that goods sent "on sale or return" are sold under a suspensive condition, and therefore that, until the condition is purified, either by a sub-sale or by the expiration of the time, the retail dealer has no property in them. Therefore, if he disposes of them in a way not contemplated in the contract,—if, for instance, he pawns them,—it is clear that, apart from the Factors Act, he cannot give the pawnbroker a good title.[3] Nor would they pass to his trustee in sequestration. But, as has been already pointed out, where a person has bought or agreed to buy goods, and is in possession of them with the consent of the seller, any sale, pledge, or other disposition by him to a third party, who takes in good faith, will have the same effect as if the person so disposing of the goods had been a mercantile agent intrusted with the possession of them with the consent of the seller.[4] Then the question comes to be whether a person who has obtained goods

[1] *Macdonald* v. *Westren*, 1888, 15 R. 988.

[2] Sale of Goods Act, 1893, s. 18, subs. 4.

[3] See *Mitchell* v. *Heys*, 1894, 21 R. 600; and opinion of Lord Young in *Macdonald* v. *Westren*, *supra*.

[4] Factors Act, 1890, s. 9; Sale of Goods Act, 1893, s. 25, subs. 2.

on "sale or return" has either bought or agreed to buy them. On the principle of the decision in *Helby* v. *Mathews*,[1]—*i.e.* that to make an agreement to buy any particular article, the buyer must be under an obligation to buy that article, and to pay the price,—it would seem clear he has not. For, having the right to return the goods, he has certainly not bought them; and as he is under no obligation ultimately to buy them, he would seem not to have made an "agreement to buy." From this the conclusion must be, that if a wholesale dealer sends goods to a retail dealer on sale or return in the ordinary course of business, and the retail dealer improperly pawns them, the wholesale dealer can recover them from the pawnbrokers as his property, without being forced to pay the amount for which they were pawned.[2] This, it must be noticed, is a conclusion exactly opposite to that arrived at, on similar facts, in the case of *Brown* v. *Marr, Barclay, etc.*,[3] which was decided before the passing of the Sale of Goods Act, 1893.

Result if retail dealer keeps the goods beyond the time agreed on.

On the other hand, if the retail dealer keeps the goods beyond the stipulated time, he has no longer any right to return them, though, if his failure to return them has been due to the fault of a third party, it has been held in England to be debateable whether he is bound to keep them.[4] But in ordinary cases, on the expiration of the time agreed upon,[5] or of a reasonable time, the retail dealer is held to have purchased the goods, and the wholesale dealer is a creditor for the price. Therefore if, after the time has expired, the retail dealer is sequestrated, the goods will pass to his trustee, and the wholesale dealer must rank as an ordinary creditor. Similarly, if he then pledges the goods, the wholesale dealer has no right to recover them from the pawnbrokers.[6]

[1] [1895], App. Cas. 471, *ante*, p. 245.

[2] The argument that by pawning the goods he had elected to purchase them (cf. *Liquidator of Brechin Auction Mart Co.* v. *Reid*, 1895, 22 R. 711, *ante*, p. 245) would be excluded, because the pawning of the goods would be a breach of the contract.

[3] 1880, 7 R. 427.

[4] *Ray* v. *Barker*, 1879, 4 Exch. Div. 279.

[5] Dating from the time the goods arrive, not from the time they are sent off—*Jacobs* v. *Harbach*, 1886, 2 T. L. R. 419.

[6] See English law, which the Act reproduces, in *Moss* v. *Sweet*, 1851, 16 Q. B. 493, 20 L. J. Q. B. 167. Until the expiration of the time fixed for returning them, or of a reasonable time, the goods are at the risk of the wholesale dealer—*Pinder & Co.* v. *Fullerton*, 1889, Guthrie's *Sheriff Court Cases*, 2nd series, 528; *Elphick* v. *Barnes*, 1880, 5 C. P. D. 321.

CHAPTER VIII

SECURITIES BY TRANSFER OF DOCUMENTS OF TITLE

Documents of title.
How far negotiable.
Delivery-order as a method of transferring right to goods.
Nature of right in security transferred.
Completion of right of security-holder.
Questions between granter of delivery-order and indorsee.
Right of seller of goods to arrest them in his own hands.
Seller's retention for debt due by indorsee of delivery-order.
Right of indorsee to enforce implied conditions.
Bill of lading.
Indorsement as a transfer of the goods.
Questions between indorsee and shipowner.
Stoppage *in transitu*.
Right of indorsee in security.
Shipping documents.

Subject of the chapter.

THE methods of constituting securities over corporeal moveable subjects which are represented by documents of title differ materially from those which must be employed when no such document of title exists. For if circumstances exist which entitle the owner of goods to issue a document which will be recognised as a symbol thereof, or if goods are in the hands of a custodier who, in the ordinary course of trade, issues a document by which he undertakes to deliver them to the person who is in right of it, the transfer of a document thus issued is, for many purposes, equivalent to the transfer of the goods themselves.

Ownership of goods does not necessarily entitle a party to issue a document of title.

It is a question of some difficulty what circumstances will entitle the owner or the custodier of goods to issue a document of title which will be recognised by the Court as a symbol or representative of the goods. It is not of course possible for everyone who is in possession of moveable property to issue a certificate containing an obligation to deliver such property, and to insist on the transfer of such certificate being recognised as an appropriate method of transferring the right to such property.[1] It is possible, however, that if such a certificate were issued, containing, for instance, an obligation or promise to deliver to the bearer the

[1] *Gunn* v. *Bolckow*, 1875, L. R. 10 Ch. 491; *Bovill* v. *Dixon*, 1856, 3 Macq. 1.

furniture in the house of the granter, he might be barred from denying to an indorsee of the document that the person to whom he had granted it had a right to obtain delivery. But he would be entitled to insist, in a question with the indorsee, on all defences competent in a question with the party to whom he granted it.[1]

Meaning of phrase "document of title."

The phrase "document of title" is defined by the Factors Act, 1890, as including "any bill of lading, dock warrant, warehouse-keeper's certificate and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented."[2] The scope of this Act is probably limited to matters occurring in the ordinary course of trade;[3] and proof of a general trade understanding to treat a particular instrument as a document of title would probably go a long way in inducing the Court to regard it as such. But it would appear to be necessary that the document in question should contain an obligation or order to deliver goods. A mere statement or acknowledgment that the goods are, as a matter of fact, lying in a warehouse, is not a document of title, and a trade understanding to regard it as such would be taken to be a misunderstanding of the law, to which no effect would be given. On this principle it was held that a wharfinger's certificate, stating that a certain quantity of iron had been deposited at the wharf, was not a document of title by the transfer of which the right to the iron would be transferred.[4] And a qualified delivery-order is not a document of title in the ordinary sense.[5] So where A. gave to B. (in security of a bill accepted by B.) a delivery-order on a warehouse-keeper with whom A. had deposited certain copper rollers, and the order was framed to the effect that the warehouse-keeper held at the disposal of B. a certain quantity of copper rollers, subject to a special agreement that A. might remove any of them which he might require in the course of his business, it was held that this document gave B. no right to the rollers in a question with A.'s trustee in bankruptcy.[6]

[1] *Gunn* v. *Bolckow*, *supra*.

[2] Factors Act, 1890, s. 1.

[3] *Cole* v. *North-Western Bank*, 1875, L. R. 10 C. P. 354.

[4] *Gunn* v. *Bolckow*, 1875, L. R. 10 Ch. 491.

[5] *MacKinnon* v. *Max Nansen & Co.*, 1868, 6 Macp. 974; *Fermiloe* v. *Bain*, 1876, 1 C. P. D. 445.

[6] *MacKinnon*, *supra*.

How far documents of title are negotiable instruments.

Documents of title, such as a bill of lading or a delivery-order, are not negotiable instruments in the sense that a bill of exchange is. They are indeed negotiable to this extent, that their indorsation and delivery, or mere delivery, if by custom of trade they are transferable by delivery, will pass the property in the goods they represent when that is the intention of the parties to the contract. But the transfer of a document of title to a *bonâ fide* and onerous indorsee does not give him the privileges of a "holder in due course," and does not, as a general rule, give him any better title than his author had, except in questions with the party who issued the document of title, who may be barred from insisting, in a question with an indorsee, in personal defences good against the indorser. This will be considered later.[1] In the case of objections which go to the root of the author's title, to transfer the document, the indorsee or transferee of a document of title must be considered as the holder of a symbol of the goods, and the transfer of the symbol will, as a rule, confer no higher right than if the goods themselves had been transferred.[2] Thus if a document of title is transferred by one who has no title to it, such as a thief or finder, or by one who has no right to transfer it, the indorsee cannot found upon it in a question with the true owner. But to this rule there are two important exceptions: (1) where the transferor is a mercantile agent within the meaning of the Factors Act, 1890; or (2) where the true owner is estopped, or barred, by his actings in the matter from objecting to the title of the transferee.

Negotiability under Factors Act.

The first of these exceptions, resting on the Factors Act, has been already considered with reference to cases of pledge, and the remarks there made need not be repeated here.[3]

Negotiability by estoppel, or personal bar.

The nature and effect of the law of estoppel, or personal bar, in relation to the pledge of a corporeal moveable subject, has been already dealt with.[4] But it is a question how far the law there stated applies to the case where a document of title,—a bill of lading, for instance, or a delivery-order or iron warrant,—and not the actual moveable subject, is pledged or transferred in security. In considering the point it will be well first to set aside those cases in which the pledgor has actually obtained authority to pledge from the true owner, but has obtained it by fraud. The right of the pledgee may then be sustained, apart from the law of personal bar, on the ground that the authority to pledge, though

[1] As to retention, see *infra*, p. 259, and as to stoppage *in transitu*, p. 283.

[2] *Commercial Bank* v. *Kennard*, 1859, 21 D. 864; *Colvin* v. *Dixon*, 1867, 5 Macp. 603; *Hamilton* v. *Dixon*, 1873, 1 R. 72.

[3] *Ante*, p. 209.

[4] *Ante*, p. 203.

revocable by the true owner on the ground of the fraud, remains in force until it is avoided.[1] These cases have been already considered.[2] The case we have now to consider is that where a document of title is pledged by a person who has obtained possession of it from the true owner on a contract which does not include, expressly or by any possible implication, the power to pledge it.

Authorities in favour of negotiability.

The case of *Pochin & Co.* v. *Robinow & Marjoribanks*[3] has been already narrated. The judgment of the Court of Session there probably establishes no more than this: that if A. intrusts B. with a document of title which confers upon him an apparently unqualified title to dispose of goods, and if at the same time A. neglected to take those precautions against possible fraud on the part of B. which were usual in the transactions in which he was engaged, he cannot object to a right which a third party has honestly obtained in reliance on the apparent authority conferred on B. But Lord Hatherley, when this case came to the House of Lords, put it on somewhat broader grounds. "If," he says, "one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation, and is misled by it." Similarly, in *Mitchell* v. *Heys*,[4] the Lord Ordinary (Low) intimated an opinion that where a document of title, such as a bill of lading or a delivery-order, is pledged without authority, the pledgee, if in good faith, takes the same title against the true owner as if he were the pledgee of a negotiable instrument, in which case there is now no doubt that he could retain the pledge for the amount he had advanced upon it.[5] And in *Babcock* v. *Lawson*, a case of the fraudulent transfer of goods through the medium of a delivery-order, the decision in favour of the transferee, though primarily rested on the ground that the transferor had obtained from the true owner an actual, though voidable, authority to pledge, was also put on the footing that if one party intrusts another with a document of title giving him an apparent authority to dispose of goods, he must suffer the loss should the party so intrusted fraudulently pledge it.[6]

Authorities against negotiability.

On the other hand, in *Gillman, Spence, & Co.* v. *Carbutt & Co.*,[7]

[1] *Kingsford* v. *Merry*, 1856, 11 Ex. 577; *Pease* v. *Gloahec*, 1866, L. R. 1 P. C. 219; *Babcock* v. *Lawson*, 1879, 4 Q. B. D. 394.

[2] *Ante*, p. 207.

[3] 1869, 7 Macp. 622; affd. (same facts) *Vickers* v. *Hertz*, 1871, 9 Macp. (H. L.) 65, L. R. 2 H. L. Sc. 113, *ante*, p. 205.

[4] 1894, 21 R. 600.

[5] *London Joint-Stock Bank*, v. *Simmons* [1892], App. Cas. 201.

[6] *Babcock* v. *Lawson*, 1879, 4 Q. B. D. 394.

[7] 1889, 61 L. T. 281. The plea of

Lord Esher expressed his opinion as to the effect of a delivery-order as follows: "Unless there is something very peculiar about it, I think that a delivery-order is only a promise to do something in future, and not a representation on which estoppel can be founded."[1] And the case of *Martinez y Gomez* v. *Allison* seems to have been decided on this latter view of the law. There the pursuer, a merchant in Spain, purchased goods from a spinning company, and directed them to be sent to a forwarding agent in Dundee, in order that he might send them on to Spain. The forwarding agent placed the goods in a warehouse, and then fraudulently pledged them with the defender for an antecedent debt of his own, by having them transferred to the name of the defender in the warehouse books. It was held that the case was outside the scope of the Factors Act, as a pledge for an antecedent debt of the agent is not protected by its provisions. The pursuer was found entitled to recover the goods, and the plea that he was barred from objecting to the title of the defender because he had allowed the forwarding agent to obtain an apparently absolute power of disposal was repelled.[2]

Is there any difference between the position of the pledgee of a corporeal moveable subject and the pledgee of a document of title, in a question with the true owner?

In this conflict of authority we are led to inquire whether there is any real distinction between the position of a pledgee of a corporeal moveable subject and a pledgee of a document of title, in a question with the true owner of the goods. Does such an owner, by intrusting another party with a document of title for a definite purpose, confer upon him any apparent authority to dispose of it greater than that which he confers by intrusting him with a moveable subject itself. Where the *ipsa corpora* of moveables are pledged without authority, it would seem to be settled, in Scotland at least, that, apart from the Factors Act, the pledgee has no title against the true owner.[3] Does it make any difference if a delivery-order, which will enable the pledgee to obtain goods, is pledged instead of the actual goods themselves? Two cases may be put: (1) A. buys goods, and orders them to be sent to B., a forwarding agent, solely for the purpose of forwarding them to him. B. fraudulently pledges them to C. (2) A. buys goods and obtains a delivery-order for them. He sends this delivery-order to B., solely in order that B. may get the goods from the warehouse to which the order is directed, and forward them to him. B.

estoppel was here repelled, but there was a specialty in the delivery-orders which ought to have put the party who took them on his guard.

[1] 61 L. T., at p. 282.

[2] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332.

[3] *Martinez y Gomez* v. *Allison*, *supra*; *Mitchell* v. *Heys*, 1894, 21 R. 600.

fraudulently pledges the delivery-order to C. In the first case C. has no title to the goods in a question with A.[1] Can any reason be suggested why he should be in a better position in a question with A. in the second case than in the first?

Result of cases on negotiability.

To sum up this discussion, it is submitted, though with some doubt and a full sense of the difficulty of the subject, that where the owner of goods intrusts another party (who is not a mercantile agent within the meaning of the Factors Act, 1890) with the documents of title to them, and the party so intrusted fraudulently pledges them, the owner can recover the goods from the pledgee, unless any circumstances appear which place his case in a specially unfavourable light. Such special circumstances may consist in his having neglected some precaution usual in his trade which would have rendered it difficult or impossible for the fraud to have been committed. They may also consist in some peculiarity in the form of the document of title—if, for instance, it is issued in a form which purports to grant an authority to the bearer to obtain possession of the goods.[2]

Bills of lading to be considered separately from delivery-orders.

The phrase "document of title" has so far been taken as a general term, in the sense in which it is used in the Factors Acts. But it will be necessary to consider securities constituted by the transfer of a bill of lading separately, as these instruments have attached to them, both by custom of trade and by special legislation, many incidents and qualities which do not attach to other documents of title. Of these the delivery-order is a type, and therefore the phrase "delivery-order" will be used in the following pages to mean documents of title other than bills of lading.

Method of transfer of delivery-orders. Under Factors Act, 1890.

The methods by which the right to goods represented by a delivery-order can be transferred by the use of that order are not entirely free from difficulty. By the Factors Act, 1890, it is provided: "For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery."[3] This is probably a statement of the common law on the subject; but there was, on the decisions, a certain amount of doubt as to whether either indorsement or mere delivery was a competent method of transferring the obligation represented by a delivery-order; in other words, whether the indorsee or transferee was thereby invested

[1] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332.

[2] Cf. *Pease* v. *Gloahec*, 1866, L. R. 1 P. C. 219.

[3] 52 & 53 Vict. c. 45, s. 11, extended to Scotland by 53 & 54 Vict. c. 40.

with a right to demand delivery of the goods from the granter of the delivery-order. The law has been illustrated chiefly by cases relating to iron warrants, *i.e.* obligations to deliver iron granted by ironmasters or keepers of stores for iron.

At common law.

In a leading case, where an iron warrant was conceived as an unconditional promise to deliver iron to anyone presenting the document, the opinion was expressed in the House of Lords that an obligation of this kind, conceived in such terms as to give a floating right of action to anyone into whose hands the document might come, was invalid, at least unless supported by a custom of trade.[1] As the case was decided on specialties, the invalidity of the iron warrants was not actually settled, especially as it had been held in the Court of Session that the indorsation of such a warrant, if made *in re mercatoria*, was sufficient to vest a right to demand delivery in the indorsee.[2] But the practice has since been to frame iron warrants and similar delivery-orders in the form of an obligation to deliver to a person named, or his assigns. In such a form their validity, as a means of transferring the obligation to deliver, in a question with the party who is debtor in that obligation, seems thoroughly settled.[3] Thus in one case it was pointed out that although the indorsee of an iron warrant obtained no *jus in re*, because the indorser had none to transfer, nor even a *jus ad rem*, because, as it happened, there was no specified and identified mass of iron which the ironmaster had undertaken to deliver, yet the indorsement was good as an assignation of a personal obligation. In an action for delivery, the indorsee could sue as an assignee of the rights of the indorser, setting forth the right of his author to demand delivery, and the transfer of that right to him.[4] There does not seem to be any reason why the fact that the indorsement was merely in security should interfere with the right of the indorsee to demand delivery, because, by the indorsement, he has obtained an *ex facie* absolute title to demand delivery, and delivery to him is therefore a complete fulfilment of the granter's obligation. But in a case of very special circumstances, where a warrant was originally granted as a security, and was ultimately sued upon by an indorsee in security ten years

[1] *Bovill* v. *Dixon*, 1854, 16 D. 619; affd. 1856, 3 Macq. 1.

[2] See also *Dimmack* v. *Dixon*, 1856, 18 D. 428; decided before the appeal in *Bovill* v. *Dixon*.

[3] *Pochin & Co.* v. *Robinow & Marjoribanks*, 1869, 7 Macp. 622, affd. *Vickers* v. *Hertz*, 1871, 9 Macp. (H. L.) 65; *Connal & Co.* v. *Loder*, 1868, 6 Macp. 1095; *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205.

[4] *Pochin & Co.*, *supra*, per Lord Pres. Inglis, at p. 629.

after its date, it was held that the transaction could not be regarded as having taken place *in re mercatoria*, and that the indorsee had no title to sue.[1]

Nature of right conferred by transfer of document of title in security.

The transfer of a delivery-order in security, when completed by intimation to the custodier of the goods, has much of the character of a pledge of the document, and thereby of the goods, and it is believed that the ordinary intention of men of business is to constitute such a pledge. But it has been expressly decided that where a bank, in making an advance, obtained from the borrower a delivery-order, intimated it to the warehouse-keeper, and got the goods transferred to their name in the warehouse books, the contract of pledge was not thereby constituted. The bank were not the pledgees, but the absolute owners of the goods, subject to a personal obligation to restore them upon all debts due by the borrower to them being paid.[2] This decision was based on the ground that pledge, as a real contract, could only be effected by the actual transfer of the goods from the pledgor to the pledgee, and not by the constructive transfer of goods in the hands of a third party, which is effected by the granting or indorsement of a delivery-order, and intimation to the custodier. The practical result of this judgment was to enable the bank to retain the goods in security of all debts which happened to be due to them by the granter of the delivery-order at the time of his bankruptcy, a result which was admittedly contrary to what the parties intended. This judgment has been approved in a subsequent case,[3] though it has been adversely criticised by Lord M'Laren in his Notes to Bell's *Commentaries*.[4] It was not noticed in the argument that it was expressly declared in the Factors Act, 1842, that "all documents pledging or giving a lien upon such documents of title as aforesaid, shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relate."[5] This Act is repealed by the Factors Act, 1890, but the same rule is there expressed in the words "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods."[6] The word "pledge" is defined as "any contract, pledging, or giving a lien or security over goods, whether in consideration of an instant advance, or of any other or continuing advance, or of any pecuniary liability." It is not unlikely, therefore, that it will be held in

[1] *Commercial Bank* v. *Kennard*, 1859, 21 D. 864.

[2] *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

[3] *MacKinnon* v. *Max Nanson & Co.*, 1868, 6 Macp. 974.

[4] Bell, *Com.* ii. 21, note.

[5] 5 & 6 Vict. c. 39, s. 4.

[6] 53 & 54 Vict. c. 40, s. 3.

future that where a document of title is granted or transferred in security, and the right of the security-holder is completed by intimation to the custodier, a pledge of the goods is thereby constituted. Such a decision would bring the law into accordance with the usual understanding of business men in entering into such contracts. The law as to the method by which a party to whom a delivery-order has been granted or transferred as a security may complete his right, is at present before the Court in the case of *Irvine* v. *Inglis*,[1] which has been sent to the whole Court. The point there in question is whether the above-quoted section of the Factors Act, to the effect that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods," implies that the mere pledge of the document completes the right of the pledgee, and gives him a real right over the goods, without delivery or intimation to the custodier. Should this question be answered in the affirmative, there is no necessity for any discussion as to the completion of the title of the pledgee. It will be complete by the mere transfer of the document with the intention to pledge it. So far, however, as the case has gone, it has been held by Lord Kyllachy in the Outer House that the section has no such effect, and that it does not alter the law of Scotland as to the completion of a security by transfer of a delivery-order. It is therefore necessary to state here the law apart from the Factors Act, although, if the judgment of the Lord Ordinary be reversed, its interest may be purely historical.

In the exceptional case where a party who is both the owner and the custodier of goods grants a delivery-order for them for the purpose of creating a security over them, the right of the security-holder must be completed by actual delivery of the goods. It is well settled that at common law no delivery, either actual or constructive, is effected either by granting a delivery-order, or by intimation of that order to the warehouseman, when the warehouseman is either the owner of the goods, or a servant of the owner. Therefore, unless the security-holder actually takes delivery of the goods, his right under the delivery-order will be incomplete and personal, and will confer no preference over the other creditors of the granter.[2] In the great majority of cases, however, a security by transfer of a delivery-order is granted by a party who has obtained the order either from the owner or from the custodier of the goods. The right of the security-holder may

[1] 20 March 1896, 3 S. L. T. No. 571.

[2] See *ante*, p. 195, and cases cited *infra*. But see, *contra*, opinion of Lord Young in *Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173.

then be completed by intimation to the custodier.[1] It may be noted that the granter of the security may either be the owner of the goods, if the contract under which he obtained the delivery-order transferred the property in them to him, or he may be the creditor in an obligation *ad factum præstandum*, *i.e.* in the obligation of the custodier to deliver them. This distinction, however, is immaterial in the completion of the right of the security-holder. For if the granter was the owner of the goods, intimation to the custodier will give the security-holder a real right in them by what is usually known as constructive delivery; if the granter was the creditor in an obligation *ad factum præstandum*, intimation to the custodier—the debtor in that obligation—will complete the transfer of the *jus crediti* therein to the security-holder. Thus in *Connal & Co.* v. *Loder*,[2] Daunt & Co. obtained a delivery-order for iron from Connal & Co., and indorsed it in security to Loder. He intimated his right to Connal & Co. after Daunt & Co. had become bankrupt, and had granted a deed of arrangement under the English Bankruptcy Act (24 & 25 Vict. c. 134). After the intimation, creditors of Daunt & Co. arrested the iron in the hands of Connal & Co. The latter firm brought a multiplepoinding, of which the iron formed the fund *in medio*. In this process it was held (1) that Loder's right to the iron was not completed by the indorsation of the warrant; (2) that it was completed by intimation to Connal & Co., and was therefore preferable to the arrestments; (3) in conformity with the opinion of English counsel, that Loder, as the holder of a prior personal right, was preferable to the inspector's in the bankruptcy of Daunt & Co. The law as to the completion of the title of the indorsee is stated as follows in the opinion of Lord Neaves:—"I think that as to iron so situated, the mode either of delivering iron, if it was specific iron, or the mode of completing a right to demand so much iron, if it was a contract of that kind, come to be perfected in the very same manner. When specific goods are sold or pledged, being in any warehouse-keeper's hands, delivery is necessary, but the delivery admits of being made in a peculiar way, which is not constructive, but real delivery. If Connal & Co. stand to-day in the relation of trustees and custodiers for Daunt & Co., and if to-morrow they become the custodiers of the same thing for

[1] *Mathison* v. *Alison*, 1854, 17 D. 274; *Hamilton* v. *Western Bank*, 1856, 19 D. 152; *Mackinnon* v. *Max Nanson & Co.*, 1868, 6 Macp. 974; *Connal & Co.* v. *Loder*, 1868, 6 Macp. 1095; *Distillers Co.* v. *Russell's Tr.*, 1889, 16 R. 479; *Rhind's Tr.* v. *Robertson & Baxter*, 1891, 18 R. 623.

[2] 1868, 6 Macp. 1095.

Daunt's vendee, that is as good a delivery as anything need be, because the vendor puts the vendee precisely in the position in which he stood himself. On the other hand, if this is an obligation *ad factum præstandum*, the substitution of the assignee as the person who is to ask delivery of it requires completion by the law of Scotland by intimation to the debtors. But once you have made intimation to the debtors, the result transfers the *jus crediti* under that obligation, and makes the holder of the iron the debtor of the transferee." [1]

Right of seller of goods to retain them in question with the indorsee of a delivery-order.

So far we have dealt with the position of an indorsee of a delivery-order in a question with the indorser; that is, with the means by which he can complete his title, and secure a preferential right in competition with the creditors of his author. We have now to consider the right of the granter of a delivery-order to retain the goods in security of debts due to him by the grantee, in a question with a person with whom the delivery-order has been pledged. This must be considered in three aspects: (1) the question as it stood at common law; (2) the effect of the Mercantile Law Amendment Act, 1856; and (3) the effect of the Factor's Act, 1890,[2] and the Sale of Goods Act, 1893.[3]

(*a*) At common law.

It has already been explained that, by the common law of Scotland, a contract for the sale of goods left the property of the goods in the seller, unless it was followed by delivery.[4] The seller, therefore, as the owner of the goods, subject to a personal obligation to deliver them, was entitled to plead retention for any debts due to him by the purchaser; that is, he was entitled to refuse to fulfil his personal obligation to deliver the goods until the purchaser fulfilled all personal obligations due to him. Even if he had granted a delivery-order for the goods, he had the right to revoke it. And as the purchaser who had obtained a delivery-order, but had not taken delivery, either actual or constructive, had no real right to the goods, he could not, by indorsing the delivery-order, confer any such right on the indorsee. It followed that a seller who had granted a delivery-order might plead retention for any debts due to him by the purchaser, even in a question with an indorsee of the delivery-order.[5] This principle was first definitely settled in *M'Ewan* v. *Smith*.[5] There

[1] *Connal & Co.* v. *Loder*, 1868, 6 Macp. 1095, per Lord Neaves, at p. 1102.

[2] 52 & 53 Vict. c. 45, extended to Scotland by 53 & 54 Vict. c. 40.

[3] 56 & 57 Vict. c. 71.

[4] *Ante*, p. 188.

[5] *M'Ewan* v. *Smith*, 1847, 9 D. 434, affd. 1849, 6 Bell's App. 340; *Melrose* v. *Hastie*, 1851, 13 D. 880; *M'Naughton* (*Robertson's Tr.*) v. *Bairds*, 1851, 14 D. 1010; *Bovill* v. *Dixon*, 1854, 16 D. 619, affd. 1856, 3 Macq. 1; *Wyper* v. *Harveys*, 1861, 23 D. 606.

sugar in a bonded warehouse in the name of Smith was sold by him to Bowie, and a delivery-order given for it. Bowie indorsed the delivery-order to M'Ewan, who paid for it, and intimated his right to Smith's importing agent, but not to the keeper of the bonded warehouse. Thereafter Bowie became bankrupt, without having paid the price of the sugar to Smith. It was held that the sugar had never been delivered, because no intimation had ever been made to the keeper of the warehouse; that Smith was therefore still the owner of the goods; and that, accordingly, he had a right to retain the goods for the price due by Bowie, even in a question with M'Ewan.[1] A further application of the right of retention was established in a case which arose out of the same bankruptcy. The facts were very similar. Hastie sold to Bowie some sugar lying in his name in a bonded warehouse, and gave him a delivery-order for it. Bowie indorsed this delivery-order to Melrose, who paid him, and intimated to Hastie's importing agent, but not to the warehouse-keeper. In this case, however, Bowie had paid for the sugar before his bankruptcy. He was, however, in debt to Hastie on other transactions; and the latter claimed a right, in a question with Melrose, to retain the sugar in security of this debt. On a train of reasoning exactly similar to that in *M'Ewan* v. *Smith*, the claim of retention was sustained.[2] In a later case it was held that an undivested seller could retain in a question with the indorsee of a delivery-order, even for debts which had been contracted by the indorser after he had made the indorsement, and thereby ceased to have any personal interest in the goods.[3]

Question whether seller is barred from exercising his right of retention by granting an unqualified order.

It was urged, in argument in *M'Ewan* v. *Smith* and *Melrose* v. *Hastie*, that the seller of goods, by granting a delivery-order for them in unqualified terms, was barred, or estopped, from asserting any right to refuse delivery in a question with the indorsee of the delivery-order. But it was held that a delivery-order was a mere mandate, which might be revoked by the granter. It was admitted that such an order had not the effect, which mercantile custom has given to a bill of lading, of passing the right to the goods to the indorsee, free from all personal defences competent to the granter against the grantee. And it was pointed out by the Lord Chancellor (Cottenham), that to argue that the granter of such an order was personally barred from claiming a right of retention, was in effect to argue that the delivery-order had the

[1] *M'Ewan* v. *Smith*, 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340.

[2] *Melrose* v. *Hastie*, 1851, 13 D. 880.

[3] *M'Naughton (Robertson & Co.'s Tr.)* v. *Bairds*, 1852, 14 D. 1010.

same privileges as a bill of lading.[1] The question of retention is only a particular instance of the wider question whether the granter of a delivery-order is barred, in a question with an indorsee, from insisting on personal defences which are competent in a question with the party to whom the order was granted. In questions of this sort much depends on the form of the document. In the above cases the delivery-order was in the ordinary form of an order upon a warehouseman, and a different result was arrived at by the Court when the question arose as to the effect of a warrant drawn in the form of a promise to deliver goods. In *Bovill* v. *Dixon*,[2] an ironmaster granted a note in the following terms: "I will deliver 1000 tons No. 1 pig-iron, free on board here, when required, after the 10th day of September next, to the party lodging this document with me." In the Court of Session it was held that the ironmaster was barred from refusing delivery to an indorsee of this warrant, on the plea that a bill given for the price by the original grantee had been dishonoured. But in the House of Lords, although the decision was affirmed on the special facts of the case, the Lord Chancellor (who was the only law peer present) held that the decision below was wrong in principle, firstly, because the indorsation of such an instrument was not a sufficient assignation of the right to demand delivery, and, secondly, because the assignee of such a right took subject to all defences which were competent in a question with his cedent.[3] In a later English case, where the iron warrants were expressed in terms which had been drawn up by English counsel in order to avoid the vendor's lien for the price, and expressed the iron to be "deliverable F. O. B. to A. or his assigns by indorsement hereon," the Master of the Rolls (Jessel) expressed the opinion that the granter of such an instrument was precluded, by the custom of trade, from claiming a lien for the price in a question with an indorsee. But he preferred to rest his decision on the ground that the iron, in this particular case, had been delivered, as the law on the point was in an unsatisfactory state, and the decisions difficult or impossible to reconcile.[4] In *Farmeloe* v. *Bain*,[5] it was held that a party who had issued orders in the

[1] Opinion of Lord Chancellor (Cottenham) in *M'Ewan* v. *Smith*, 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340, at p. 352.

[2] *Bovill* v. *Dixon*, 1854, 16 D. 619; affd. 1856, 19 D. (H. L.) 9, 3 Macq. 1.

[3] *Dimmack* v. *Dixon*, 1856, 18 D. 428, was decided in favour of the holder of the iron warrant, but before *Bovill* v. *Dixon* was heard in the House of Lords.

[4] *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205; but see *Farmeloe* v. *Bain*, 1876, 1 C P. D. 445.

[5] *Supra.*

following terms: "We hereby undertake to deliver to your order indorsed hereon 25 tons zinc off your contract of this date," was not estopped from claiming to retain the zinc for the price in a question with an onerous indorsee. But where a railway company issued two orders for the same parcel of wheat, and it was not obvious, owing to careless expression, that the orders referred to the same parcel, it was held that they were estopped from denying to an indorsee that there were two parcels, on the very wide ground that a party who issues a delivery-order owes a duty, to mercantile men likely to deal with it, to express it so that no mistake may be likely to arise.[1] Had this question still depended on the rules of the common law, it is possible that it might be held that a custom of trade, to which the Court would give effect, had grown up to treat delivery-orders as negotiable to the extent of defeating the seller's right of retention in a question with an indorsee. But their effect now depends, as will be shown immediately, on the provisions of the Factors Act, 1890, and the Sale of Goods Act, 1893.

(*b*) Under Mercantile Law Amendment Act, ss. 2 and 3.

The obvious injustice resulting from the decision in *Melrose* v. *Hastie* probably led to the insertion of the 2nd and 3rd sections of the Mercantile Law Amendment (Scotland) Act, 1856.[2] These sections were as follows:—

"(2) Where a purchaser of goods who has not obtained delivery thereof shall, after the passing of this Act, sell the same, the purchaser from him, or any subsequent purchaser, shall be entitled to demand that delivery of the said goods shall be made to him, and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery, on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser: Provided always that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser.

[1] *Coventry* v. *Great Eastern Rwy. Co.*, 1880, 11 Q. B. D. 776. See also *Carr* v. *London & N.-W. Rwy. Co.*, 1875, L. R. 10 C. P. 307; and *Seton* v. *Lafone*, 1887, 19 Q. B. D. 68.

[2] 19 & 20 Vict. c. 60.

"(3) Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

Interpretation of sec. 2.

The consideration of sec. 3 may be left over till we come to deal with a similar provision in the Sale of Goods Act, 1893, which has been substituted for it.[1] On the 2nd section it may be remarked that it did not affect the right of a seller of goods to retain them for the price, and therefore left the decision in *M'Ewan* v. *Smith*[2] untouched, and that it applied only to sub-sales, or perhaps to securities in the form of sub-sales, and therefore did not apply to the case of an express pledge of a delivery-order. And it was decided that if the right of the sub-purchaser was in any way excluded, as by the diligence of the creditors, or the sequestration of the original purchaser before the sub-purchaser's right was completed, the seller was entitled to retain the goods for all debts due to him by the original purchaser. This was decided in *Wyper* v. *Harveys*.[3] There Harvey, a distiller, sold whisky to Risk, who paid the price, but did not take delivery, leaving the whisky in a bonded store kept by Harvey. Risk re-sold the whisky to Wyper, and received payment, but Wyper did not intimate the sub-sale to Harvey until after Risk had been sequestrated, and Harvey had used arrestments in his own hands for a separate debt due to him by Risk on another transaction. On these facts it was held by the whole Court (Lord Deas dissenting) that Harvey was entitled to retain in a question with Wyper. Five of the judges rested their decision on the ground that the arrestments used by Harvey were prior to the intimation of the sub-sale made by Risk, and were therefore preferable. The other seven judges, while concurring on this point, held that the sequestration of Risk had carried to his trustee the personal right to demand delivery, in preference to the unintimated assignation held by Wyper. Thus Wyper, as he was only the holder of an unintimated assignation, had no right to demand delivery of the whisky at all, and the original right of Harvey to retain for all debts due to him by Risk was not affected by the 2nd section of the Mercantile Law Amendment Act in a question with the trustee in bankruptcy.

[1] *Infra*, p. 268.

[2] 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340, *ante*, p. 259.

[3] 1861, 23 D. 606.

(c) Present state of the law.

These sections of the Mercantile Law Amendment Act have now been repealed,[1] and the present state of the law must be gathered from the provisions of the Factors Act, 1890, and the Sale of Goods Act, 1893. As the effect of these Acts on the right of a seller of goods to retain them in a question with an indorsee of a delivery-order has not yet been elucidated by any decisions in Scotland, the following suggestions as to their probable effect are put forth with great diffidence. It will be convenient to treat separately (1) the right of retention for the price of the goods, and (2) the right of retention for debts unconnected with the contract of sale.

(1) Seller's lien under Sale of Goods Act.

The Sale of Goods Act has introduced a new right of retention for the price, which is entirely independent of any question as to the right of property or *jus in re* in the goods. It is declared, sec. 39, subsec. 1:—

"Subject to the provisions of the Act, and of any Statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller[2] of goods, as such, has by implication of law—

"(*a*) A lien on the goods, or right to retain them for the price while he is in possession of them.

"(*b*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu*, after he has parted with the possession of them.

"(*c*) A right of re-sale, as limited by this Act."

By subsec. 2: "When the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to, and coextensive with, his rights of lien and stoppage *in transitu* where the property has passed to the buyer."

This right of retention may be exercised if (1) the sale is made without any stipulation as to credit, or (2) if the period of credit stipulated for has expired, or (3) if the buyer becomes insolvent.[3] It is not excluded by the fact that the seller is in possession of the goods as agent, or bailee, or custodier for the buyer.[4]

Limitations of lien of unpaid seller.

From the preceding paragraphs it would appear that a seller

[1] Sale of Goods Act, 1893, s. 60, and schedule.

[2] "A seller of goods is an unpaid seller, within the meaning of the Act: (1) When the whole of the price has not been paid or tendered. (2) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise" (Sale of Goods Act, 1893, s. 38).

[3] Sale of Goods Act, 1893, s. 41.

[4] *Ib.* subs. 2.

of goods has, in a question with the purchaser, a common-law right to retain them for the price, if the property has not passed; and a statutory right of retention or lien, whether the property has passed or not. The next question is, What are the limitations of this right if the question is with a person to whom the purchaser has transferred his right to the goods by indorsing to him a delivery-order for them, and, more particularly, what are those limitations if that indorsement is made in security?

By sec. 10 of Factors Act, 1890, and sec. 47 of Sale of Goods Act.

This question has been dealt with both in the Factors Act, 1890, and the Sale of Goods Act, 1893. By the former Act it is provided (s. 10): "Where a document of title to goods has been lawfully transferred to a person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*." The analogous provision of the Sale of Goods Act, 1893 (s. 47), is to the same effect, but is expressed more definitely. This section, after providing that the unpaid seller's right of lien or retention is not in general affected by a sub-sale, unless he has assented to it, proceeds: "Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee." It would seem quite clear from this section that a pledgee of a document of title has a right to demand delivery preferable to the right of the unpaid seller to retain for the price. The question at issue in *Bovill* v. *Dixon*[1] is therefore now settled.

By sec. 9 of Factors Act, 1890.

The same result has been arrived at in England on consideration of sec. 9 of the Factors Act. That section provides: "Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the document of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or

[1] 1854, 16 D. 619; affd. 1856, 3 Macq. 1.

under any agreement for any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." In *Capital & Counties Bank* v. *Bretherton, Ford, & Co.*,[1] the defendants sold to A. a quantity of wheat lying to their order in a warehouse, and gave him a transfer-note for it. He intimated this transfer-note to the warehouse-keeper, and the wheat was entered in his name in the warehouse books. He then obtained warrants for the wheat from the warehouse-keeper, and transferred them to the plaintiffs, in security of advances. A. then became bankrupt, without having paid the price, and the defendants gave notice to the warehouse-keeper not to deliver the wheat. It was held that the case was ruled by sec. 9 of the Factors Act (quoted *supra*), and therefore that the plaintiffs had a right to the wheat preferable to the lien of the defendants for the price.[2]

(2) Right of retention for all debts due by the purchaser.

The right of general retention of a seller of goods, *i.e.* the right to retain them until all debts due to him by the purchaser are paid, would seem now in all cases to be subordinate to the right of an indorsee of a delivery-order. First of all, that right can only exist, even in a question with the purchaser himself, in cases where the conditions of the contract of sale were exceptional. For the right of general retention is the privilege of the seller as an undivested owner of the goods, and in ordinary contracts of sale, as the property in the goods now passes to the purchaser on the completion of the contract,[3] the right can never exist. In exceptional contracts, where the passing of the property is in any way postponed, it may exist in a question with the purchaser, but is probably subordinate to the right of an indorsee of the delivery-order. This, it would appear, cannot be inferred from the provisions of the Sale of Goods Act, 1893, limiting the unpaid seller's right of lien,[4] as these apply only to the case of an unpaid seller

[1] 19 Feb. 1896, 12 T. L. R. 216.

[2] In *Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173, Lord Rutherfurd Clark expressed an opinion (p. 192) that sec. 9 of the Factors Act could only apply to a case where a delivery-order was granted by the seller to the purchaser, and actually indorsed by the latter, and that it did not apply to the case where the seller authorised the purchaser to grant delivery-orders himself, *i.e.* to the case given in the text This seems a very narrow and technical construction of the section; and the Lord Ordinary (Wellwood) and Lord Young were of an opposite opinion. The case was decided upon other grounds.

[3] *Ante*, p. 197.

[4] Secs. 41–43.

claiming a right to retain for the price, and not to the case of a seller who has been paid the price, but claims a right to retain for other debts due to him by the purchaser. But there is no such limitation in the Factors Act, 1890, which is expressed quite generally. The sections which appear to apply to this case are secs. 9, 10.

Provisions of Factors Act, 1890.

Sec. 9, which has been already quoted,[1] places the indorsee of a delivery-order, in a question with the seller, in the same position as if the indorser had been a mercantile agent for the seller, intrusted, with his consent, with the possession of the delivery-order. It has been shown that this section has been held in England to confer on the indorsee a right preferable to the lien of the unpaid seller for the price.[2] It would seem that it would have the same effect if the right which the seller alleged were a right to retain for other debts due to him by the purchaser, instead of merely a right to retain for the price. This would seem to follow *à fortiori*. It is also clear on principle. For an owner of goods who has placed a mercantile agent in possession of them, or of the documents of title to them, is held to have consented to any sale or pledge made by that mercantile agent in the course of his business.[3] And if a mercantile agent pledges goods with the consent of the owner, by transferring the document of title, it is clear that the owner could not refuse delivery to the pledgee on the ground that the mercantile agent was otherwise indebted to him (the owner).[4] Therefore as the indorsee of the delivery-order is now, by sec. 9, in the same position as if the indorser had been a mercantile agent, the owner cannot retain the goods, in a question with the indorsee, for any debts due to him by the indorser.

Sec. 10 of the Factors Act leads to the same conclusion. By it the transfer of a document of title has the same effect on the "vendor's lien" as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*. That is to say, as will be shown in treating of bills of lading,[5] the vendor's lien is entirely defeated if the document of title was transferred in pursuance of a contract of sale; and if the transfer was by way of pledge, it can only be exercised subject to the rights of the pledgee. The phrase "vendor's lien" is defined as meaning, in Scotland, "any right of retention competent to the original owner

[1] *Ante*, p. 265.
[2] *Ante*, p. 266, and note 2.
[3] Factors Act, 1890, s. 2.
[4] Bell, *Com.* i. 536; Story on *Agency*, s. 420; Pollock on *Contract*, 6th ed., p. 98; Anson on *Contract*, 9th ed., p. 342.
[5] *Infra*, p. 284.

or vendor."[1] These words would appear wide enough to cover the right of general retention of an undivested seller, though it is conceivable that they might be held to mean only the right of retention for the price.

Right of seller of goods to attach them in his own hands.

The law as sketched in the preceding paragraphs applies to the case where the question is between the indorsee of a delivery-order and a seller of goods who has chosen to rely on his right of retention, and has done nothing to acquire a separate right or *nexus* over the goods. But by the 3rd section of the Mercantile Law Amendment Act, "any seller of goods may attach the same while in his own hands or possession by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same effect in competition or otherwise as an arrestment or poinding by a third party." This section has been repealed by the Sale of Goods Act,[2] but has been re-enacted in the same Statute with the omission of the clause fixing the date of intimation of the sub-sale as the date at which the right to arrest or poind shall cease.[3]

Effect of sec. 3 of Mercantile Law Amendment Act.

The general effect of the provision of the Mercantile Law Amendment Act has been decided to be, that if a seller of goods arrests or poinds them in his own hands, or in the hands of a warehouseman who is a servant of his, before intimation has been made to him of any sub-purchase, he acquires a right to retain the goods for the price, or for any debt which the first purchaser may be owing to him, which is preferable to the right of the sub-purchaser to demand delivery.[4] And although the section would seem to make the arrestment or poinding used by a seller good only in those cases where an arrestment or poinding used by a third party would be good, it has been held that arrestments used after sequestration of the first purchaser were effectual.[5] It has also been decided that the intimation of the sub-sale, though informal, is sufficient to prevent the use of arrestment or poinding by the seller, if it is of a character to make him aware of the fact of the sub-sale. Thus letters written by the original purchasers, announcing that

[1] Factors Act, 1890 (53 & 54 Vict. c. 40, s. 1).

[2] Sec. 60 and schedule.

[3] Sale of Goods Act, 1893, s. 40. The section is: "In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

[4] *Wyper* v. *Harveys*, 1861, 23 D. 606, narrated p. 263; *Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173.

[5] *Wyper* v. *Harveys*, *supra*.

they had re-sold the goods, were held to be sufficient intimation.[1]

Effect of sec. 40 of Sale of Goods Act.

There would appear no reason to doubt that the 40th section of the Sale of Goods Act, 1893,[2] which is expressed quite generally, entitles the seller of goods to arrest or poind them for any debt which may be due to him by the original purchaser.[3] But it raises a difficult question as to what is the *punctum temporis* at which the right of a seller so to attach the goods is determined. It is probable that *Wyper* v. *Harveys*[4] is still an authority to the effect that the sequestration of the debtor (*i.e.* of the original purchaser) is not a bar to such attachment. In other respects it is thought that the validity of an arrestment or poinding by a seller in possession of goods must be judged by considering whether an arrestment or poinding by a third party would have been effectual.[5] Now a third party, who is a creditor of a purchaser of goods, could only arrest or poind those goods while his debtor, the purchaser, continued to have a right to them. If the purchaser had re-sold the goods, the property would have passed to the sub-purchaser by the completion of the contract of sale,[6] and therefore the completion of such sub-sale would render it impossible for a creditor of the original purchaser to attach them by diligence. It would therefore seem that a seller of goods loses his right to arrest them by the mere fact of a sub-sale having taken place, even though that sub-sale has never been intimated to him. Suppose, however, that the original purchaser pledges, instead of reselling, the goods. Then a third party, a creditor of that original purchaser, could still arrest or poind them; and his right, in competition with the pledgee, would depend upon whether the pledge was or was not completed by possession before the arrestment or poinding.[7] Now a pledge of goods in the hands of a third party is completed by the constructive delivery effected by intimation to the custodier.[8] Therefore the pledgee would be preferable to a third party using arrestments if he intimated his pledge to the custodier before the arrestments were used. It would seem to follow, provided that there were no question as to the effect of documents of title under the Factors Act, that the original seller would obtain a preference if he used arrestments or poinding in

[1] *Browne & Co.* v. *Ainslie & Co.*, *supra*.

[2] See *ante*, note 3, p. 268.

[3] It is, however, in a part of the Act headed "Rights of unpaid seller against the goods."

[4] 1861, 23 D. 606.

[5] See opinions of the judges in *Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173.

[6] Sale of Goods Act, 1893, ss. 17, 18, *ante*, p. 197.

[7] *Ante*, p. 188.

[8] *Ante*, pp. 195–257.

his own hands before the pledgee intimated to the custodier of the goods. And, by the conditions of the case, the custodier must be either the seller himself or a warehouseman who is a servant of his, otherwise the goods would not be in the seller's possession, and he could not attach them. So it would seem that, in a question with a pledgee of the goods, the seller will be preferable if he arrests or poinds the goods before the pledgee has completed his security by intimating his right to the seller or to his warehouseman.

Nature of intimation required to preclude attachment by seller.

Under the Mercantile Law Amendment Act, as has been shown, intimation need not be given by the pledgee himself, as intimation by the original purchaser was held to be sufficient.[1] But now, if the conclusions of the last paragraph are correct, intimation of the subordinate right is necessary, not in order to put the original seller in bad faith in arresting in his own hands, but to complete the subordinate right of pledge by constructive delivery. It is therefore possible that it will be held, in cases under the 40th sec. of the Sale of Goods Act, that the pledgee of the goods must intimate his right himself.

Can seller attach goods in question with pledgee of delivery-order?

The case is greatly complicated if the seller grants a delivery-order for the goods, and this delivery-order is pledged by the purchaser. The pledgee is then entitled to appeal to the title which he obtains under the 9th sec. of the Factors Act, 1890; that is, he is in the same position as if he had obtained the pledge from a mercantile agent of the original seller.[2] It would seem that in a question with a pledgee armed with such a title, it would be useless for a seller of goods to arrest or poind them for a debt due to him by the pledgor. For he clearly has no authority to attach the goods so as to disappoint the right of a pledgee from his own mercantile agent. This result was arrived at by the Lord Ordinary in a case under the Mercantile Law Amendment Act, though the Inner House affirmed on other grounds. A. sold whisky, which was lying in his own bonded warehouse, to B., and gave him a delivery-order for it. B. intimated this order to the warehouseman, and told him that he would issue orders for it. He then re-sold the whisky to C., and granted delivery-orders for it, addressed to the warehouseman of A.'s bonded warehouse. A. arrested the whisky in his own hands, for a debt due to him by B., and refused delivery to C. The Lord Ordinary (Wellwood) held that C. had a title under the 9th sec. of the Factors Act, 1890, which was preferable to any arrestments which A. had used. In the Inner House this judgment was affirmed (Lord Rutherfurd

[1] *Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173.

[2] *Ante*, p. 265.

Clark dissenting): by the Lord Justice Clerk (Kingsburgh) and Lord Trayner, on the ground that intimation of the sub-sale had been made to A. before he used the arrestments; by Lord Young, on the ground that the sale of the whisky to B., and the intimation by him to the keeper of the seller's private warehouse, had passed the property in the whisky to him, and that it could not be arrested by any creditor of his after he had re-sold it to C.[1]

Right of seller of goods to retain them in security of debt due to him by indorsee of delivery-order.

Before the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), came into operation, it was held that where a delivery-order, representing goods which were still in the possession of the seller, was transferred to an indorsee, whether absolutely or in security, and such indorsee was in debt to the seller, the latter had the right to retain the goods for such debt in a question with the indorsee or his trustee in bankruptcy. This was decided in the case of *Distillers' Co.* v. *Russell's Tr.*[2] There the Distillers' Co. sold whisky, which was lying in their own bonded stores, to J. & G. Stewart, and granted a delivery-order for it. Stewart sold the whisky to Walters, and Walters to Russell. In each case the transferor granted a delivery-order, and the transferee intimated to the Distillers' Co., and received an acknowledgment from them. On the bankruptcy of Russell the Distillers' Co. claimed a right of retention over the whisky for a debt due to them by the bankrupt on another transaction. It was held (by a majority of three to two) that they had a right to retain, on the ground that Russell obtained, and could obtain, only a *jus ad rem* to, or right to demand delivery of, the whisky, which still belonged to the Distillers' Co., because it had never been delivered, and therefore that the trustee, as representing the bankrupt, could not demand performance of the obligation to deliver from the Distillers' Co. without himself implementing all obligations due by Russell to them. This decision would no longer be given if the question should arise under the Sale of Goods Act, 1893, as it is clear that under the provisions of that Act the property in the whisky would have passed, by the respective contracts of sale, from the Distillers' Co. to Stewart, from Stewart to Walters, and from Walters to Russell, and therefore that the Distillers' Co., being no longer owners, but only custodiers, of the whisky, would have no right to retain it. But it would appear that they would

[1] *Browne & Co.* v. *Ainslie & Co.*, 1893, 21 R. 173. It is submitted, with deference, that the opinion of Lord Young is in conflict with all the prior authorities as to the effect of intimation of a sale to the keeper of the private warehouse of the seller. See *ante*, p. 195.

[2] 1889, 16 R. 479.

be entitled to take advantage of the 40th sec. of the Sale of Goods Act,[1] and arrest the whisky in their own hands for debts due to them by Russell. That section, as has already been stated, is expressed quite generally, and gives to the seller of goods, while still in possession of them, the right to attach them by arrestment or poinding; such arrestment or poinding to have the same effect in competition as an arrestment or poinding by a third party. Now there can be no doubt that any creditor of Russell would have been entitled to arrest the whisky in the hands of the Distillers' Co., and that such an arrestment, if not cut down by Russell's sequestration, would have been good.

Rights of creditors of seller of goods, in competition with indorsee of delivery-order.

So far the rights of the original seller have been dealt with, in a question with the sub-pledgee, or indorsee in security, of the delivery-order. But at common law it is clear that the creditors of the original seller, or his trustee in bankruptcy, would be entitled to attach the goods, if the property therein remained in the seller, even in a question with the sub-purchaser or sub-pledgee.[2] As has already been explained, the 1st sec. of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60), protected such goods from the diligence of the seller's creditors; and the Sale of Goods Act, 1893, by vesting the property of goods sold in the purchaser by the contract of sale,[3] removes them altogether from the diligence of the creditors of the seller. But if a sale is made subject to the condition that the property shall not pass until the expiry of a certain period of credit, and if the purchaser should transfer his right, by indorsation of a delivery-order or otherwise, to a third party, it would seem that such third party could not compete with the diligence of the creditors of the original seller, because the repeal of the 1st sec. of the Mercantile Law Amendment Act leaves the goods open to the diligence of such creditors, unless and until he has parted with the property therein.[4]

Competition between a second purchaser and indorsee of delivery-order.

A more complicated question might arise if a seller of goods, who had parted with the property therein, and had granted a delivery-order therefor, but remained in possession, should, either by fraud or mistake, re-sell the same goods to a *bonâ fide* third party. Such third party would take the same title as if the seller had been a mercantile agent intrusted with the possession

[1] 56 & 57 Vict. c. 71, s. 40.

[2] *Anderson* v. *M'Call*, 1866, 4 M. 765; *Wyper* v. *Harveys*, 1861, 23 D. 606.

[3] 56 & 57 Vict. c. 71, ss. 17, 18, *ante*, p. 197.

[4] This would seem to be the law in England (Blackburn on *Sale*, 2nd ed., p. 196).

of goods with the consent of the owner; that is, he would take the same title as if the true owner had actually consented to the sale.[1] So he would clearly be preferable to the first purchaser. But if the first purchaser should transfer the delivery-order to a sub-purchaser or sub-pledgee, what will be the position of such sub-purchaser or sub-pledgee in a question with the second purchaser from the original seller? Both appear to have an absolute title to the goods, and the criterion of preference is not obvious.

Right of indorsee of delivery-order to demand fulfilment of implied conditions.

The question has been raised how far an indorsee of a delivery-order is entitled to claim from the granter the fulfilment of conditions which do not appear on the face of the document, but are alleged to have formed part of the contract on which the document was originally granted. It has been held that he has no right to insist on conditions not necessarily implied by the delivery-order, as he is a stranger to the contract between the granter and the original grantee. But he is entitled to prove that by the general custom of trade the delivery-order implies conditions which do not appear by the ordinary meaning of the words employed.[2] Thus the indorsee of a warrant engaging to deliver iron was held entitled to prove that, by the general understanding of merchants, Clyde and Dundyvan iron was thereby meant. Evidence of the understanding of the original purchaser was admitted, not to show what that original contract was, but as a step towards proving the general mercantile usage in the matter.

Nature of bill of lading.

A bill of lading was originally a receipt given by the master of a ship to the shipper of goods when such goods were put on board. In course of development it has come to contain a statement of the receipt of the goods and of their condition when shipped; and an obligation to deliver them in like condition at a certain place to a person named therein, or his assigns, unless such delivery is prevented by certain causes, which are enumerated or imported by reference. The document requires a stamp of sixpence, and cannot be after-stamped; while a penalty of £50 is incurred by anyone who issues a bill of lading unstamped.[3]

Bill of lading and charter-party.

Where goods are shipped in a general ship, that is to say, one not specially chartered by the shipper or consignee of the goods, the terms of the contract of affreightment are usually expressed solely in the bill of lading; but where the ship itself, or a part of it,

[1] 56 & 57 Vict. c. 71, s. 25.

[2] *MacKenzie* v. *Dunlop*, 1853, 16 D. 129; affd. 1856, 3 Macq. 22.

[3] 54 & 55 Vict. c. 39, s. 40, and schedule.

is chartered, the bill of lading is generally preceded by a charter-party. Where there is both a charter-party and a bill of lading, the former is the ruling document, should their terms differ, in a question between shipowner and charterer,[1] although, in matters which relate to the details of the mode in which the voyage is to be performed, the terms of the charter-party may be altered by the bill of lading.[2] But the shipowner, by issuing a bill of lading without the conditions contained in the charter-party, has barred himself from insisting on those conditions, in a question with an indorsee of the bill of lading who is not a party to the charter-party.[3] The phrase "other conditions as per charter-party" has occasionally been inserted in the bill of lading, and it has been contended that the conditions expressed in the charter-party are thereby imported by reference into the bill of lading. But it has been held that these words apply only to those obligations which are stated in the charter-party to be incumbent on the consignee, and do not import what is known as the "negligence clause," or clause stipulating special exemptions from liability.[4]

Bill of lading as a symbol of the goods.

In addition to being a receipt for the goods and an expression of the contract on which they were put on board, the bill of lading is also a symbol of the goods. As it is assignable, by indorsement and delivery, it forms a means of transferring the property in the goods at a time when, being in transit, they are incapable of actual delivery. When the bill of lading is indorsed and delivered with the intention to pass the property, the property and the possession of the goods are thereby transferred, without any intimation to the shipowner or shipmaster, who is the actual custodier.[5] But the effect of the indorsement and delivery of the bill of lading depends upon the contract between the indorser and the indorsee. It may not be intended to pass the property outright, but only to transfer the goods in security. The principle that the transfer of the bill of lading is equivalent to the transfer of the goods, and the extent to which it has been recognised, are

[1] *Rodocanachi* v. *Milburn Brothers*, 1886, 18 Q. B. D. 67; *Wagstaff* v. *Anderson*, 1880, 5 C. P. D. 171.

[2] *Davidson* v. *Bisset & Sons*, 1878, 5 R. 706.

[3] *Leduc* v. *Ward*, 1888, 20 Q. B. D. 475; *The Patria*, 1871, L. R. 3 Ad. 436; *Manchester Trust* v. *Furness* [1895], 2 Q. B. 539.

[4] *Delaurier* v. *Wylie*, 1889, 17 R. 167; *Russell* v. *Niemann*, 1864, 34 L. J. C. P. 10.

[5] See generally, as to the effect of transfer of bill of lading, *Cowdenbeath Coal Co.* v. *Clydesdale Bank*, 1895, 22 R. 682; *Lickbarrow* v. *Mason*, 1 Smith's L. C., 10th ed., p. 674; *Barber* v. *Meyerstein*, 1870, L. R. 4 H. L. 317; *Sanders* v. *M'Lean* 1883, 11 Q. B. D. 327; *Sewell* v. *Burdick* 1884, 10 App. Cas. 74; Bell, *Com.* i. 214, Lord M'Laren's note.

explained in the following passage from a judgment of Lord Justice Bowen:—"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading, by the law merchant, is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that such property should pass, just as, under similar circumstances, the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods, and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it, not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."[1]

Effect of sending with bill of lading a bill of exchange for price.

The limitations of the effect of the transfer of the bill of lading are illustrated by cases relating to the rights of parties where a bill of lading is sent for goods ordered, together with a bill of exchange for the price. In such cases it was held, and is now declared by Statute, that the consignee, even though the bill of lading is taken in his name, or indorsed to him, obtains no title thereby to the goods, unless he accepts the bill of exchange.[2] Thus in *Shepherd* v. *Harrison*, A., a merchant abroad, shipped goods to B., a merchant in Manchester, and sent to him, through his own agent in Manchester, the bill of lading, and a bill of exchange for the price. The bill of lading was taken in favour of A., but indorsed by him. B. kept the bill of lading, but, in consequence of disputes which had arisen on other contracts between him and A., refused acceptance of the bill of exchange. The agent for A. in Manchester thereupon obtained delivery of the cargo by presenting a duplicate copy of the bill of lading, and B. brought an action for the goods. It was held that the property in the goods was not transferred by the indorsement and delivery of the bill of lading unless the condition, namely, the acceptance

[1] *Sanders* v. *Maclean*, 1883, 11 Q. B. D. 327.

[2] *Brandt* v. *Bowlby*, 1831, 2 B. & Ad. 932; *Shepherd* v. *Harrison*, 1871, L. R. 5 H. L. 116; *Rew* v. *Payne*, 1885, 53 L. T. 932. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19, subs. 3.

of the bill of exchange, upon which such indorsement was made, was fulfilled. The property passes not on the mere indorsement of the bill of lading, but on the actual appropriation of the goods by the shipper to the consignee. The decision in this case is now embodied in subs. 3 of sec. 19 of the Sale of Goods Act, 1893.

Transfer of bill of lading.

Bills of lading are usually made out in sets of three, and contain a provision that on one being accomplished the others shall stand void. As a rule the obligation they contain is to deliver "to A. or assigns," or simply "to order"; and when so framed they are transferable, either simply by delivery or by indorsement. Bills of lading, as documents *in re mercatoria*, are not struck at by the Act 1696, c. 25, "anent blank bonds and trusts," and may therefore be drawn simply to bearer.[1] And the effect of a bill of lading as a means of transferring the property is not affected by the fact that it was originally signed without any statement of the amount of the goods shipped, provided that this amount was filled in before the instrument was transferred.[2] But if the bill of lading is taken simply to A. B., it would appear that it is then not an instrument transferable by indorsation, and that an indorsement by the person in whose favour it is taken would not pass the property to the indorsee, nor justify the shipmaster in delivering the goods to him.[3]

Where the several copies of bill of lading are indorsed to different parties.

The fact that bills of lading are issued in sets of three has occasionally led to complications, as it renders it possible for a shipper of goods, who has taken the bills of lading in his own name, to indorse the three copies to different parties, and thus to raise competing titles. This is the more possible because a purchaser of goods to be paid for on delivery of the bill of lading is not entitled to protect himself by refusing payment until all three copies have been delivered to him.[4] The shipmaster is entitled to deliver to the first person presenting to him an *ex facie* regular and duly indorsed bill of lading, if he has no notice of any competing title.[5] It was at one time held that if two competing titles were presented, he was entitled to choose between them; but this decision has been overruled, and the shipmaster is now held bound either to select the right title at his peril, or to refuse

[1] Bell, *Prin.* s. 418.

[2] *Cowdenbeath Coal Co.* v. *Clydesdale Bank*, 1895, 22 R. 682.

[3] *Henderson & Co.* v. *Comptoir d'Escompte de Paris*, 1873, L. R. 5 P. C. 253.

[4] *Sanders* v. *Maclean*, 1883, 11 Q. B. D. 327.

[5] *Glyn, Mills, & Co.* v. *East and West India Dock Co.*, 1882, 7 App. Cas. 591.

delivery to both.[1] In practice he will usually be able to obtain an indemnity against legal proceedings, which will enable him to deliver the goods and avoid incurring expense for demurrage.[2]

Wrongful delivery does not affect the right to the goods.

But although the shipmaster is entitled to deliver the goods to the first person presenting a bill of lading, that delivery does not affect the right to the goods. The indorsement of the bill of lading not only passes the property in the goods, if such was the intention of the parties to the contract, but also operates as constructive delivery; and therefore the right to the goods depends on the first indorsement of the bill of lading, and the right acquired by the first indorsee cannot be affected by the indorser fraudulently indorsing another copy of the bill of lading to a second indorsee, or by the latter obtaining the actual possession of the goods.[3] This rule applies even although the goods have been landed at a sufferance wharf, or other dock warehouse, under a stop-order for freight, before either copy of the bill of lading was indorsed; because the bill of lading remains a living instrument, and its transfer operates constructive delivery of the goods, as long as they are lying subject to the order contained in it.[4] Even if the goods have been actually but wrongfully delivered to a person not in possession of a bill of lading, the bill of lading continues to exist as their symbol; and an indorsee thereof, though after such delivery, will obtain a good title to the goods, and a right to sue for them under the 1st sec. of the Bills of Lading Act[5] (18 & 19 Vict. c. 111). But the respective rights of the first and second indorsee might be altered if the first indorsee enabled the indorser to commit the fraud through gross negligence.[6]

Indorsee of bill of lading may sue on contract of affreightment.

Formerly the indorsee of a bill of lading, though he obtained a right to have the cargo delivered to him, was not entitled by the indorsement to sue the shipowner on the contract of carriage, and was not liable to him thereon.[7] But by the Bills of Lading Act (18 & 19 Vict. c. 111, s. 1) every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property of goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabili-

[1] *Glyn, Mills, & Co., supra.*

[2] *In re Westzinthus*, 1833, 5 B. & Ad. 817.

[3] *Barber* v. *Meyerstein*, 1870, L. R 4 H. L. 317.

[4] *Barber* v. *Meyerstein, supra.*

[5] *Pirie* v. *Warden*, 1871, 9 Macp. 523.

[6] *Glyn, Mills, & Co.* v. *East and West India Docks Co.*, 1882, 7 App. Ca. 591, per Lord Blackburn, at p. 609.

[7] *Craig & Rose* v. *Delargy*, 1879, 6 R. 1269; but see per Lord Trayner in *Delaurier* v. *Wylie*, 1889, 17 R. 167, at p. 186.

ties, in respect of such goods, as if the contract contained in the bill of lading had been made with himself. But it has been held in England that where the indorsement of the bill of lading is only in security, and the indorsee takes no possession of the goods, this section is not applicable, because the indorsee does not then obtain the property in the goods, but only a special property as a pledgee.[1] Therefore it would appear that where the indorsee of a bill of lading has taken it merely in security, and with no intention on the part of the indorser to pass the property, he has no title to sue the shipowner on the contract of affreightment, and cannot be sued by him.[2] Thus in *Sewell* v. *Burdick*, A. shipped goods for Russia in a ship belonging to B., and indorsed the bills of lading in security to his banker, C. The goods were conveyed to Russia, and, after lying there for a year unclaimed, were sold by the local authorities, and the price absorbed in payment of dues. In an action by B. against C. for payment of the freight, it was held that as C. was only the holder of the bill of lading in security, and had never taken possession of the goods, B. had no title to sue him under the 1st. sec. of the Bills of Lading Act (18 & 19 Vict. c. 111).[3] But the indorsee in security has obtained a good title to place himself in the position of the indorser, by making himself the owner of the goods; and he does so, in a question with the shipowner, if and when he takes possession of them.[4] It follows that when the indorsement of a bill of lading has been made only to create a security, the shipper who has so indorsed it retains a good title to sue the shipowner for damage done to the cargo, the damages recovered to be for the benefit of the parties to be shown to be entitled thereto.[5] On a similar principle, an indorsee who had acquired a bill of lading on the express condition that he should only pay for the goods the ship actually contained, was held not entitled to sue the shipowner for a larger amount which

[1] *Sewell* v. *Burdick*, 1884, 10 App. Ca. 74; *The Freedom*, 1871, L. R. 3 P. C. 594; *The Figlia Maggiore*, 1868, L. R. 2 A. & E. 106, as explained by Lord Selborne in *Sewell* v. *Burdick*, at p 88.

[2] This would seem to follow from the judgment of the House of Lords in *Sewell* v. *Burdick*. On the other hand, it was held in *Bristol and West of England Bank* v. *Midland Railway Co.* [1891], 2 Q. B. 653, that a pledgee of the bill of lading, as pledgee of the goods, could sue in trover or detinue anyone who detains those goods. And as the right given to the indorsee in security of a bill of lading in Scotland is of the nature of an absolute right of property, qualified by an obligation to reconvey, it is doubtful whether the judgment in *Sewell* v. *Burdick* would be followed by the Scotch Courts.

[3] *Sewell* v. *Burdick*, 1884, 10 App. Ca. 74.

[4] *Sewell* v. *Burdick*, *supra*.

[5] *The Glamorganshire*, 1888, 13 App. Ca. 454.

appeared in the bill of lading, because the indorsement had passed to him, under the terms of his contract, the property in these goods only which were actually in the ship.[1] But, assuming the title to sue to have passed to the indorsee, he may bring an action against a shipowner or warehouseman for wrongful delivery of the goods, even if his own title accrued after they were delivered.[2]

Rights and liabilities of indorsee of bill of lading.

The rights and liabilities of the indorsee of a bill of lading may be considered under three heads: in questions (1) with the shipowner; (2) with the original seller of the goods; and (3) with the indorser or his trustee in bankruptcy.

(1) In questions with shipowner.

The terms of the bill of lading are, by sec. 5 of the Bills of Lading Act (18 & 19 Vict. c. 111), conclusive evidence, against the master or any other person signing it, of the shipment of the goods, when such bill of lading is in the hands of an indorsee or assignee who has taken it for valuable consideration, and without notice that the goods were not in fact shipped, unless the master can prove that his so signing was due to the fraud of the shipper, or of some person under whom the holder claims.[3] It is a further question how far the shipowner is barred, by the statements made by the master in the bill of lading, on insisting on the true state of facts in a question with such an indorsee. In signing the bill of lading, the master, while acting within the limits of his authority, binds his owners, but he is not in general entitled to bind them by statements which are not true in fact.[4] Thus it has been decided that he has no authority to sign bills of lading for goods which have never in fact been shipped,[5] [6] nor to sign two independent bills of lading for the same goods,[7] and he will not, by doing so, render his owner liable. But a statement in the bill of lading that a certain amount of goods have been shipped, will throw the *onus* on the shipowner of proving that they were not in fact shipped.[8] When the goods have been actually shipped, and are stated in the bill of lading to be in good condition, or of a

[1] *Owners of The Immanuel* v. *Denholm & Co.*, 1887, 15 R. 152.

[2] *Bristol and West of England Bank* v. *Midland Railway Co.* [1891], 2 Q. B. 653; *Pirie* v. *Warden*, 1871, 9 Macp. 523.

[3] See *Valieri* v. *Boyland*, 1866, L. R. 1 C. P. 382.

[4] *Owners of The Immanuel* v. *Denholm & Co.*, 1887, 15 R. 152, per L. J. C., at p. 156; *Grant* v. *Norway*, 1851, 10 C. B. 665.

[5] *M'Lean & Hope* v. *Fleming*, 1871, 9 Macp. (H. L.) 38; cf. *Leishman* v. *Christie*, 1887, 19 Q. B. D. 333.

[6] So an action for delivery of the goods by the indorsee is irrelevant if he does not aver that the goods have in fact been shipped—*M'Lean & Hope* v. *Munck*, 1867, 5 Macp. 893.

[7] *Hubbersty* v. *Ward*, 1853, 8 Ex. 330.

[8] *Bedouin Steam Navigation Co.* v. *Smith & Co.*, 1895, 22 R. 350; revd. 1895, 33 S. L. R. 96.

certain quality, and arrive damaged, or are found not to be of the condition described, the question arises whether the shipowner is entitled to prove that the statements in the bill of lading are untrue, in a question with an onerous indorsee. It has been stated that where a contract has been reduced into a writing which is intended to constitute such contract, parole proof to qualify it is not admissible, unless there is a well established mercantile usage to the contrary.[1] But it would rather appear that the rule is, that the statements in the bill of lading regulate the *onus* of proof in the event of the goods arriving in a damaged condition, and that the indorsee is simply the assignee of the rights of the shipper, and in no better position than he is. Thus if the goods are stated in the bill of lading to be shipped "in good condition," and arrive damaged, the *onus* will rest upon the shipowner to prove either that they were not in fact shipped in good condition, or that they were damaged by some cause for which, under the contract contained in the bill of lading, he is not responsible.[2] In respect of statements in the bill of lading with regard to the weight, brand, or quality of the goods shipped, the tendency of recent decisions has been to charge the indorsee, as a person presumably conversant with mercantile affairs, with a knowledge of the ordinary limits of a shipmaster's authority. Thus while in certain matters which fall directly within the duty of the shipmaster, such as the weighing of the goods shipped, the statements in the bill of lading may be conclusive against the owner, yet in other matters, such as the brand of the goods, the owner will be entitled to prove that such statements were incorrect, since the indorsee must be held to have been aware, when he took the bill of lading, that it was not within the scope of the master's authority to decide of what brand the goods were.[3] And the master is not the agent of the owners in committing a fraud; and therefore where the master, by fraudulent concert with the shippers, entered a false date of shipment, and thereby induced the consignee to accept the goods (which he might otherwise have rejected as not timeously delivered), it was held that the shipowners were not liable in damages.[4]

Liability of shipowner for damage to the goods. Under the contract.

Where it is not averred that the statements in the bill of

[1] Lord Esher in *Leduc* v. *Ward*, 1888, 20 Q. B. D. 475.

[2] *Craig & Rose* v. *Delargy*, 1879, 12 R. 1269; *Owners of The Immanuel* v. *Denholm & Co.*, 1887, 15 R. 152; *Shankland* v. *Athya & Co.*, 1865, 3 Macp. 810.

[3] *Lebeau* v. *General Steam Navigation Co.*, 1872, L. R. 8 C. P. 88; *Cox, Patterson, & Co.* v. *Bruce*, 1886, 18 Q. B. D. 147; *Craig & Rose* v. *Delargy*, *supra*, per Lord Pres.

[4] *Grieve, Son, & Co.* v. *König & Co.*, 1880, 7 R. 521.

lading as to the shipping of the goods in good quality are incorrect, the shipowner is responsible for any damage which they may sustain in transit, both under the contract contained in the bill of lading, as a depositary, and as a common carrier. The liability on the first head is usually limited by a negligence clause which is inserted in the bill of lading, and which enumerates various possible causes of damage for which the shipowner disclaims liability. Where these exemptions are expressed in the bill of lading itself, the indorsee takes it subject to them, although it is otherwise, as has already been stated, when they are merely imported by reference from the charter-party.[1] It is outside the scope of the present work to enter upon a discussion of the various exemptions contained in the negligence clause, and the meaning which has been put upon their terms.[2] There would seem to be no limit to the power of the shipowner to protect himself from liability by extensions of the negligence clause; but it has been observed that if bills of lading were in general framed with a negligence clause sufficiently wide to cover the actual fault of the shipowner himself, it is probable that the Legislature would interfere.[3]

Onus of proof as to cause of damage.

The question of the *onus* of proof as to the actual cause of the damaged state of the goods may often be of great importance. The rule would seem to be, that where the fact that the goods are damaged is ascribed to some cause excepted in the negligence clause, and it is not self-evident that the particular damage would naturally arise from that cause, it lies on the shipowner to prove his defence; but where the applicability of the exception is self-evident, and apparent on the face of the pursuer's own case, the *onus* of proof is shifted,—as, for instance, where the goods arrive broken, and breakage is expressly excepted from the risk.[4]

As a depositary.

Even under the widest negligence clause the shipowner remains liable as a depositary; but in this capacity he is only bound to use due diligence, and is only responsible for negligence, the onus of proving such negligence lying upon the shipper or indorsee.[5]

As a common carrier.

Again, as a common carrier, the shipowner is bound to provide

[1] *Ante*, p. 274.

[2] See on the Negligence Clause, Black, *Digest of Scottish Shipping Cases*, p. 93; Maclachlan on *Shipping*, p. 560; Scrutton, *Charter Parties*, p. 159.

[3] *Chartered Mercantile Bank* v. *Netherlands, etc., Navigation Co.*, 1883, 10 Q. B. D. 521.

[4] *Moes, Moliere, & Co.* v. *Leith, etc., Shipping Co.*, 1867, 5 Macp. 988; *Williams* v. *Dobie*, 1884, 11 R. 982; *Cunningham* v. *Colvils, Lowden, & Co.*, 1888, 16 R. 295 (Lord Shand, p. 311); *Cohn* v. *Davidson*, 1877, 2 Q. B. D. 455.

[5] Per Lord Neaves in *Moes, Moliere, & Co., supra*, at p. 997.

a seaworthy ship, unless this obligation is expressly waived in the bill of lading. Without such express exception, no ordinary provisions in the negligence clause, however widely expressed, will protect him from liability for unseaworthiness, as such provisions, if nothing to the contrary is stated, apply only to perils and causes of damage arising after the shipping of the goods.[1]

Where damage is done through a cause for which the shipowner is not responsible, it is nevertheless the duty of the captain, as representing him, to use every effort to minimise the loss, and in particular to notify the damage, and its true cause, to the shipper as early as possible. Failure in doing so will subject the shipowner to liability to make good the damage, unless he can prove—and the *onus* lies upon him—that nothing could have been done to remedy it, even if he had notified the shipper at once.[2]

Indorsee not affected by secret contracts between indorser and shipowner.

In all such questions the indorsee of the bill of lading is, in a question with the shipowner, in the same position as the indorser. But he is not affected by private agreements and equities between shipper and shipowner which do not appear in the bill of lading. Thus, as has already been seen, where conditions in the charter-party are not reproduced in the bill of lading, the shipowner cannot insist upon them in a question with the indorsee.[3] Similarly, when a cargo was lost through deviation from the direct route, it was decided that the shipowner could not defend himself, in a question with an indorsee of the bill of lading, by proof that the shipper had agreed to allow such deviation.[4]

Liability of indorsee for freight.

Where the bill of lading is taken in favour of the consignee, or indorsed in pursuance of an absolute sale, the consignee or indorsee, on accepting it, thereby becomes liable to the shipowner for freight, even though he does not take possession of the goods.[5] Liability in this respect only adheres to the consignee or indorsee as owner of the goods; and therefore, if he has parted with the bill of lading by an absolute sale, the shipowner has no longer any claim upon him.[6] Where an indorsement is made only in security, and where, therefore, the property in the goods does not pass, no liability for frieght is incurred by the indorsee, unless and until

[1] *Steel & Craig* v. *State Line Steamship Co.*, 1877, 4 R. (H. L.) 103; cf. *Gilroy, Sons, & Co.* v. *Brice & Co.*, 1891, 18 R. 569; *Hill* v. *Scott* [1895], 2 Q. B. 371 and 713 (goods shipped without a bill of lading).

[2] *Adam* v. *J. & D. Morris*, 1890, 18 R. 153; *Notara* v. *Henderson*, 1872, L. R. 7 Q. B. 225.

[3] *Ante*, p. 274.

[4] *Leduc* v. *Ward*, 1888, 20 Q. B. D. 475.

[5] Bell, *Prin.* s. 424.

[6] *Smurthwaite* v. *Wilkins*, 1862, 11 C. B. (N. S.) 842.

he takes possession of the goods. If he takes possession, he has placed himself in the position of the shipper, and incurred liability to the shipowner, although the liability of the shipper for freight is not thereby removed, unless there is a special stipulation that it shall cease.[1]

Cesser clause.

In cases where the bill of lading is preceded by a charter-party, it is usual for the charterer to insert a clause, called the "cesser clause," to the effect that the charterer's liability shall cease as soon as the cargo is shipped, the captain having an absolute lien on the cargo for all freight, dead freight and demurrage. The effect of such a clause has been held to be, that the liability of the charterer absolutely ceases when the cargo is put on board, except for claims which have arisen for delay at the port of loading, and which are not covered by demurrage.[2] The shipowners are left to make good other claims by their lien over the cargo, and their remedy against the consignee.[3] It is usual to import the "cesser clause" into the bill of lading by reference,—the phrase "other conditions as per charter-party" is sufficient,—and the indorsee cannot then obtain the goods without discharging the shipmaster's claims; but it would appear that if no such reference appears in the bill of lading, the shipowner could not claim against the indorsee anything more than his common-law lien for freight.

Shipowner has no lien for general balance.

Although the shipowner may in this way have an extensive lien over the goods, he has no property therein, nor even the possession of them, but is merely the agent or carrier for the shipper or for the holder of the bill of lading. He has therefore no right, apart from express contract, to set up a claim of retention for a general balance due to him by the shipper, in a question with the indorsee of the bill of lading.[4]

(2) In questions with seller of goods. Stoppage *in transitu*.

The rights of an indorsee in security of a bill of lading, in a question with the original seller of the goods, are of importance in the event of the consignee, who has indorsed the bill of lading, failing to pay the price of the goods, and the seller exercising his right to stop them *in transitu*. The general nature and effect of stoppage *in transitu* need not be considered here;[5] all that it

[1] *Sewell* v. *Burdick*, 1884, 10 App. Ca. 74; but see note on p. 278.

[2] *Gardiner* v. *Macfarlane*, 1889, 16 R. 658; see *Digest of Cases on Demurrage* in Scrutton, *Charter Parties*, p. 113.

[3] *Beynon* v. *Kenneth*, 1881, 8 R. 594; *Salvesen* v. *Guy & Co.*, 1885, 13 R. 85; *Sanguinetti* v. *Pacific Steam, etc., Co.*, 1877, 2 Q. B. D. 238—English authorities there cited.

[4] *Bogle* v. *Dunmore & Co.*, 1787, M. 14216.

[5] The rules as to stoppage *in transitu* are codified in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 39, 44, 45, 46.

is necessary to state are the rules which modify or defeat that right when the question is no longer one between seller and purchaser, and when the rights of a third party, as indorsee of the bill of lading, have intervened. But it must be observed that stoppage is competent only when the goods are in transit between the seller and the purchaser; and therefore when the purchaser obtains goods on credit, and ships them himself to a consignee abroad, as they are no longer in transit between seller and purchaser, they cannot be stopped.[1] The general question of the effect on the seller's right of stoppage *in transitu*, caused by the indorsement of the bill of lading by the buyer to a third party, was elaborately considered in the leading case of *Lickbarrow* v. *Mason*.[2] There goods were consigned, and one copy of the bill of lading, blank indorsed, was sent to the consignee, and another copy to the agent of the seller at the place of arrival. The consignee sold the goods, and indorsed the bill of lading to a purchaser, who took it in entire *bona fides*. On the bankruptcy of the consignee without having paid the price, the agent for the seller stopped the goods *in transitu*. It was held that the indorsement and delivery of the bill of lading to an indorsee, who took it *bonâ fide* and for value, passed the property in the goods to him, to the effect of defeating the seller's right to stop *in transitu*. From some expressions in the judgment of Buller, J., it was at one time thought that the indorsement passed the property, whatever was the contract between indorser and indorsee; but this difficulty has now been cleared up, and it is settled that the property only passes if that was the intention of the parties in the contract upon which the indorsement was made.[3] Thus if the indorsee took the bill of lading as a purchaser, the right to stop is entirely excluded; if he took as a security-holder, it is postponed to the right in security. This rule, first established by decisions, has now been made statutory.[4] Where, then, the bill of lading is

[1] *Morton* v. *Abercromby*, 1858, 20 D. 362; *Wright* v. *Mitchell*, 1871, 9 Macp. 516.

[2] 1793, 1 Smith's L. C., 10th ed., p. 674.

[3] Bell, *Com.*, 7th ed., i. 214, Lord M'Laren's note; *Sewell* v. *Burdick*, 1884, 10 App. Ca. 74; *Sanders* v. *M'Lean*, 1883, 11 Q. B. D. 327.

[4] 55 & 57 Vict. c. 71, s. 47: "Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

indorsed in security, the seller is still entitled to stop the goods, and will thereby acquire a right to them, postponed indeed to that of the security-holder, but preferable to that of the purchaser, or of any other party deriving right from him.[1] Thus where a consignee of goods indorsed the bill of lading in security to a bank, and afterwards sold the cargo "to arrive," it was held that the seller's right to stop the goods still remained, subject to an obligation to satisfy the debt for which the bill of lading was pledged, but preferable to the right of the sub-purchaser, who had bought the cargo "to arrive" without receiving a bill of lading.[2] And although the right of the security-holder is preferable to that of the seller stopping *in transitu*, yet he is under an obligation to respect the rights of such seller, and is therefore bound first to exhaust all other rights in security which he possesses over the estate of the purchaser, and can only attach the goods under the bill of lading for the balance then remaining.[3] And if he has taken the bill of lading in security of a specific debt, he is not entitled to retain it, or the goods under it, for a general balance due by the purchaser in a question with the seller stopping *in transitu*.[4]

Bill of lading is a negotiable instrument in questions of stoppage *in transitu*.

These rules give to the bill of lading, in questions of stoppage *in transitu*, one of the most important characteristics of a negotiable instrument, because the indorsee, if he himself takes the document in good faith and for value, acquires a good title to defeat the stoppage, even although the indorsement may have been of the nature of a fraud upon the rights of the seller. Thus where goods were consigned, and the bill of lading, together with a bill of exchange for the price, were sent to the consignee, and the latter, accepting the bill of exchange, deposited the bill of lading with the seller's agent in security of his acceptance, but afterwards recovered it by fraud, and indorsed it for value to a third party who was in entire good faith, it was held that the indorsee acquired a good title to defeat the right of stoppage *in transitu*.[5] Indeed, in order to enable the seller to reduce the indorsement of the bill of lading, and thus make his stoppage effectual, he must aver, and put in issue, that the indorsement, or successive indorsements, were fraudulent on the part both of indorser and indorsee.[6] But where the bill of lading has been indorsed by the purchaser in

[1] *In re Westzinthus*, 1833, 5 B. & A. 817; *Spalding* v. *Ruding*, 1843, 6 Beav. 376; *Kemp* v. *Falk*, 1882, 7 App. Ca. 573.

[2] *Kemp* v. *Falk*, *supra*.

[3] *Ex p. Alston*, 1868, L. R. 4 Ch. 168.

[4] *Spalding* v. *Ruding*, 1843, 6 Beav. 376.

[5] *Pease* v. *Gloahec*, 1836, L. R. 1 P. C. 219.

[6] *Adamson, Howie, & Co.* v. *Guild*, 1868, 6 Macp. 347.

security of a prior debt within sixty days of his bankruptcy, the seller, if he stops the goods *in transitu*, may establish his right to the goods by a reduction of the indorsement under the Act 1696, c. 5.[1] But, except under this Act, it is not an objection to the title of the indorsee, that the value he gave for the bill of lading was to accept it as security for an existing debt.[2]

Stoppage *in transitu* when indorsee took the bill of lading knowing that indorser was insolvent.

It is somewhat doubtful whether the fact that the indorsee was aware, when he took the bill of lading, that the indorser was insolvent, is sufficient to put him on his inquiry as to whether the goods have been paid for. When A., a merchant in Hong Kong, took from B., who was largely indebted to him, and whom he knew to be insolvent, an assignation of certain specified goods, and, *inter alia*, of all bills of lading to come, and a cargo arrived consigned to B. by C., it was held that the indorsement of the bill of lading by B. to A., in pursuance of the said assignation, did not prevent C. from stopping *in transitu*.[3] The decision was partly given on the ground that A., when he took the bill of lading, knew B. to be insolvent, and partly on the ground that no value was given for the document. But this case has been disapproved of, and the question is unsettled.[4] But where the bill of lading is expressed conditionally,—if, for instance, the acceptance of a bill of exchange is therein made a condition precedent to delivery,—the indorsee of the bill of lading has notice of the condition, and is bound to see whether it has been fulfilled.[5]

Question whether the seller, by stopping *in transitu*, can obtain a preference over price payable by indorsee.

Even where the seller's right to recover the goods by stoppage *in transitu* is defeated by the transfer of the bill of lading, it is possible that he might nevertheless, by its exercise, acquire a *nexus* or preference over the price which the indorsee has agreed to pay to the indorser, provided that price is still unpaid, and thus obtain a preferential ranking in the bankruptcy of the indorser.[6] Thus, in *ex parte Golding, Davis, & Co.*, A. bought caustic of soda from Golding, Davis, & Co., and re-sold it, at a slightly increased price, to B. at New York. It was shipped for that port, and the bill of lading was taken in favour of B. A. having become insolvent, Golding, Davis, & Co. stopped the goods *in transitu*; but as the price of caustic of soda had meanwhile fallen, it was agreed to carry out the contract with B., without prejudice to any rights

[1] *Stoppel* v. *Stoddart*, 1850, 13 D. 61.

[2] *Pease* v. *Gloahec*, 1866, L. R. 1 P. C. 219; *Leask* v. *Scott*, 1877, 2 Q. B. D. 576.

[3] *Rodger* v. *Comptoir d'Escompte*, 1869, L. R. 2 P. C. 393.

[4] *Leask* v. *Scott*, 1877, 2 Q. B. D. 376.

[5] *Barrow* v. *Coles*, 1811, 3 Camp. 92.

[6] *Ex p. Golding, Davis, & Co.*, 1880, 13 Ch. D. 628.

acquired by the stoppage. It was held, in a question arising in A.'s bankruptcy, that Golding, Davis, & Co. were entitled to a preference over the price due by B., to the extent of the amount which A. had agreed to pay to them, the balance going to the trustee in bankruptcy. The result would presumably have been the same had the bill of lading been taken in favour of A., and indorsed by him to B.; but the case has been very adversely criticised by Lord Selborne, who intimated an opinion that a stoppage *in transitu* could give a right to the goods, and to the goods alone, and must therefore be considered as doubtful.[1]

(3) In questions with indorser or his trustee in bankruptcy. Nature of right over goods conferred by indorsement of bill of lading as a security.

As the effect of the indorsement of a bill of lading in transferring the property of the goods depends, as has already been shown, on the contract in pursuance of which the indorsement was made, it might appear that the indorsee in security does not become the owner, but only the possessor, of the goods. That is to say, that his right is of the nature of a pledge, and not of an *ex facie* absolute transfer. In one case, however, it was assumed that where a bill of lading was indorsed to a bank in security of an advance, the property in the goods passed to the bank, and that their right was analogous to that of an *ex facie* absolute disponee of heritable property, subject to an obligation to reconvey.[2] But in a more recent case, when the case of *Tod* was considered in the House of Lords, the right of the bank there was described by the Lord Chancellor (Herschell) as that of "mere pledgees," and the former decision generally was regarded as questionable.[3] So should a case arise in which it is necessary to decide whether the indorsee in security is entitled to retain his control over the goods, as an absolute owner, subject to a personal obligation to reconvey, until all debts due to him by the indorser are discharged, or whether he is bound, as a pledgee, to relinquish his right on payment of the particular advance made on the security of the bill of lading, the point may still be held to be open. It is also doubtful whether the indorsement of a bill of lading to one who takes it merely in security gives the indorsee any power to sell the cargo, if such power is not expressly given, as it usually is.[4]

Indorsee in security must retain control of goods through the bill of lading.

Whether the right of the indorsee is one of pledge, or of property subject to an obligation to account, the maintenance thereof

[1] Per Lord Selborne in *Kemp* v. *Falk*, 1882, 7 App. Ca., 573, at p. 578.

[2] *Tod & Son* v. *Merchant Banking Co.*, 1883, 10 R. 1009; cf. *Hamilton* v. *Western Bank*, 1856, 19 D. 152, *ante*, p. 258.

[3] *North-Western Bank* v. *Poynter*, 1894 21 R. 513; revd. 1894, 22 R. (H. L.)

[4] *Tod & Son*, *supra*, and observations thereon by Lord Chancellor Herschell in *North-Western Bank*, *supra*.

depends upon his retaining the control of the cargo, whether situated in the ship or landed subject to all charges.[1] By the transfer of the bill of lading the indorsee obtains possession of the goods through the shipmaster holding as agent for him. But if he gives up the control over the goods by allowing the indorser to sell them, he loses his real security, unless the indorser, in so selling, is acting as an agent or broker for him. In *Tod & Son* v. *Merchant Banking Co.*, bills of lading for a cargo of esparto grass were sent to a bank, blank indorsed, in consideration of which they honoured the shipper's bills for the price. No express power of sale was given. On arrival of the cargo, it was warehoused, subject to the order of the bank. The shipper proceeded to dispose of it to his customers, taking from each a written undertaking to pay to the bank, in consideration of which the bank granted delivery-orders for the grass thus sold. In one instance, however, the bank allowed delivery without getting such an undertaking from the purchaser, and the price was arrested in the hands of the purchaser by a creditor of the shipper. In these circumstances it was held that the bank, by allowing the shipper to sell and deliver this particular portion of the cargo on his own behalf, and without any obligation by the purchaser to pay to the bank, had lost their real security, and could not compete with the arresters. It was held that the shipper, in selling, was not acting as agent for the bank, but independently, and for his own benefit.[2] In such circumstances the case may still be authoritative; but the more general question which it was supposed to decide—the power of the indorsee to employ the indorser to sell for him without losing his security—has since been settled in the opposite way in the case of *North-Western Bank* v. *Poynter*.[3] There Page & Co. transferred the bill of lading of a cargo to the bank in security of an advance, and granted an express power of sale. The bank, by written contract, restored the bill of lading to them, as trustees and agents for the sale of the cargo. The cargo was sold by Page & Co., but the price was arrested in the hands of the purchaser by a creditor of theirs. In a multiplepoinding it was held by the Second Division (Lord Young dissenting) that the bank had lost their security by restoring the bill of lading to the shippers, and thus reinvesting them with the control of the cargo. In the House of Lords this decision was reversed,

[1] Bell, *Com.* ii. 19; *Barber* v. *Meyerstein*, 1870, L. R. 4 H. L., 317.

[2] *Tod & Son* v. *Merchant Banking Co.*, 1883, 10 R. 1009.

[3] 1894, 21 R. 513; revd. 1894, 22 R. (H. L.).

it being there held that the indorsee in security of a bill of lading, or any other person in the position of a pledgee, might restore the subject of his security to the pledgor, provided that he did so on a contract which made the pledgor an agent for him, without losing his real right over the subject in question, or subjecting it to the diligence of the creditors of the pledgor.

Shipping documents.

It may be convenient to state here the rules which govern the transference of policies of marine insurance effected over a cargo, when the bill of lading for that cargo is transferred in security. Such policies are, in the ordinary case, personal contracts between the insurer and the insured, and do not pass with the property in the goods. But they are assignable either by indorsation[1] or by simple delivery with intent to assign.[2] But in order to make an assignation valid before a loss under the policy has occurred, three things are necessary: an insurable interest in the cedent, a continuance of the risk, and an insurable interest in the assignee.[3] After a loss has occurred, the policy, or rather the claim under it, may be assigned to anyone, whether he has an insurable interest or not, and he is entitled to sue upon it in his own name.[4] Where there is a completed sale of the cargo on the ordinary condition of payment on handing over shipping documents, the policy is validly assigned without express assignation, as one of those documents, provided that the whole interest in the cargo passes to the buyer on such sale. But where it is arranged that the price shall only be payable on safe delivery at port, the policy does not pass without express stipulation, as the seller still retains an interest in the goods and the policy until such delivery is completed.[5] In such a case, where the loss occurred by the sinking of a lighter sent by the buyer to receive the goods, it was held that the policy, not having been specially assigned, had dropped, as the interest of the buyer had ceased on safe delivery on board the lighter.[6] Applying this principle to the case of a security-holder, it would appear that the policy would not pass to him without express assignation, even although he obtained possession of the shipping documents, because the indorser would still have an interest to keep it up for his own benefit. Special policies are sometimes issued, whereby the shippers of the goods insure "as well in their own name, as for and in

[1] 31 & 32 Vict. c. 86, s. 2.

[2] Arnould, *Marine Insurance*, 6th ed., i. 114.

[3] Arnould, i. 113.

[4] *Lloyd* v. *Fleming*, 1872, L. R. 7 Q. B. 299.

[5] *North of England Oilcake Co.* v. *Archangel Insurance Co.*, 1875, L. R. 10 Q. B. 249.

[6] *Ib.*

the name or names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all."[1] Such a policy, it is submitted, would run with the property in the goods, and could be sued upon by any person at whose risk the goods were at the time of the loss.

Indorsee of bill of lading has an insurable interest in the goods.

The indorsee in security of a bill of lading has an insurable interest to insure the goods on a new policy,[2] and the indorser may also insure.[3] If the indorsee insure for a sum greater than the debt for which he holds the security, it is a question of intention whether he meant to cover only his own interest or that of the indorser as well. In the former case, he can only recover the amount of his debt; in the latter, he can recover the whole sum insured, and is a trustee of the surplus for the indorser.[4]

[1] *Delaurier* v. *Wylier*, 1889, 17 R. 167.

[2] *Sutherland* v. *Pratt*, 1843, 12 M. & W. 16.

[3] *Hibbert* v. *Carter*, 1787, 1 T. R. 745.

[4] *Irving* v. *Richardson*, 1831, 2 B. & A. 193.

CHAPTER IX

SHIPS AS A SUBJECT OF SECURITY

Registration and certificate.
Statutory mortgage.
Transfer and discharge of mortgage.
Certificate of mortgage.
Rights of mortgagee.
Liabilities of mortgagee.
Bonds of bottomry.
Bonds of respondentia.

Securities over British ships.

PROPERTY in British ships can be made available as a subject of security by methods which have been specially provided by Statute. It is not necessary, in this connection, to consider securities over ships which do not bear the character of British ships, and to which, therefore, these statutory methods do not apply.

Qualifications for registration as owner of British ship.

In order that a vessel may be registered as a British ship, and enjoy the privilege thereof, the owner must be either (*a*) a natural-born British subject residing within the Queen's dominions, or a partner of a firm carrying on business there; or (*b*) an alien who has been naturalised and has taken the oath of allegiance, and who resides or carries on business within the Queen's dominions; or (*c*) a body corporate which is subject to the laws of, and has its principal place of business within, the United Kingdom or a British possession,[1] even although some of its members are foreigners.[2]

Certificate of registry.

The law upon the subject of British ships, and *inter alia* the methods of constituting securities over them, was to a large extent codified by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), now repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). By this latter Act every British ship is to be registered by the principal officer of customs in the port to which she belongs. On registration a certificate of registry is given, which contains, *inter alia*, the names of the persons to whom the ship belongs, the port of registry, and the name and port of the ship.[3] Property in a ship so registered is usually divided into sixty-four shares, and no more than sixty-four persons can be registered as owners.[4] The certificate of registry is the proof that the ship is entitled to the

[1] 57 & 58 Vict. c. 60, s. 1.
[2] *Regina* v. *Arnaud*, 1846, 9 Q. B. 806.
[3] 57 & 58 Vict. c. 60, ss. 2, 14.
[4] Sec. 5.

privileges of a British ship, and the owners and master are bound, under penalties, to keep it in safety.[1]

Certificate as evidence of ownership.

The certificate is primarily intended as a safeguard against ships assuming the character of British ships without being registered, and not to serve as a proof of ownership; but it has nevertheless been regarded as *primâ facie* evidence that the persons whose names are inscribed therein are owners of the ship.[2] But it has been held that it will not be sufficient to prove title in order to support interest in an action for marine insurance. It has been stated that when anyone comes into Court asserting his ownership of a British ship, and claiming thereon, he is bound to instruct his ownership by further proof; but that when a creditor seeks to attach the ship, the *onus* lies upon him to prove that the ship in reality belongs to his debtor, if the name of such debtor does not appear on the certificate of registry.[3] Thus where a ship was arrested for the debt of A., the fact that the certificate bore that she belonged to the children of A., who were in pupilarity, was held to be *primâ facie* evidence that A. was not the owner; and the arrestments were in consequence loosed without caution, although it was averred the transfer from A. to his children was collusive.[4]

Ship may be mortgaged by *ex facie* absolute transfer.

The constitution of securities over a ship, or a share thereof, is provided for by the Merchant Shipping Act, 1894, and a special form is given for that purpose, which is known as a mortgage of the ship.[5] But although a mortgage in the form provided by the Act is the proper and appropriate method of hypothecating the ship, yet the mode which was formerly in use, by an *ex facie* absolute transfer or bill of sale, with a back-letter, is still occasionally made use of; and the fact that what is *ex facie* an absolute transfer is in reality a security will be recognised by the Court, if instructed by competent evidence.[6] But this is, in most cases, an inconvenient form of security, as it may subject the security-holder to all the responsibilities of an owner.

Statutory mortgage.

The form of mortgage given by the Act describes the ship, and contains, for purposes of identification, a copy of the surveyor's certificate. It does not require to be stamped.[7] Such mortgages

[1] Secs. 15, 16.

[2] *Pirie* v. *Anderson*, 4 Taun. 652.

[3] *Duffus & Lawson* v. *Mackay*, 1857, 19 D. 430; *Grant* v. *Grant*, 1867, 6 M. 155.

[4] *Grant* v. *Grant*.

[5] 57 & 58 Vict. c. 60, s. 31, Sched. I, Form B.

[6] *Carlyle* v. *MacAlpin's Trs.*, 1864, 2 Macp. 882; *Watson* v. *Duncan*, 1879, 6 R. 1247; *The Innisfallen*, 1866, L. R. 1 Ad. 72; *Hutchison* v. *Wright*, 1858, 25 Beav. 444.

[7] Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I, Exemptions.

are entered in the register by the registrar at the port of registry of the ship, in the order in which they are presented for registration. As between the parties to it, a mortgage is effectual although unregistered; but registration is the criterion of preference between competing mortgages, and the registered mortgagee has priority over all encumbrances not appearing on the register at the date of registration, even although he may have had notice, actual or constructive, thereof.[1] It is provided that the registered mortgagee is not affected by the subsequent bankruptcy of the mortgagor;[2] but this provision has been held not intended to override the Act 1696, c. 5, against securities for prior debts within sixty days of bankruptcy. If, therefore, the mortgage were given to the mortgagee in security of a prior debt of the mortgagor, within sixty days of the bankruptcy of the latter, the title, although duly registered, could be cut down by the creditors.[3]

Transfer and discharge of mortgage.

When a mortgage has been constituted, it may be transferred in a form provided by the Act, and the transfer registered.[4] When any mortgage is discharged, the registrar, on production of the mortgage deed, and the receipt for the mortgage monies indorsed thereon, is bound to make an entry in the register that such mortgage has been discharged. On such entry being made, "the estate, if any, which passed to the mortgagee vests in the person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested, if no such mortgage had ever existed."[5] In a case where a mortgagee, in virtue of his powers of sale, sold certain shares of a ship, and executed a discharge of his mortgage, and a bill of sale in favour of the purchaser, which were registered of same date, and the bill of sale turned out to be invalid, an attempt was made by the mortgagor to take advantage of the provisions of the section above quoted, by maintaining that the property in the shares vested in him on the registration of the discharge of the mortgage. But it was held that even if the mortgagor thereby obtained the formal title to the shares, the beneficial right to them was in the purchaser; and that the latter was entitled, in order to rectify his title, to a decree ordaining the registrar to register a second bill of sale.[6]

Certificate of Mortgage.

A certificate of mortgage is used where it is desired to possess the means of mortgaging the ship at a distance from the port of registry. It is issued by the registrar of the port of registry.

[1] 57 & 58 Vict. c. 60, s. 33.
[2] *Ib.* s. 36.
[3] *Anderson* v. *Western Bank*, 1859, 21 D. 230.
[4] 57 & 58 Vict. c. 60, s. 37, Sched. I, Form C.
[5] *Ib.* s. 32.
[6] *Duthie* v. *Aiken*, 1892, 20 R. 241.

By the Merchant Shipping Act, 1856 (17 & 18 Vict. c. 104, Sched. M.), a form for such a certificate was provided. This is not repeated in the Act of 1894, but it is declared that the certificate shall contain the name of the person who is to exercise it; the maximum amount, if any; the place where it is to be exercised, if any is specified; the limit of time for which it is to endure; and an enumeration of all existing registered mortgages (57 & 58 Vict. c. 60, ss. 40, 42). The fact of such certificate having been issued is entered on the register, and mortgages made on the certificate take precedence of all charges which were not registered when it was issued.[1] Such a certificate cannot be used within the United Kingdom, if the port of registry be there, nor, if such port be in a British possession, can it be used within such possession.[2] Mortgages made on such a certificate must be indorsed thereon by a registrar or British consular officer, at the place at which they are made, and their priority *inter se* is regulated by the order of indorsement.[3] The death of the mortgagor before the date of a mortgage on a certificate does not invalidate it.[4] If he is made a bankrupt, mortgages made after the date of bankruptcy will give an effectual preference to the mortgagee, provided that (*a*) he took the mortgage in good faith and without notice of the bankruptcy; (*b*) that the period for which the certificate was issued does not exceed twelve months; and (*c*) that that period, and the places at which the power is to be exercised, are entered on the certificate.[5]

Rights of mortgagee over the ship.

The rights of the mortgagee, whether the mortgage is made at home or abroad by means of a certificate, are regulated to some extent by the Statute. The mortgagee is not to be held as owner of the ship or share mortgaged to him, except to the extent which may be necessary for making such ship or share available as a security.[6] The mortgagor, therefore, acts as owner as before, and his acts in that capacity, if made with reasonable prudence, will be binding on the mortgagee. The limit of his right to deal with the ship is to be found in the prejudice of the security of the mortgagee.[7] The latter is entitled to interdict him from doing anything which will imperil the subject of the security, such as sending the ship out uninsured; and will not be bound by contracts made by the mortgagor with third parties for the employ-

[1] 57 & 58 Vict. c. 60, s. 43, subs. 5.
[2] Sec. 41.
[3] *Ib.* s. 43, subs. 2 and 5.
[4] *Ib.* s. 43, subs. 3.
[5] *Ib.* s. 43, subs. 4.
[6] *Ib.* s. 34.
[7] *Laming & Co.* v. *Seater*, 1889, 16 R. 828; *Collins* v. *Lamport*, 1864, 34 L. J. Ch. 196; 4 De G. J. & S. 500.

ment of the ship, unless such contracts are made reasonably and providently. Lord Westbury has laid down the limits of the powers of the mortgagor in terms which have been approved by the Scotch Courts: "As long, therefore, as the dealings of the mortgagor with the ship are consistent with the mortgagee's security, so long as these proceedings do not materially prejudice and detract from or imperil the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as the owner of the vessel; and if he has authority to act as owner, he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property."[1] Thus where A. mortgaged a ship to B., and undertook to keep up an insurance policy on her, it was held that B. was entitled to interdict the ship from sailing uninsured, and was not liable in damages to a third party who had chartered the ship from A., and had suffered loss owing to her non-delivery on account of the interdict.[2] But if the mortgagee capriciously and without good reason prevents the fulfilment of contracts made by the mortgagor while in possession of the ship, he will be liable in damages.[3] The mortgagor, while in possession, has an implied authority to keep the ship in a seaworthy condition; and if, for that purpose, he subject her to a lien for repairs, such lien will be good against the mortgagee.[4]

Power of sale.

Every registered mortgagee has a power of sale of the ship, or of the share mortgaged to him, even if such a power is not expressly provided; but a postponed mortgagee can only sell on obtaining the consent of all prior mortgagees, or an order from a competent Court.[5] If the sale produces a surplus over the mortgage and expenses, the mortgagee selling is a trustee for such surplus for the other mortgagees, or for the mortgagor. In order to make effectual this power of sale, a mortgagee who has a mortgage over a whole ship is entitled to enter into possession of it. *Primâ facie*, his only right is then to sell the ship; but he is not bound to do so at once, if such a sale would result in a loss. Nor is he bound, while waiting for an opportunity to sell, to keep the ship laid up and unemployed; but may employ

[1] *Collins* v. *Lamport*, *supra*.

[2] *Laming & Co.* v. *Seater*, 1889, 16 R. 828.

[3] *The Highlander*, 1843, 2 Wm. Rob. 109.

[4] *Williams* v. *Alsup*, 1861, 30 L. J. C. P. 353.

[5] 57 & 58 Vict. c. 60, s. 35.

her without incurring liability for accidental damage, if he do so with discretion, and displays that amount of care which an ordinarily prudent man would display in the conduct of his own affairs.[1] But if the mortgagee employ the ship in a speculative venture, and she is injured, or has to be sold at a sacrifice, he will be chargeable with the loss thereby incurred.[2]

Right of mortgagee, when in possession, to freight.

The right to take possession implies the right to receive the earnings of the ship. The mortgagee does not, by his mortgage, receive any transfer by way of contract or assignment of the freight; but when he takes possession he becomes the master or owner of the ship, and from that time everything which represents the earnings of the ship must be paid to him, if not already paid. It follows that by taking possession during the course of a voyage, the mortgagee becomes entitled to the freight which is due on its completion, and he has the benefit of the mortgagor's liens over the cargo.[3] There is no apportionment of freight; as none can be earned unless the voyage is completed, the whole is due to the person who is owner at the time of such completion.[4] When the mortgagor assigns the freight to be earned, as he is entitled to do, it would appear that the mortgagee, if he have no notice of the assignment at the time of the mortgage, can, by taking possession of the ship before the freight is due, obtain a right to it preferable to that of the assignee, unless he had notice of the assignation.[5] Similarly, if the mortgagor is sequestrated while in possession, the freight will pass to his trustee; but the mortgagee may obtain it by taking possession before the voyage is completed.[6] When actual taking of possession is impossible, notice to the mortgagor and to the charterers will, in a question of freight, be sufficient.[7] But the mortgagor is under no obligation to employ the ship in such a way as to earn freight; he is entitled to carry his own goods free of freight; and if he ships goods at a freight below the usual market rate, the mortgagee, on taking possession, can claim no more than has been agreed upon.[8] When the first mortgagee, by taking possession, obtains a right to receive the freight, he may recoup himself out

[1] *De Mattos* v. *Gibson*, 1860, 30 L. J. Ch. 145.

[2] *Marriot* v. *Anchor Reversionary Co.*, 1861, 30 L. J. Ch. 571.

[3] *Keith* v. *Burrowes*, 1877, 2 App. Ca., 636; *Rusden* v. *Pope*, 1868, L. R. 3 Ex. 269; *Wilson* v. *Wilson*, 1872, L. R. 14 Eq. 32; *Brown* v. *Tanner*, 1868, L. R. 3 Ch. 597.

[4] *Stewart* v. *Greenock Marine Insur. Co.*, 1847, 1 Macq. 328.

[5] *Wilson* v. *Wilson*, *supra*; *Brown* v. *Tanner*, *supra*.

[6] *Rusden* v. *Pope*, 1868, L. R. 3 Ex. 269.

[7] *Rusden* v. *Pope*, *supra*.

[8] *Keith* v. *Burrowes*, 1877, 2 App. Cas. 636.

of it for an advance he has made to the mortgagor on the security of the freight, in competition with a second mortgagee who had made a prior advance on the freight, of which he had not given notice to the first mortgagee.[1]

Rights of mortgagee of a share in a ship.

Where only a share of a ship is mortgaged, the mortgagee cannot enter into possession of the ship in order to realise his security, and can only intervene under exceptional circumstances. Thus where the mortgagor of a share in a ship was also ship's husband, it was held that the mortgagee, in concurring with the owners of the other shares in removing him from that position, had entered into possession to the extent of defeating the right of the mortgagor to the portion of the freight effeiring to his share, and was therefore preferable to an assignee claiming on an assignment of the freight by the mortgagor.[2]

Liabilities of mortgagee.

It is often a difficult question what amount of interference with the ship will render the mortgagee the owner thereof, and, in that capacity, subject to the liabilities of the ship, such as furnishings supplied for the ship's use, or loans effected by the captain abroad on personal credit. If the mortgagee actually enter into possession, the voyage is for his behoof, and he incurs the same responsibility that attaches to an owner.[3] When absolute possession is not taken, the question would seem to be, For whom did the master act in ordering necessaries or in contracting debt?[4] But in one case the fact that the mortgagee of a passenger steamer had, upon the failure of the mortgagor to meet a bill for an instalment of the mortgage, uplifted the fares, and given directions for the employment of the ship, was held evidence of such possession as would render him liable for necessaries supplied.[5]

Bottomry bonds.

In addition to the mortgages provided by the Merchant Shipping Acts, securities may, in certain circumstances, be created over ships by bonds of bottomry, and over the cargo by bonds of respondentia. Such bonds constitute a security over the ship without possession, and are the only conventional hypothecs known in the law of Scotland. They may be granted by the owner of the ship at any place; by the master, as a general rule, only at a foreign port.[6] They can

[1] *Liverpool Marine Credit Co.* v. *Wilson*, 1872, L. R. 7 Ch. 507.

[2] *Beynon* v. *Godden*, 1878, L. R. 3 Ex. D. 263.

[3] *Havilland, Routh, & Co.* v. *Thomson*, 1864, 3 Macp. 313.

[4] *The Troubadour*, 1866, L. R. 1 Ad. 302.

[5] *Russell* v. *Baird & Co.*, 1839, 1 D. 931.

[6] Abbott on *Shipping*, 13th ed., p. 156–7.

only be validly granted in cases of extreme necessity, when money which is indispensable for the prosecution of the voyage cannot be obtained in any other manner. It is an essential condition that if the ship is lost, the lender on bottomry loses his money, while, if she arrives safely, he is entitled to be repaid, with the addition of what is known as marine interest, specified in the bond; and usually, in consideration of the risk, at a very high rate. The use of bonds of bottomry by the owner at a home port has become almost obsolete with the increase of capital employed in the shipping trade; while the facilities for mortgaging the ship introduced by the Merchant Shipping Acts have rendered the recourse to such an expensive mode of raising money as a rule unnecessary. The following remarks have mainly reference to bottomry bonds granted by the master of a ship at a foreign port.

Power of master to bottomry the ship.

The master has no power to mortgage the ship in any other manner, except by the express authority of the owners;[1] and he is bound, before entering on a bond of bottomry or respondentia, to communicate, in the former case, with his owners, in the latter, with the owners of the cargo, if such communication be at all practicable.[2] Cases may still arise where it is impossible for the master to advise the owners of the ship or cargo, and in such cases he is entitled to bottomry the ship on his own responsibility. But as the lender imperils his money on the fact of impossibility of such communication, which alone justifies the bond of bottomry, such cases are rare. An attempt to communicate with the owners is not an indispensable preliminary to a bottomry bond; but if there is a reasonable chance of obtaining a reply within a time not inconvenient with reference to the circumstances of the case, then it is the duty of the master to communicate, or at least to attempt to do so; and the validity of the bond, as a hypothecation of the ship, will depend upon his fulfilment of that duty. At one time the Courts of Admiralty in England were wont to regard bonds of bottomry with great favour, and the course of decisions tended to sustain them as valid bonds, even although they contained clauses which were inconsistent with the rules regulating bottomry. In such cases the clauses which were invalid were rejected, while those which were operative were saved.[3] But

[1] *Miller & Co* v. *Potter, Wilson, & Co.*, 1875, 3 R. 105.

[2] *The Oriental*, 1851, 7 Moo. P. C. C. 398; *The Buonaparte*, 1853, 8 Moo. P. C. C. 459; *Kleinwortt, Cohen, & Co.* v. *Cassa Marittima of Genoa*, 1877, L. R. 2 App. Ca. 156.

[3] *The Nelson*, 1823, 1 Hag. Ad. Rep. 169.

in more recent cases the tendency has been to construe bonds of bottomry more strictly. Thus it was held that the master, where it was possible to communicate with the owners by telegraph or otherwise, was bound to state not only that he was in financial difficulties, but also that he proposed to grant a bond of bottomry; and that if he failed to do so, the bond was invalid.[1] In a later case, where the master had been instructed by the owner to hypothecate the ship and cargo, and had also communicated with the shippers, who declined to interfere, it was held that the bond was invalid, so far as regarded the cargo, because he had failed to communicate with the consignee, although such communication was practicable.[2] These extensions of the duty of communication, which have been followed in other cases, have had their effect in tending to the disuse of bonds of bottomry.

Conditions necessary to valid bottomry.

Money must be necessary for the voyage.

Assuming that the master has duly communicated with the owners and received their consent, or that such communication is impossible, there are two main conditions which must coexist in order to render a bond of bottomry necessary, and therefore binding. These conditions are: (1) that the money must be necessary for the prosecution of the voyage, or for the safety of the ship or cargo; and (2) that it cannot be procured on personal credit. When it is necessary to repair the ship before she can proceed on her voyage, or to purchase coals, or necessaries for the crew, a bond of bottomry may be justifiable.[3] The same result is reached when the money is borrowed to release the ship from a lien or arrest to which she is subjected by the law of the place for debt incurred for such necessaries.[4] But the payment of a debt incurred on a previous voyage is not a good ground for bottomry.[5] And the fact that the ship is arrested on an illiquid claim for damages will not justify the captain in granting a bond of bottomry, whereby the illiquid claim is turned into a liquid debt.[6] Nor is the private debt of the captain a sufficient ground for bottomry, even although he may thereby be liable to arrest under the law of the place.[7] The lender on bottomry is bound to inquire as to the cause necessitating the bond, and its validity

[1] *The Oriental*, 1851, 7 Moo. P. C. C. 398.

[2] *The Buonaparte*, 1853, 8 Moo. P. C. C. 459; *The Onward*, 1873, L. R. 4 Ad. 38.

[3] Maclachlan on *Shipping*, 4th ed., p. 54; *The Nelson*, 1823, 1 Hag. Ad. Rep. 169; *Dymond* v. *Scott*, 1877, 5 R. 196.

[4] *The Karnak*, 1869, L. R. 2 P. C. 505.

[5] *The Lochiel*, 1843, 2 Wm. Rob. 34.

[6] *The Ida*, 1872, L. R. 3 Ad. 542.

[7] *Smith* v. *Gould*, 1842, 4 Moo. P. C. 21.

will depend on the adequacy of such cause;[1] but if good cause exist, the fact that the captain misapplies the money will not invalidate the bond.[2]

(2) And not obtainable on personal credit.

In the same way, the lender is bound to inform himself that the money necessary cannot be procured on the personal credit of the owners. He must inquire whether any agent of the owners or shippers, consignee, or other person connected with the ship exists, who might be willing to make the advance.[3] Such a person is, however, himself entitled to lend on bottomry, provided that he is not indebted to the owner of the ship; if he is, the bond will be *pro tanto* reduced.[4] The fact that the proposal for bottomry has been publicly advertised, and the lowest offer accepted, does not justify the lender in abstaining from inquiry, though it may afford evidence of the necessity.[5] Where the bond is given for furnishings already supplied, and for which the creditor has no lien on the ship, it is in almost all cases invalid; as the fact that the furnishings necessary have been already obtained on personal credit affords strong proof that the recourse to bottomry was unnecessary.[6] But the bond will not be invalid, if otherwise good, on the ground that small accounts for furnishings already supplied are included in it.[7]

Form of bond.

Where the circumstances justify the master in borrowing on bottomry, the exact form of the bond is not material. It must be in writing, and should narrate the occasion or necessity; the sum borrowed; the premium to be paid; the ship and voyage; the fact that the repayment depends upon the completion of the voyage; and that the ship is hypothecated for the debt. The master usually binds himself, but a bottomry bond is not a competent form of imposing a personal obligation upon the owners, and such an obligation is regarded as an indication that the bottomry was not necessary, and may lead to a reduction of the premium.[8] But a bottomry bond may be granted as a collateral security to bills drawn by the master upon the owners for the amount borrowed. The master has no implied power to bind his owners by a bill;[9] and, if he draws on them, and at the same time grants a bottomry bond,

[1] *The Pontida*, 1884, L. R. 9 P. D. 177.

[2] *The Jane*, 1 Dod. Ad. M. 461.

[3] *Gunn* v. *Roberts*, 1874, L. R. 9 C. P. 331.

[4] *The Oriental*, 1851, 7 Moo. P. C. C. 398; *The Hebe*, 1846, 2 Wm. Rob. 412.

[5] *Soares* v. *Rahn*, 1838, 3 Moo. P. C. C. 1.

[6] *The Ida*, 1872, L. R. 3 Ad. 542.

[7] *The Vibilia*, 1838, 1 Wm. Rob. 1, at p. 8.

[8] Bell, *Prin.* s. 330; *Cochrane* v. *Gilkison*, 1854, 16 D. 548; *Sword* v. *Howden*, 1826, 4 S. 757.

[9] *London Joint-Stock Bank* v. *Stewart*, 1859, 21 D. 1327.

it is held to confer an option on the owners either to accept the bills, and thereby discharge the bond, or to refuse acceptance, leaving the ship hypothecated. When, therefore, the owners had refused the bills, and the ship was lost on the voyage, it was held that the lender of the money could not recover.[1] It is essential to the validity of the bond that repayment should be made to depend upon the safe arrival of the ship at her destination. The lender must take the maritime risk, otherwise there is no bottomry.[2] It is not indispensable that the risk should be specially mentioned, provided that it can be clearly inferred; but a bond which was made payable at thirty days after sight of bills drawn, and which contained no provision of maritime risk, nor of marine interest, was held not to be a good bottomry.[3] In this case the fact that no marine interest was agreed upon was held to be a strong indication that the intention of the parties was that the money should be advanced on personal credit, and not on the security of the ship.

Rights of lender on bottomry.

A bottomry bond, when validly constituted, does not transfer the property of the ship, but gives the lender a claim upon it in the nature of a hypothec. On failure of payment he is entitled to sell the ship on her safe return, on application to a Court having Admiralty jurisdiction; in Scotland, to the Court of Session or Sheriff Court.[4] On the proceeds he is entitled to rank in priority to any claimant, with the exception of seamen for their wages, or the master for his wages and disbursements.[5] While the ship remains in existence *in specie*, and uncaptured by a foreign power, she remains hypothecated to the lender on bottomry, as a constructive total loss is not recognised as putting an end to the obligation.[6] Should the ship deviate from her proposed course, and be totally lost after such deviation, the owners will remain liable to the lender on bottomry.[7]

Competing bonds of bottomry, when effected by the owner, rank in the order of their dates; but when effected by the master, rank in the inverse order, on the ground that it was presumably by the aid of the last loan that the ship was preserved as a subject of security.[8] The claim of the lender on bottomry, as it attaches the

[1] *Cochrane* v. *Gilkison*, 1854, 16 D. 548.

[2] *Miller & Co.* v. *Potter, Wilson, & Co.*, 1875, 3 R. 105; *Stainbank* v. *Fenning*, 1831, 11 C. B. 51.

[3] *Miller*, *cit.*

[4] *Lucovitch*, *Petr.*, 1885, 12 R. 1090.

[5] *The Daring*, 1868, L. R. 2 Ad. 260.

[6] *Thomson* v. *Royal Exchange Assur. Co.*, 1813, 1 M. & Sel. 29.

[7] Maclachlan on *Shipping*, p. 61; cases there cited.

[8] *The Rhadamanthe*, 1813, 1 Dod. 201.

ship, will not be affected by a sale to a *bonâ fide* purchaser without notice;[1] nor will it be postponed to the claims of any mortgagee, whether the mortgage was effected before or after the bottomry.[2]

International law.

In considering by what law claims of bottomry are to be adjudged, it would rather appear, though the subject is obscure, that in English and Scotch cases it would be held that the law of the ship's flag must be appealed to, and not the law of the place where the contract is entered into.[3]

Bonds of respondentia.

Bonds of respondentia do not differ materially from bonds of bottomry in the circumstances which justify their creation, or in the conditions which govern their validity. As a general rule, it would seem that the captain is only justified in hypothecating the cargo in this manner by extreme necessity, when the attempt to raise money on personal credit, or bottomry of the ship and freight, has failed.[4] It must be entered into for the benefit and safety of the cargo; for if it is incurred for the repairs of the ship, without producing any adequate benefit to the cargo, the bond will not be sustained. It would appear that the test of the necessity is whether the owner, if present, and acting as a reasonable and prudent man, would have allowed the cargo to be hypothecated, or would rather have paid the freight and transhipped the cargo.[5]

If cargo is sold under bond of respondentia, the owners are liable to the shippers.

Where the master of the ship enters into a bond of respondentia which is sustained as a valid claim, and under which the cargo is sold, the owners of the ship are liable to the shippers in its value. Even when the master, in entering on respondentia, has acted imprudently and improperly, and outwith the scope of his employment, the owners are liable, as it is a risk insured against in the bill of lading, and not provided for by any of the exceptions therein.[6]

[1] *The Catherine*, 15 Jur. 231.

[2] *The Gustaf*, 1862, Lush. 506.

[3] Maclachlan on *Shipping*, p. 66; *Lloyd* v. *Guibert*, 1864, 33 L. J. Q. B. 241.

[4] *Jacobsen* v. *Hansen*, 1850, 12 D. 762; English authorities there discussed.

[5] *The Onward*, 1873, L. R. 4 Ad. 38; *Dymond* v. *Scott*, 1877, 5 R. 196.

[6] *Benson* v. *Duncan*, 1849, 18 L. J. Ex. 169; *Anderson Foundry Co.* v. *Law*, 1869, 7 Macp. 836.

CHAPTER X

RETENTION OR LIEN

Nature of retention.
Retention of debts.
In mutual contracts.
Where one party is bankrupt.
Debts of principal and agent.
Of broker and underwriter.
Of company and partners.
Retention on title of property.
Retention founded on possession.
Nature of possession required.
Special retention or lien.
General retention or lien.
Waiver of lien.

RETENTION may be defined as a right to resist a demand for payment or performance till some counter obligation be paid or performed.[1] It is distinguished from compensation inasmuch as it is not a method of extinguishing an obligation, but merely of postponing performance; from hypothec, in respect that possession is necessary to found it; from an express pledge or other right in security, because it is not, generally speaking, a part of the express contract between the parties, but is implied by law as a tacit condition or corollary of that contract. Originally and properly the right of retention applied only to corporeal subjects, but it has, in the course of time, been extended to debts.[2] Though its origin is somewhat obscure and controverted, it would seem to be derived, with certain modifications, from the civil law, and to be part of the common law of Scotland.[3]

Nature of a right of retention.

The law on the subject is complicated by the fact that the word retention is used to denote various rights, widely different in their origin and extent. Thus the right of a party to withhold performance of his obligation under a mutual contract, if the counter obligation is not performed, is often spoken of as a right of retention, and may result in a right to retain money or goods. Again, the right of a creditor in a contingent debt, on the bankruptcy of his debtor, to set off the present value thereof against a debt which he himself owes to the bankrupt, is in origin a right of

Various meanings of the word retention.

[1] Ersk. iii. 4. 20.

[2] Bell, *Prin.* s. 1450.

[3] See the argument in *Harper* v. *Faulds*, 1791, in Bell's Oct. Cas. 440.

retention. Further, where a party has a right of property or *jus in re* in a subject, and is under a personal obligation to transfer it to another, he has a right of retention over that subject until all debts due to him by that other party are paid. And finally, there is the ordinary case of retention or lien, where the person in possession of property belonging to another is entitled to retain it in security of debts or obligations due to him by the owner. It is proposed here to treat first of the right to retain, or delay payment of, a debt; and secondly, of the rights of retention or lien competent over moveable property, using the word property in an extended sense, so as to include not only corporeal moveables, but also incorporeal rights.

Retention of debts. Distinguished from compensation.

The law of retention of debts is an equitable extension of the statutory right of compensation. By the Act 1592, c. 43, it is enacted that "any debt *de liquido in liquidum* instantly verified be writ or aith of the party before giving of the decreete be admitted be all judges within this realme be way of exception; bot not after the giving thereof in the suspension or in reduction of the same decreete." Under this Statute, where parties are mutually debtor and creditor of each other, and both debts are liquid, either party may plead compensation. But as the Statute applies only to liquid debts, or debts capable of being liquidated at once, compensation is not applicable where one of the debts is illiquid—where, for instance, it depends upon a contingency, requires to be expiscated by a proof, or consists of a claim of damages. To such cases the law of retention of debts applies; and gives the person who is debtor in the liquid claim the right, in certain cases, to retain the debt, or, in other words, to withhold payment, in security of his illiquid claim.

General rule is that an illiquid cannot be set against a liquid claim.

The general rule is well established that an illiquid cannot be set against a liquid claim; that a person who is sued for a debt which he admits to be due and payable, cannot withhold payment on the ground that he has an illiquid claim against the creditor who is suing him.[1] This rule has been illustrated in a variety of circumstances. Thus if the debt which is put forward as a counter-claim depends on a contingency, it will not support a plea of retention. So it was held that a banker was not entitled to refuse to honour a customer's cheque, on the ground that the bank was the holder of certain bills drawn by the customer, on which he might ultimately become liable to an amount in excess of the balance standing to his credit.[2] And, as a general rule, if

[1] Ersk. iii. 4. 15; Bell, *Prin.* s. 573.

[2] *Paul & Thain* v. *Royal Bank*, 1869, 7 Macp. 361.

A. brings an action against B. for payment of a debt admittedly due, B. will not be entitled to plead that, as the result of an accounting, it would be found that A. was in reality indebted to him. He is generally bound to pay the debt admittedly due, and substantiate his illiquid counter-claims in a separate action.[1] Thus where an action was brought for repayment of a loan, a plea of retention, founded on an illiquid claim for board and lodging supplied by the defender to the pursuer, was repelled.[2] The rule is equally clear where the counter-claim, on which the plea of retention is founded, consists of a claim of damages.[3] Thus where a railway company brought an action for rates due for carriage of goods, it was held that it was no relevant defence to the action to aver that the company was liable to the defender in damages for injury done to some other goods, which they had carried at a different time.[4] And where an outgoing tenant raised an action against his landlord for a sum fixed by arbitration as compensation for the value of crops taken over by the landlord, it was held that the landlord could not plead retention in respect of a claim of damages against the tenant for miscropping and failure to upkeep buildings.[5]

And a debt not yet payable cannot be set against one which is due.

None of these cases, it may be observed, go so far as to decide that where a debtor has a claim against his creditor which is not yet payable, but does not require to be expiscated by proof, nor depend upon any contingency, he cannot found upon it a plea of retention. But in the opinion of Erskine and of Bell, retention is not applicable to such a case.[6]

Cases of retention are exceptions to this rule.

The cases where retention of debts is permissible form the exceptions to the general rule that an illiquid cannot be set off against a liquid claim. These cases may be grouped under four heads: (1) Where the illiquid claim admits of instant verification. (2) Where both the liquid and the illiquid claim arise out of a mutual contract. (3) Where one or other of the parties is bankrupt or *vergens ad inopiam*. (4) Where, in exceptional circumstances, retention has been allowed to meet the justice or convenience of the particular case.

[1] *Ewing* v. *Earl of Strathmore*, 1825, 4 S. 310, affd. 1832, 6 W. S. 56; *Smith* v. *Drummond*, 1829, 7 S. 816. This rule is not applied in exceptional cases—*Ross* v. *Ross*, 1895, 22 R. 461; *infra*, p. 319.

[2] *Drew* v. *Drew*, 1855, 17 D. 559; *Stuart* v. *Stuart*, 1869, 7 Macp. 366.

[3] *Monro* v. *Graham*, 1857, 20 D. 72; *Mackie* v. *Riddell*, 1874, 2 R. 115. Cases narrated *infra*.

[4] *Scottish North-Eastern Rwy.* v. *Napier*, 1859, 21 D. 700.

[5] *Sutherland* v. *Urquart*, 1895, 23 R. 284.

[6] Ersk. iii. iv. 15; Bell, *Com.* ii. 122.

(1) Where the illiquid claim admits of instant verification.

(1) If the demand for a debt which is instantly payable is met by a counter-claim which, though illiquid, is of such a nature that it can be instantly liquidated, the maxim *Quod statim liquidari potest pro jam liquido habetur* applies, and the pursuer's claim will be delayed until the counter-claim is liquidated.[1] Thus if the counter-claim can be instantly verified by the writ or oath of the opposing party, it will afford a good ground for retention.[2] And where, at the close of a lease, the tenant had a fixed and ascertained claim for the value of the crops and unexhausted manure left on the farm, it was held that the landlord might delay payment of this claim until a counter-claim for arrears of rent and interest on improvement expenditure had been cleared up by a proof.[3] This case, which may be rested on the ground that both claims arose out of the same contract, has been explained by Lord Kinnear on the ground that the claim of the landlord was practically as liquid as that of the tenant.[4]

(2) Where the illiquid and liquid claims arise out of a mutual contract.

(2) In mutual contracts,—*i.e.* "the reciprocal undertaking or engagement of two or more persons whereby something is to be given or done, or abstained from, on the one side for a valuable consideration or counter-engagement on the other,"[5]—it is a recognised rule that if one party fails to perform the contractual obligations undertaken by him, in any material respect, the other party is not bound to perform his part of the contract, and seek his remedy in an action for damages, but is entitled to refuse performance of the obligations he himself has undertaken, and to treat the contract as rescinded. In other words, one party to a mutual contract cannot insist on his claim under the contract unless he has satisfied, or is prepared to satisfy, the corresponding and contemporaneous claims of the other party.[6] Without, however, declaring the contract rescinded, a party, whose obligation under the contract consists in the payment of a sum of money for prestations to be performed by the other party, is entitled to withhold payment of that debt until these prestations are performed, or to retain it in security of a claim of damages arising to him

[1] Act 592, c. 143; Ersk. iii. iv. 16.

[2] *Stuart* v. *Stuart*, 1869, 7 Macp. 366.

[3] *Lovie* v. *Baird's Trs.*, 1895, 23 R. 1.

[4] Opinion of Lord Kinnear in *Sutherland* v. *Urquart*, 1895, 23 R. 284.

[5] Bell, *Prin.* s. 70.

[6] Stair, i. 10. 15; Bell, *Prin.* s. 71; *Kelman* v. *Barr's Tr.*, 1878, 5 R. 816; *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730. This can only be stated as a general rule, subject to exceptions in particular circumstances (*Pegler* v. *Northern Agricultural Co.*, 1877, 4 R. 435), and exceptional contracts, like that of marine insurance (*Allan* v. *Hynd*, 1830, 8 S. 612); *infra*, p. 322.

from the defective manner in which they have been performed. This latter right entitles him, on being sued or otherwise pressed for payment, to set off, *ope exceptionis*, such a claim of damages; and to have it expiscated by a proof in the same action.[1] This is an exception to the rule that an illiquid cannot be set off against a liquid claim. Its application will be best shown by a few examples.

Cases in illustration of retention in mutual contracts.

In *Taylor* v. *Forbes*, one of the earlier cases in which the principle was properly recognised, a demand for freight for the conveyance of corn was met by a claim of damages for injury done to the corn in consequence of the defective state of the vessel. It was held that this claim might be admitted to a proof before answer, and, being found good, might be set off against the freight.[2] In a later case, where storekeepers petitioned for authority to sell corn in their store for storage charges, it was held that the owner of the corn might prove and set off a claim of damages for improper storage; because a petition for warrant to sell the goods was equivalent to a petitory action for payment, to the effect of letting in equitable grounds of defence.[3] Where a time is fixed for performance of a contract, the observance of that time is generally a material condition of the contract, and a claim of damages for delay beyond the stipulated time may be pleaded in defence to an action for the contract price.[4] Thus where A. was employed to build a poor-house, to be completed at a fixed time under a penalty of £5 a week, it was held that the parochial board might set off a claim arising from delay, in an action by A. for the contract price.[5] But it has been observed that a claim of damages for delay beyond a reasonable time, where no time is expressly fixed, could not be allowed as a defence to an action for a debt admittedly due under the contract; though the reason for this distinction is not very clear.[6] The case of *Pegler* v. *Northern Agricultural Co.* is interesting, because it appears to have been decided contrary to the authorities above narrated. A., who had acted as the manager of a company, brought an action for arrears of his salary against the directors. They pleaded retention on the ground, first, that he had failed to keep the books properly, and so occasioned loss to

[1] *Kilmarnock Gas Light Co.* v. *Smith*, 1872, 11 Macp. 58; *Turnbull* v. *M'Lean & Co.*, *supra*; *Barclay & Co.* v. *Anderston Foundry Co.*, 1856, 18 D. 1190. Cases in following paragraphs.

[2] *Taylor* v. *Forbes*, 1830, 9 S. 113.

[3] *Gibson & Stewart* v. *Brown & Co.*, 1876, 3 R. 328.

[4] *Johnston* v. *Robertson*, 1861, 23 D. 646; *Macbride* v. *Hamilton & Son*, 1875, 2 R. 775.

[5] *Johnston* v. *Robertson*, *supra*.

[6] *Macbride* v. *Hamilton & Son*, *supra*.

the company; and secondly, that he had in his hands moneys belonging to the company, to an amount which they were unable to specify, but which at least equalled the salary claimed. These defences were held irrelevant.[1] With regard to the claim of accounting, this decision was clearly right, as it was an attempt to set off an illiquid against a liquid debt, and could hardly be regarded as part of the mutual contract. But it is very difficult to understand why the first defence was repelled, except on the ground that the record contained no definite statement that it was the duty of the manager to see that the books were properly kept. In any other view, this decision would seem in conflict with all the other cases on the subject.

Retention between landlord and tenant.

The application of the law of retention in mutual contracts to the cases which arise on the contract of lease is a matter of some difficulty. Lease is a mutual contract, in which the main obligation of the landlord is to give possession of the subjects; the main obligation of the tenant is to pay the rent. The leading question is, What constitutes such a breach of the landlord's obligation to give possession, as to entitle the tenant to retain the rent?

Where landlord fails to give possession.

If the landlord fails to give the tenant possession of the whole, or any material part, of the subjects of the lease, it is clear that he has failed to fulfil the material obligation of the contract, and the tenant is therefore justified, to the extent to which he has suffered damage, in refusing to implement his obligation to pay the rent. This right he may give effect to by retaining his rent; but he is entitled to do so, not on the ground of retention in security of a claim of damages, but on the ground that the rent, or a part of it, is not really due, because possession has not been given.[2] Thus where the lessor of a mill allowed the necessary water-power to be diverted, the tenant was held to be entitled to retain his rent.[3] And where, during a lease of a farm, part of the premises were destroyed by fire, without fault on either side, the tenant was held to be entitled to withhold a proportionate amount of his rent.[4] A similar decision was pronounced where the right to cut peats from a moss was a stipulation in a lease, and the right was lost by the landlord selling the moss.[5] The case of *Dryborough* v. *Dryborough* is apparently an exception. There a brewery was let on the condition that if any part of the premises should become

[1] *Pegler* v. *Northern Agricultural Co.*, 1877, 4 R. 435.

[2] See opinion of Lord President in *Muir* v. *Macintyre*, 1887, 14 R. 470.

[3] *Gordon* v. *Suttie*, 1826, 4 Mur. 86.

[4] *Muir* v. *Macintyre*, *supra*, where the earlier authorities are collected.

[5] *Duncan* v. *Brooks*, 1894, 21 R. 760.

untenantable, the landlord should have the option of rebuilding or allowing an abatement from the rent. Part of the premises did become untenantable; but it was held that this did not entitle the tenant, either at common law or under this special agreement, to retain any portion of the rent.[1] There were specialties in the case which were unfavourable to the tenant's claim, but the decision went upon the general law that an illiquid claim would not justify a refusal to pay a liquid debt; and it is difficult to reconcile the case with the principle that the loss of a portion of the subjects let will entitle the tenant to make a proportionate deduction from the rent. But this principle, depending as it does upon the theory that rent is not due for subjects of which the tenant has not the possession, hardly touches retention at all.

Where landlord fails to implement some other material condition of the lease.

The rule, however, that a tenant is not obliged to pay his full rent unless he gets full possession of the subjects has been extended to cover cases where the landlord, though he has placed the tenant in full possession of the subjects, has failed to execute certain stipulated repairs on buildings, or has violated some other condition of a character so important as to make it a material condition of the contract. For although giving possession and paying rent are the material conditions on each side respectively in the contract of lease considered in the abstract, it is clear that in any particular lease other conditions may be of equal or greater importance. In such cases it may be held that the landlord, by failing to implement such conditions, has failed to give full possession of the subjects, and the tenant may not only claim and retain an abatement from his rent, but may retain his whole rent in security of a claim of damages for breach of the condition. But where it is attempted to define the condition a failure in which will be held to be equivalent to a failure to give possession, great difficulty is found. It is probably impossible to group or reconcile the decisions, but an increasing tendency may be observed to favour the tenant's claim of retention.

Retention by tenant in security of a claim of damages.

It would seem to be clear that a mere personal claim for damages against the landlord, though arising in regard to the subjects of the lease, will not entitle the tenant to withhold his rent.[2] Thus, in a recent case, it was held that the fact that the tenant had suffered some inconvenience or loss from the execution of repairs of the premises by the order of the landlord would not entitle him to retain his rent, as long as he obtained the substan-

[1] *Dryborough* v. *Dryborough*, 1874, 1 R. 909.

[2] *Hill* v. *Gordon*, 1834, 13 S. 88; *M'Rae* v. *Smith*, 1841, 3 D. 994, and cases in following notes. But see *Campbell* v. *Watt*, 1795, Hume, 788.

tial use and enjoyment of the premises.[1] And the opinion may be hazarded, though the actual case does not seem to have occurred, that the tenant of a farm would not be entitled to retain his rent in security of an illiquid claim of damages for injury done by game.[2] The principle would seem to be, in any case which does not actually amount to eviction or failure to give possession of some substantial part of the subjects let, that retention will not be allowed unless the injury complained of is specifically averred to be a breach of some express condition of the lease.[3] Where the landlord is only averred to have violated some condition alleged to be implied, or some collateral obligation, the tenant must pay his rent, and establish his claim of damages in a separate action.[4] Some of the earlier cases, indeed, go beyond this, and refuse retention if claimed for the defective condition, and not the actual loss, of the subjects let. Thus although in *Graham* v. *Gordon*[5] the tenant of a farm, who had taken it on the condition that certain repairs were to be executed, was held to be entitled to retain his rent, on the ground that until these repairs were executed, full possession had not been given, yet in several other cases the plea of retention, though apparently founded on equally good grounds, was not sustained.[6] Thus it was held that a tenant of a quarry was not entitled to retain his rent on the ground that a stipulated access to it had not been made;[7] and a farmer has in several cases been obliged to pay his rent, though he alleged in defence that certain stipulated repairs had not been executed.[8] It is submitted that, in view of the decisions in *Munro* v. *M'Geogh* and *Sivright* v. *Lightbourne*,[9] these cases can no longer be regarded as authorities.[10]

Recent cases on this point.

In the majority of the more recent cases the decision has been favourable to the tenant's claim of retention when founded on the breach of an express condition of the contract, provided that the tenant takes the objection in due time. In *Kilmarnock Gas*

[1] *M'Laughlan* v. *Reilly*, 1892, 20 R. 41; cf. *Sutherland* v. *Urquart*, 1895, 23 R. 284.

[2] Cf. *Johnstone* v. *Whittle*, 1892, Guthrie's *Select Sheriff Court Cases*, 2nd series, p. 253 (damage by voles).

[3] *Sivright* v. *Lightbourne*, 1890, 17 R. 917.

[4] *Humphrey* v. *Mackay*, 1883, 10 R. 647; *Thomson* v. *Coventry*, 1833, 11 S. 725.

[5] 1843, 5 D. 1207.

[6] *Dun* v. *Craig*, 1824, 3 S. 274; *Johnston* v. *Inglis*, 1832, 10 S. 260; *M'Rae* v. *Macpherson*, 1843, 6 D. 302; *Dods* v. *Fortune*, 1854, 16 D. 478.

[7] *Johnston* v. *Inglis*, *supra*. Contrast *Guthrie* v. *Shearer*, 1873, 1 R. 181.

[8] *M'Rae* v. *Macpherson* and *Dods* v. *Fortune*, *supra*.

[9] 1888, 16 R. 93, and 1890, 17 R. 917; both narrated *infra*.

[10] In certain cases, though there is no very modern instance, the tenant has been allowed to retain on the condition of consigning the rent—*Clark* v. *Finlay*, 1823, 2 S. 480; *Cumming* v. *Williamson*, 1842, 4 D. 1304.

Light Co. v. *Smith*,[1] a gas company let to a tenant a piece of ground adjoining their works, with a right to all the ammoniacal liquid and tar to be produced at the works, at a rent of £130. After some years of the lease had passed, the tenant refused to pay the half-year's rent, on the ground that the gas company were diverting a certain portion of the tar. His claim, it is to be noted, was not that he was entitled to an abatement of the rent, but that he was entitled to retain the whole rent due, in security of a claim of damages for the alleged breach of contract. It was held that he was entitled to a proof of these averments, in a petition for sequestration at the instance of the lessor. This case may be contrasted with *Humphrey* v. *Mackay*,[2] where, in a petition for landlord's sequestration, the defence that the landlord had interfered with the water-supply of a mill was repelled, on the ground that there was no definite averment that the landlord had broken any express condition of the lease. In *Davie* v. *Stark*[3] a shop was let, on the condition that the next shop should not be used in the same trade. This condition the landlord himself violated, by carrying on a similar trade there. The tenant threw up the lease, and refused to pay the last instalment of the rent. It was held that the condition in question was, in the circumstances, a material part of the contract of lease, and that its violation justified the tenant in giving up the lease, and retaining the rent in security of his illiquid claim of damages. The same result has been arrived at in cases of agricultural leases, where the execution of certain repairs has been made a condition of taking the farm. If these repairs are not executed, the tenant is entitled to plead that he has not obtained full possession, and to retain his rent in security of the claim of damages thence arising.[4] But much will depend upon the circumstances of each case: upon the apparent *bona fides* of the tenant in taking the plea of retention; and upon the stage at which the objection is taken. This is brought out in two cases decided within a few months of each other by the same Division of the Court. In both a claim of retention for failure to execute certain stipulated repairs was made, and opposite results were arrived at on a consideration of the special facts of each case. In the first of these cases the lease was for nineteen years, and the tenant, after three years' occupancy, claimed to retain a certain amount of his rent, on the ground that certain repairs, for which

[1] 1872, 11 Macp. 58.

[2] 1883, 10 R. 647.

[3] 1876, 3 R. 1114. See also *Guthrie* v. *Shearer*, 1873, 1 R. 181—non-implement of obligation to make access to quarry.

[4] *Sivright* v. *Lightbourne*, 1890, 17 R. 917.

he had stipulated on entering on the lease, had not been executed. It was held that he was entitled to retain, in respect that the landlord had failed to give him full possession of the subjects.[1] In the second case the circumstances were in many respects similar, but less favourable to the tenant. The lease was a verbal one from year to year, and the tenant, after occupying the farm for five years, removed from it, and stated, in defence to an action for the last half-year's rent, an offer of proof that the landlord had failed to execute certain repairs which had been a condition of his entering upon the lease. The defence was, in these circumstances, repelled; but an opinion was intimated by Lord Shand, that had the tenant stated his objections in the early part of the term of the lease, instead of waiting till he had removed from the farm, the plea of retention would have been sustained.[2]

Retention at the end of a lease is more easily admitted.

At the end of a lease, it would appear that the Court will more readily allow the plea of retention. This plea is "more favourable when it is applied to the issue only of the tack, and to the rent of the last year, supposing always that the ground of claim has arisen recently, or, if it be older, that the tenant has been duly and seriously urgent for it in former years."[3] Thus if it is a condition of the lease that the landlord should be bound to recompense the tenant for meliorations on the farm, it would appear, in ordinary circumstances, that the tenant would be entitled to retain the rent last due in security of such a claim.[4] In one case, however, where the amount of the counter-claim depended upon the result of a submission which was pending between the incoming and the outgoing tenant, it was held that the latter was not entitled to retain his rent, or even to consign it in court to await the ascertainment of his claims.[5]

Right of landlord to retain sums due by him to the tenant.

The right of retention is also available to the landlord, in the exceptional case in which payment of a liquid sum is part of the material obligations undertaken by him, and he has an illiquid claim against the tenant, arising from a contract inseparable from the lease. Thus where the claim of a tenant for the value of the crops and manure taken over at the end of the lease had been

[1] *Munro* v. *M'Geogh*, 1888, 16 R. 93.

[2] *Stewart* v. *Campbell*, 1889, 16 R. 346.

[3] In note by Baron Hume to *Bowie* v. *Duncan*, 1807, Hume, 839; cf. *Davie* v. *Stark*, 1876, 3 R. 1114.

[4] *Arbuthnot* v. *Colquhoun*, 1772, M. 10424; *Walpole* v. *Beaumont*, 1780, M. 15249; *Stewart* v. *M'Ra*, 1834, 13 S. 4; *Heriot* v. *Halket*, 1825, 3 S. 479. These cases affirm the right of the tenant to retain for meliorations in a question with a purchaser or a heritable creditor; but the objection that the counter-claim was illiquid does not seem ever to have been taken.

[5] *Dickson* v. *Porteous*, 1852, 15 D. 1.

fixed by arbitration, the landlord was held entitled to a proof of certain counter-claims, consisting of arrears of rent and interest on money expended in improvements, which he alleged to be due to him by the tenant.[1] In this case, however, it would appear that the claim of the landlord was practically liquid, though its exact amount might not be ascertainable. And he has been held not to be entitled to refuse to pay a liquid sum due to the tenant, on the plea of retention to meet illiquid claims of damages for breach of the collateral conditions of the lease. So it was held that a landlord could not refuse to pay a sum agreed upon as the price of stock which he had taken over, on the ground that he had claims of damages against the tenant for miscropping and failure to upkeep buildings.[2] But it is conceived that if the tenant threw up his lease, the landlord would be entitled to retain a sum due by him for meliorations or for stock taken over, in security of his claim of damage for this breach of contract.[3] A recent case, in which it was held that the landlord might retain buildings put up by the tenant and which he had a right to remove, in security of the rent, seems to depend on different principles, and will be noticed elsewhere.[4]

Retention between superior and vassal.

The principle of retention in mutual contracts applies to the relations of superior and vassal, and entitles the vassal to retain the feu-duties when the superior fails to perform any material condition of the feu-contract.[5] Thus where A. feued ground for building purposes, on the condition that neighbouring houses should not be raised beyond a certain height, and the superior permitted this condition to be violated, it was held that A. could retain his feu-duty until the condition was complied with.[6] And where a superior undertook to relieve the vassal of certain public burdens, and the vassal paid them in the first instance, it was held that he was entitled to retain his feu-duty until he was reimbursed.[7] Again, where a superior, in a building feu, undertook to make a road as access, and also to provide sewers, and became bankrupt without fulfilling these obligations, it was held that the vassal might retain the feu-duties, in a question with the

[1] *Lovie* v. *Baird's Trs.*, 1895, 23 R. 1.

[2] *M'Crae* v. *Gordon*, 1842, 4 D. 1310; *Sutherland* v. *Urquart*, 1895, 23 R. 284.

[3] See *Davidson's Tr.* v. *Urquart*, 1892, 19 R. 808, and *Taylor's Tr.* v. *Paul*, 1888, 15 R. 313, *infra*, p. 315. In both cases, however, the tenant was bankrupt.

[4] *Smith* v. *Harrison & Co.'s Tr.*, 21 R. 330. See *infra*, p. 334.

[5] Bell, *Prin.* s. 702; *Ainslie* v. *Mags. of Edinburgh*, 1839, 2 D. 64, and 4 D. 639.

[6] *Cockburn* v. *Heriot's Hospital*, 1825, 4 S. 128.

[7] *Hope* v. *Lumsdaine*, 1871, 9 Macp. 865.

holder of a heritable security over the superiority, until the access and sewers were built.[1] But this decision was rested on the fact that the superior was bankrupt; and it was observed to be doubtful whether retention would have been allowed if he had remained solvent, because the obligation to pay the feu-duty was not necessarily coincident with the obligations undertaken by the superior.

Retention not admissible where the liquid debt should have been paid before the illiquid claim arose.

The right of retention in mutual contracts does not extend to the case where a debt has become due under the contract, and ought properly to have been paid, before any breach of contract occurred. In that case the debtor will not be allowed to retain in respect of a breach of contract afterwards committed by the creditor. Thus in *Fisher* v. *Geddes*, A. and B. entered into a joint adventure to run a coach from Edinburgh to Inverness, on an agreement whereby each was to provide horses for part of the way, and to receive a proportionate share of the fares, and neither was to have any interest in any similar or rival undertaking. As B. resided at Inverness, he received most of the fares, and thereby became indebted in a balance to A. After this balance had been fixed and was payable, A. entered into a partnership in a rival coach. B., on being sued for the share of the fares due by him to A., pleaded retention in respect of a claim of damages for the breach of contract committed by A. in joining the rival coach. This defence was repelled, because the balance for which B. was sued was fixed and payable before his claim of damages came into existence.[2] The same principle is illustrated in the rule, in cases of marine insurance, that the insured cannot retain the premium for a loss due by the underwriter, because, in legal theory, the payment of the premium is the first step in the contract.[3]

Retention where one or other party is bankrupt.

(3) Apart from the law of mutual contract, the normal case for retention of debts is where one or other of the parties is bankrupt or *vergens ad inopiam*. Cases of this kind are considered in Bell's *Commentaries* under the head of "Balancing of Accounts in Bankruptcy." The nature and effect of retention, or balancing of accounts, in bankruptcy may be considered in two aspects: first, when the creditor in the debt instantly payable is bankrupt; and, secondly, when the creditor in the future or contingent debt is bankrupt.

(*a*) Where the creditor in the liquid debt is bankrupt.

Where the creditor in the debt instantly payable is bankrupt, it is held to be inequitable that the other party should be forced to pay this debt in full, and content himself with ranking for the present value of his future or contingent debt on the estate of the

[1] *Arnott's Trs.* v. *Forbes*, 1881, 9 R. 89.

[2] *Fisher* v. *Geddes*, 1829, 7 S. 704.

[3] See *infra*, p. 322.

bankrupt. The theory of the law then is, that he is entitled to retain the debt instantly due, in security of his own future or contingent claim: the practical result is, that he is entitled to have the present value of the future or contingent debt estimated, and set it off against the debt which he is due to the bankrupt estate.[1] So in proceedings in sequestration or cessio a future or contingent debt due by the bankrupt will be valued, and may be set off against a debt instantly due to him by the creditor in question, who will therefore be liable only for the balance, if any, then remaining.[2] And where the tenant of a farm died insolvent, and his estate was sequestrated, and the landlord, under the stipulations of the lease, had entered into possession of the farm prior to the sequestration, and thus become liable for the value of the crop and manure, it was held that he was entitled to set off a claim for arrears of rent against the sum thus due by him, in a question with the trustee in the sequestration.[3] It seems to be thought, though no direct authority can be alleged for it, that a creditor in an illiquid claim for damages would be entitled, on the bankruptcy of his debtor, to retain a debt which he was himself due to the bankrupt.[4] It is probable that a distinction might be drawn between a claim for liquidated damages for breach of contract, and a general claim of damages arising from delict. The former claim, as admitting of easy verification, might justify retention of a debt,[5] but it is difficult to see how a mere general claim of damages—as, for instance, an action for defamation—would be held to entitle the pursuer therein to refuse to pay a debt which he was instantly due to the defender, even if the latter were bankrupt.

Limitations of right of retention in this case.

The right of a creditor in a future or contingent debt to retain a debt which he is instantly due, on the bankruptcy of the other party, is subject to very important limitations. It will not be allowed if (*a*) the *concursus crediti et debiti* has arisen after the bankruptcy, or (*b*) if its admission would involve a double ranking of the same debt on the bankrupt estate, or (*c*) when the circumstances of the case make the plea a breach of faith on the part of the solvent creditor.

Where *concursus crediti et debiti* has arisen after the bankruptcy.

(*a*) It is a general rule, both in compensation and in retention of debts, that the *concursus crediti et debiti*, in respect of which

[1] Bell, *Com.* ii. 122.

[2] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), ss. 52, 53.

[3] *Davidson's Tr.* v. *Urquart*, 1892, 19 R. 808.

[4] Bell, *Com.* ii. 122.

[5] Cf. *Smith* v. *Harrison & Co.'s Tr.*, 1893, 21 R. 330, which, however, was a case of compensation between two liquid and ascertained debts.

compensation or retention is pleaded, must have taken place before the bankruptcy of either party.[1] After the debtor is divested of his estate under the bankruptcy laws, such *concursus* cannot take place, and a debt incurred to the trustee in bankruptcy cannot be compensated by a debt due by the bankrupt, because the bankrupt and the trustee are separate persons. Thus where the tenant of a farm was sequestrated, and the landlord took over the stock in pursuance of an arrangement made with the trustee, it was held that he could not compensate the debt thus arising by his claim for rent, because he was indebted, not to the bankrupt, but to the trustee as representing the general creditors.[2] On the same principle, a party who is indebted to a bankrupt estate is not entitled to purchase claims against that estate, and set them off against the debt for which he is liable.[3] It is doubtful how far this rule would apply to the case where the debt, in respect of which compensation or retention is pleaded, was acquired after the debtor was notour bankrupt, but before he was divested of his estate. It is, however, suggested by Professor Bell, that if such a debt were acquired within sixty days of the bankruptcy, in order to obtain an indirect preference over other creditors, the transaction might be reduced under the Act 1696, c. 5.[4] A specialty may be noticed in the case where the debt which it is proposed to compensate arises on a bill. If A. draws and B. accepts a bill, on which B. is the true debtor, and it is discounted with a bank, then, if B. fails, and A. is forced to retire the bill, he may plead compensation on the debt thus arising against a debt which he is due to B., although at the date of B.'s bankruptcy he was not the holder of the bill, and therefore not directly a creditor upon it.[5] This, however, is more an apparent than a real exception to the rule, that to let in compensation or retention the *concursus crediti et debiti* must have arisen before the bankruptcy of either of the parties, because the drawer of a bill, in which the acceptor is the real debtor, is always a contingent creditor of the acceptor until the bill is paid, and the contingency is purified on the drawer retiring the bill with his own funds.

[1] Bell, *Com.* ii. 132; *Mill* v. *Paul*, 1825, 4 S. 219; *Stewart* v. *Rose*, 1816, Hume, 229; *Taylor's Tr.* v. *Paul*, 1888, 15 R. 313.

[2] *Taylor's Tr.* v. *Paul*, *supra*. This case may be contrasted with *Davidson's Tr.* v. *Urquart*, 1892, 19 R. 808, *supra*, p. 315, where the debt due by the landlord had arisen before the tenant was sequestrated.

[3] *Lawrie* v. *Robertson*, 1783, M. 2581.

[4] Bell, *Com.* ii. 124.

[5] *Hannay & Son's Tr.* v. *Armstrong Bros.*, 1875, 2 R. 399; affd. 4 R. (H. L.) 43.

(*b*) Again, retention of a liquid in security of an illiquid debt will not be allowed, even if the creditor in the liquid debt is bankrupt, if the admission of such a plea would result in ranking the illiquid debt twice on the bankrupt estate.[1] The practical application of this rule is found when both estates are bankrupt. Then, in ordinary circumstances, the estate which owes the liquid debt is entitled to retain it in security of the illiquid debt due by the other estate, or rather, to value the illiquid debt, and set that value off against the liquid debt. But if A. and B. are parties to a bill of exchange, and, *inter se*, A. is only a cautioner, a third party, to whom the bill has been indorsed, would be entitled, on the bankruptcy of A. and B., to rank on each estate for the full amount of the bill. On his doing so, A.'s trustee would be a contingent creditor on B.'s estate for the amount of the dividend he might ultimately pay on the bill. But for this debt he would not be entitled to rank, because B.'s estate, by ranking the indorsee for a dividend on the bill, has paid it, and it is an established rule that the same debt cannot be ranked twice on a bankrupt estate. On this principle, supposing that B. were, at the time of the bankruptcy, a creditor of A. in a liquid debt arising out of a different matter, A.'s trustee could not plead retention in respect of the debt due to him on the bill, because to allow retention, and thus diminish the assets of B.'s estate, would practically amount to ranking the debt on the bill twice on the estate of B.[2] But this technical rule applies only where the party on whose estate it is proposed to rank has been actually divested of his estate in favour of a trustee in sequestration or cessio. There is then a separation of interests between the bankrupt and what was his estate; and the estate, if it pays a dividend on any debt, is completely discharged of that debt. But where a man is merely insolvent, and makes a composition with his creditors, he is bound to pay, or compound for, every debt for which he would be liable if he were solvent. If, therefore, in the case given above, B. were not actually sequestrated, but had compounded with the holder of the bill, leaving him to rank on A.'s estate for the difference between the composition and twenty shillings in the pound, it is clear that A.'s estate would have a contingent claim against B. for any dividends to be paid to the holder of the bill. And if B. were a creditor of A.

Where the admission of the plea of retention would involve a double ranking on the bankrupt estate.

[1] *Anderson* v. *Mackinnon*, 1876, 3 R. 608; *ex p. Macredie*, 1873, 42 L. J. Banky. p. 90; cf. *Jamieson* v. *Forrest*, 1875, 2 R. 701.

[2] *Anderson* v. *Mackinnon*, 1876, 3 R. 608.

in another debt, the two claims would be set off against each other.[1]

Where the plea of retention involves a breach of faith.

Retention or compensation will not be admitted even in bankruptcy where the relations between the parties are such as to make the plea a breach of an implied contract between them, or a violation of good faith. So where a person has deposited money with another for a special purpose, the depositary cannot plead compensation or retention in respect of present or contingent debts due to him by the depositor on general account.[2] And where A. granted to B. an alimentary annuity, he was not allowed to refuse to pay it on the ground that B. was bankrupt and otherwise indebted to him.[3]

(*b*) Where the creditor in the illiquid debt is bankrupt.

The principle of retention is also admitted where the obligant in a liquid debt has a future or contingent claim against his creditor, and that creditor is bankrupt, with the result that the solvent party has a somewhat anomalous right, which may be described as a right to plead compensation when the debt in which he is liable becomes payable. The practical application of this rule is somewhat difficult, and may be best explained by a statement of the only case which has occurred in Scotland.[4] A policy-holder became bankrupt while indebted to the insurance company to an amount greater than the value of the policies. The insurance company were thus in the position of creditors of the bankrupt in a debt liquid and payable, and debtors to him in a future and contingent obligation. In ranking on the bankrupt estate they at first claimed a right to treat the policies as surrendered, and to set off the surrender value against the debt due by the bankrupt to them. This claim they subsequently departed from, and it was held to be untenable. Their substantial claim was that they had a right of retention over any sums payable on the policies when they should become due, in security of any debt which should then be due to them by the bankrupt; and they valued and deducted this right of retention in making their claim on the bankrupt estate. In this form their claim was sustained. The practical effect in this particular case seems to have been that the insurance company were relieved of their obligation under the policies, at the cost of deducting their surrender value from a claim which they were making on the bankrupt estate. For in making their claim, they valued their right of retention at the surrender value of the policies. This left the trustee the option

[1] *Mackinnon* v. *Monkhouse*, 1881, 9 R. 393.

[2] *Campbell* v. *Little*, 1823, 2 S. 484.

[3] *Reid* v. *Bell*, 1884, 12 R. 178.

[4] *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 Macp. 595.

of taking over the security at the value put upon it,—which, assuming the surrender value to be a fair one, he could have no interest to do,—or of reserving to the insurance company the full benefit of their security.[1] On this latter alternative, the sums due under the policies, when they should become payable, would be compensated by the debt due to the company, and therefore neither the trustee nor the bankrupt could have any interest to prevent them from lapsing. In all such cases the debtor in the contingent debt would be able to secure the same result, that is, he would be able to set off the present value of the contingent debt against the debt due to him, by adopting the method of valuation and estimating his right of retention at the present value of the contingent debt.

Retention in exceptional cases.

(4) In certain exceptional cases, it is within the discretion of the Court to allow retention of a liquid in security of an illiquid debt, even where both parties are solvent, by delaying an action for the liquid debt until the illiquid claim is established, when the justice or convenience of the particular case seems to require it. Proof of such an illiquid counter-claim was allowed in several cases in the seventeenth century, quoted by Erskine.[2] In modern practice two instances have occurred. In the first of these a man-servant demanded payment of a legacy from the executors of his employer. They admitted that it was due, but pleaded that the pursuer was really in debt, to a much greater extent, to the executry estate, and they raised an action to establish this claim. The action, at the instance of the servant, came up for hearing a week before the date at which a jury trial to try the counter-claim had been fixed. It was held that this was a case where, without disturbing the general rule that a liquid debt could not be met by an illiquid claim, the action might be sisted to await the result of the jury trial.[3] In a later case, the widow of a landed proprietor brought an action against the heir (her son) for arrears of an annuity due to her. This claim was admitted, but the heir pleaded that the action should be sisted to await the result of an action of count and reckoning at his instance against the pursuer, concluding for a large amount alleged to be due to him as legitim, and for the profits of the estate for several years, during which the pursuer had managed the estate as his tutor-at-law. There was a strong *primâ facie* case in favour of the heir's claim. In these circumstances the Court superseded the consideration

[1] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 65.

[2] Ersk. iii. 4. 16.

[3] *Munro* v. *Macdonald's Exrs.*, 1866, 4 Macp. 687.

of the case until the action of count and reckoning should be disposed of.[1]

In cases of retention, parties must as a rule be debtor and creditor in the same capacity.

As has been already incidentally stated, the person claiming to retain a debt due to a bankrupt estate, in respect of a future or contingent debt due by the bankrupt to him, must be able to show that there is a *concursus crediti et debiti* between the two debts.[2] To establish such a *concursus*, he must be a debtor and creditor of the same person in the same capacity. Thus where a man is in debt as an individual, he cannot retain that debt on the ground that his creditor is indebted to him as an agent, factor, or trustee. Thus where a party died when largely indebted to a bank, and his executors deposited money belonging to the executry estate in the same bank, on deposit receipts which showed that it was trust money, it was held that the bank could not retain sums so deposited to meet the debt due by the deceased, because the debtor and his executry estate were separate parties.[3] And where an executor was sued for a private debt, it was held that he could not plead compensation in respect of debts which were due to him as executor.[4] A negative test would seem to be, that the person claiming a right of retention must have a right, at the time or in future, to sue the bankrupt on the debt for which he claims to retain. On this principle, it was held that there was no *concursus debiti et crediti*, and therefore no compensation or retention, between a debt due to a trust and a debt due to the debtor by the beneficiary.[5] But, as will be shown in dealing with cases of factors, a right to sue, or liability to be sued, does not necessarily imply a right to retain. The application of the principle that *concursus crediti et debiti* is a condition of retention is of special importance in three classes of cases: (1) Where retention is claimed against a principal in respect of a debt due by a factor. (2) Where retention is pleaded by one or other of the parties to a contract of marine insurance. (3) Where it is pleaded between debts of a company and of the individual partners.

Retention where goods are sold by a factor.

(1) Where goods are sold by a factor or agent, avowedly as such, the purchaser cannot retain the price, in a question with the principal, on the ground that the factor is indebted to him and is bankrupt, even although the terms of the contract would have entitled him to pay to the factor while he continued solvent. The

[1] *Ross* v. *Ross*, 1895, 22 R. 461.

[2] Ersk. iii. 4. 13; Bell, *Prin.* s. 573.

[3] *Gray's Trs.* v. *Royal Bank*, 1895, 23 R. 199; see also *Hewitt* (*Clark-Kennedy's Factor*) v. *Symons*, 1896, 3 S. L. T. No. 366, *infra*, p. 382.

[4] *Stuart* v. *Stuart*, 1869, 7 Macp. 366.

[5] *Johnston* v. *Johnston*, 1875, 2 R. 986.

price is due to the principal, and payment made to the factor is made to him merely as the agent or hand of the principal. There is therefore no *concursus crediti et debiti*.[1] As long as the purchaser knew that he was dealing with an agent, even though he did not know who the principal was, he cannot retain the price in respect of a debt due to him by the agent.[2] But it is very common for agents or factors to sell goods in their own name, without disclosing the fact that they are acting for a principal. In that case the purchaser, if he believed that the factor was in reality the principal in the transaction, may have a right to retain or compensate the price, in respect of a debt due to him by the factor.[3] It has been held, however, that he cannot in any case retain for an illiquid claim of damages against the factor.[4] This right of retention is rested on the ground that the principal has, by his conduct, induced the purchaser to transact with the factor on the footing that he was a principal, and is therefore subject to the equities pleadable by the purchaser in a question with the factor.[5] So it is only where the principal has given his agent or factor possession of the goods that the right of retention can arise. If the sale is merely by a broker, who has no possession, the purchaser cannot retain even if he was under the impression that the broker was a principal.[6] And the principal must have assented, either expressly or by implication, to the factor selling in his own name.[7] But retention will not be excluded by the fact that the principal has privately prohibited the agent from selling in his own name, if he has selected an agent, such as a factor, who is in the custom of selling in his own name, and may be expected by third parties to do so; in other words, the purchaser may retain, if he bought from a factor who acted as a principal, even if, in so doing, the factor exceeded his authority.[8] Again, in order to be entitled to retain against the principal, the purchaser must have been actually and reasonably under the impression that he was dealing with a

[1] *Liddle* v. *Young*, 1852, 14 D. 647; *Mathew* v. *Auld & Guild*, 1874, 1 R. 1224 (stockbroker); *Fish* v. *Kempton*, 1849, 7 C. B. 687.

[2] *Mathew* v. *Auld & Guild*, *supra*; *Lavaggi* v. *Pirie & Sons*, 1872, 10 Macp. 312.

[3] Bell, *Prin.* s. 573, *Com.* i. 526, Lord M'Laren's Note; *Hitchiner, Hunter, & Co.* v. *Stewart & Ninian*, 1803, M. 14206; *George* v. *Clagett*, 1797, 7 T. R. 359, 4 R. R. 762, 2 Smith's L. C. 10th ed., 135; *Lavaggi* v. *Pirie & Sons*, 1872, 10 Macp. 312.

[4] *Turner* v. *Thomas*, 1871, L. R. 6 C. P. 610.

[5] See opinion of Wilde, C. J., in *Fish* v. *Kempton*, 1849, 7 C. B. 687, at p. 691.

[6] *Baring* v. *Corrie*, 1818, 2 Barn & Ald. 137; cf. *Mathew* v. *Auld & Guild*, 1874, 1 R. 1224.

[7] *Semenza* v. *Brinsley*, 1865, 18 C. B. (N. S.) 467; 34 L. J. C. P. 161.

[8] *Ex p. Dixon*, 1876, 4 Ch. Div. 133.

principal, up to the time at which the right to plead retention accrued. If he admits that he never considered the point, and had no impression on the matter,[1] or if it is shown that reasonable inquiry would have revealed the fact of the agency,[2] he has no right of retention. And even if he at first believed the factor to be a principal, he cannot retain for debts incurred to him by the factor after he became aware of the existence of a principal.[3]

The same rules apply to analogous cases.

These rules are not confined to the case of the sale of goods by a factor, but apply to other analogous cases. Thus, in a recent English case, A. employed B. to collect the amount of a general average loss from the underwriters. B., not being a member of Lloyd's, employed C., an insurance broker, and represented himself as, and was understoood by C. to be, the principal in the matter. On the bankruptcy of B., it was held that C. was entitled to set off the sums collected under this employment against a debt due by B. to him, in a question with the real principal, A.[4]

Retention between parties to a contract of marine insurance: The insured cannot retain the premium against the underwriter.

(2) In entering upon the question of the rights of retention between parties to a contract of marine insurance, and the effect of the rule of *concursus crediti et debiti* in such cases, it may first be noticed, though it is perhaps not strictly relevant, that the insured has no right to retain the premium, in a question with the underwriter, or his trustee in bankruptcy, either to meet a debt due to him by the underwriter, or in security of his contingent claim for a loss under the policy. This does not rest on the question of *concursus*, but upon the legal theory that the payment of the premium is the first step in a contract of insurance, and it is supposed to be paid *ante omnia*.[5] In modern practice, this rule is of little importance, as the business of marine insurance is invariably conducted through the medium of a broker, and the underwriter looks to the broker, and not to the insured, for the payment of the premium. And in the ordinary policy there is inserted an acknowledgment by the underwriter of the receipt of the premium, and this, except in cases of fraud, is conclusive against him in a question with the insured. Therefore, in the ordinary case, the underwriter cannot sue the insured for premium, nor can he set off the premium in an action for a loss, even

[1] *Cooke* v. *Eshelby*, 1887, 12 App. Cas. 271; but see *contra*, per Lord Benholme in *Lavaggi* v. *Pirie & Sons*, 1872, 10 Macp. 312, at p. 316.

[2] *Fleming* v. *Finlay & Co.*, 1832, 10 S. 739; *Baring* v. *Corrie*, 1818, 2 Barn & Ald. 137.

[3] Per Wilde, C. J., *Fish* v. *Kempton*, 1849, 7 C. B. 687, at p. 691.

[4] *Montague* v. *Forwood* [1893], 2 Q. B. 350.

[5] *Ferrier* v. *Sandeman*, 29 June 1809, F. C.; *Lilly* v. *M'Kissock*, 24 Nov. 1818, F. C.; *Allan* v. *Hynd*, 1830, 8 S. 612.

although, by the bankruptcy of the broker or otherwise, the premium has not in fact been paid.[1]

Broker cannot retain premiums against underwriter.

Where a broker is employed, the theory of the contract between the underwriter, the broker, and the insured is, that the underwriter is a creditor of the broker for premiums, and that the insured is a creditor of the underwriter for losses.[2] From this it follows that, on the bankruptcy of the underwriter, the broker cannot retain the premiums due by him either to meet a loss already due by the underwriter, or in security of the contingent claim for a loss which has not yet occurred, because he is not the creditor in the policy.[3] He is therefore bound to pay the premiums to the trustee in bankruptcy, leaving the insured to rank for the amount due for a present or contingent loss.[4] It is not uncommon for the broker to act on a *del credere* commission, by which he guarantees the solvency of the underwriter, and is liable to the insured for losses, if the underwriter fails. If, while acting on such a commission, he takes the policy in his own name, he would seem to be entitled, on the bankruptcy of the underwriter, to retain the premium; but if he takes it in the name of the insured, he has no such right, even if he has actually paid the loss.[5]

If the broker fails, it might appear that this theory, if fully carried out, would entitle his trustee to demand payment of the premium from the insured, and pay a dividend on it to the underwriter. But the rule is not carried so far; and it is held that if the broker, at the time of his failure, has neither received nor paid the premium, the underwriter may claim it directly from the insured.[6]

Retention by underwriter for debt due by broker in question with insured.

Another point may arise on the bankruptcy of the broker. The custom of Lloyd's is that an account is kept between the broker and the underwriter, in which the broker credits the underwriter with the premiums on all policies effected, and debits him with return premiums and losses. In this way, as between

[1] Arnould, *Marine Insurance*, i. 197; *Dalzell* v. *Mair*, 1808, 1 Camp. 532; *De Gaminde* v. *Pigou*, 1812, 4 Taunt. 246.

[2] Arnould, i. 217; *Power* v. *Butcher*, 1829, 10 B. & C. 329, per Parke, B., at p. 347.

[3] *Selkrig* v. *Pitcairn & Scott*, 1805, M. App. Insurance, No. 10; *Koster* v. *Eason*, 1813, 2 M. & Sel. 112, 14 R. R. 603.

[4] As to return premiums, see Arnould, *Marine Insurance*, i. 223.

[5] Bell, *Com.* ii; Arnould, p. 221; *Koster* v. *Eason*, *supra*; *Cumming* v. *Forester*, 1813, 1 M. & Sel. 494, 14 R. R. 511.

[6] Bell, *Com.* ii. 127. See opinions, printed in *Selkrig* v. *Pitcairn*, *supra*, of case of *Robson* v. *Wilson*, May 1798, n. 2.

broker and underwriter, the payment due upon a loss may be compensated by the premiums due on the same or other policies.[1] As long as all parties are solvent, there is no difficulty, as the broker accounts to the insured for the payment due on the loss. But if the broker becomes bankrupt, the question arises whether the underwriter can plead this method of settlement in answer to a demand by the insured for a loss. It has been held that the question depends upon whether the insured can be shown to have been aware of this method of dealing. The custom of Lloyd's is merely the custom of a particular place, and not a general usage of trade, of which all persons are supposed to be cognisant.[2] It is therefore only binding on those persons who are aware of it. If, then, the insured is acquainted with this custom, he is held to have authorised the broker to act in accordance with it, and the underwriter may therefore plead compensation or retention; but if he is not aware of it, the underwriter cannot defend himself, in an action for a loss, by pleading compensation on a balance due to him by the broker, as the insured cannot then be held to have given the broker any authority except to receive the amount of a loss in cash.[3]

Retention between debts of a company and of its partners.

The questions which arise when compensation or retention in bankruptcy is pleaded between the debts of a company, and those of the individual partners, are so special that they require to be treated in some detail. The authorities on the subject relate to compensation between liquid debts, and not to retention, or balancing of accounts in bankruptcy, in respect of debts which are illiquid or contingent; but it is conceived that the rules applicable to the former would also be applicable to the latter case.

Where the question is between the company and a partner.

Where the question is solely between the company and its partners, and one partner is bankrupt, while the company and the other partners remain solvent, there is no right of compensation or retention between debts due by the bankrupt partner to the company, and debts due by another partner to him, or between debts due to the bankrupt partner by the company, and debts to another partner by him. The reason of this is that in such cases the company and the individual partners are, with respect to any one partner, separate persons, and there is thus no *concursus crediti et debiti* between the debts before bankruptcy.[4]

[1] Arnould, *Marine Insurance*, i. 196.

[2] *Bartlett* v. *Pentland*, 1830, 10 B. & C. 760.

[3] *Sweeting* v. *Pearce*, 1859, 7 C. B. (N. S.) 449; 29 L. J. C. P. 265.

[4] *Galdie* v. *Gray*, 1774, M. 14598; Bell, *Com.* ii. 548.

And should the solvent partner assign his debt to the company, after the bankruptcy, in order to create such a *concursus*, it would be held to be an attempt to obtain an illegal preference over the other creditors of the bankrupt partner.[1] The same principle would doubtless apply to the case where the company and one individual partner became bankrupt: a solvent partner could not retain a debt which he owed to the company, in respect of a debt due to him by the bankrupt partner.

In questions with third parties: General Rules.

Where the question is with a third party, who is not a member of the company, the general rule is that there is no *concursus crediti et debiti* between firm-debts and debts of individual partners. But this general rule is subject to so many exceptions, especially in bankruptcy, or when the company is dissolved, that it is of little use as a practical guide. The subject will be more easy to explain if regarded from the point of view of certain secondary rules, on which the various cases have been decided. These secondary rules are: (1) That the company is not responsible for the private debts of its individual partners.[2] (2) That each partner is individually liable for partnership debts.[3] (3) That an individual partner is not, so long as the company continues to exist, the creditor in a debt due to the company. From these rules the various cases have resulted as follows.

Company debtor cannot retain for debt due to him by a partner.

As the company is not responsible for the private debts of a partner, it follows that a debtor to the company cannot set off against that debt a debt due to him by a partner in his individual capacity, on the bankruptcy of the company.[4] But this rule does not apply when the company is dissolved by any cause other than bankruptcy. After its dissolution, the assets of the company belong to the individual partners in *pro rata* shares, and therefore a debtor to the dissolved company, who is at the same time a creditor of an individual partner, can plead retention or compensation to the extent of that partner's share of the debt due to the company. This right will become of practical importance in the case where the individual partner in question is bankrupt, and the third party is sued by the other partners for the debt which he owes to the company.[5]

Debtor of partner may retain for debt due to him by company.

It is a well settled principle of the law of partnership, that each partner is individually liable for the debts of the company.

[1] Bell, *Com.*, *ut supra*.
[2] Bell, *Com.* ii. 547.
[3] Bell, *Prin.* ss. 356, 371.
[4] *Morrison* v. *Hunter*, 1822, 2 S. 68; Bell, *Com.* ii. 553.
[5] *Mitchell* v. *Canal Basin Co.*, 1869, 7 Macp. 480, per Lord President Inglis, at p. 487.

On this ground, it has been held that a third party, who is in debt to an individual partner, may, on the bankruptcy of that partner, set off a debt due to him by the company, because, as he is entitled to demand payment of the company debt from that partner, the *concursus crediti et debiti* exists at the date of the bankruptcy.[1] On an extension of the same principle, it is held that where the company is in debt to a third party, and an individual partner is a creditor of his, the company may, on the bankruptcy of the third party, set off the one debt against the other. To enable this to be done, an assignation of the partner's claim to the company must be implied; but as no express assignation is necessary, it is held that the *concursus crediti et debiti* has occurred before bankruptcy.[2]

Company cannot retain for debt due to individual partner.

A third rule is, that the individual partners are not, so long as the company continues to exist, creditors in the debts due to the company. Therefore there is no *concursus crediti et debiti*, and therefore no room for compensation or retention, between a debt due by an individual partner to a third party, and a debt due by that third party to the company. So on the bankruptcy of the third party, the individual partner is liable in payment of his debt, and the company must rank on the bankrupt estate.[3] But if the company is dissolved, although still solvent, the individual partner becomes a creditor in debts due to the company to the extent of his share in the company assets, and therefore is entitled to that extent to plead compensation or retention.[4] Thus if A., a partner in the firm of A. & B., owes £500 to C., a bankrupt, and C. is at the same time a debtor of the firm for £500, A. cannot set off his debt against that due to the firm, because he is not, in his individual capacity, a creditor of C. But if the company, while still solvent, is dissolved, A. becomes a creditor in one-half of the £500 due by C., his partner B. being a creditor in the other half; and therefore he can plead compensation to the extent of £250. It would appear that it would be an illegal preference for A. and B. to arrange, after the bankruptcy, that the entire debt due by C. to the company should form part of A.'s share of the

[1] *Thomson* v. *Stephenson*, 1855, 17 D. 739; see per Lord President in *Mitchell* v. *Canal Basin Co.*, *supra*.

[2] Bell, *Com.* ii. 554; *Russel* v. *M'Nab*, 1824, 3 S. 63; *Salmon* v. *Padon & Vannar*, 1824, 3 S. 406; *Hill* v. *Lindsay*, 1847, 10 D. 78; *Lockhart* v. *Ferrier*, 1842, 12 D. 1253. It is doubtful whether the company can plead compensation if the partner particularly concerned refuses his consent—*Raleigh* v. *Hughson & Dobson*, 1861, 23 D. 352.

[3] *Mackie* v. *M'Dowall*, 1774, M. 2575; *Thom* v. *North British Bank*, 1850, 13 D. 134.

[4] *Oswald's Tr.* v. *Dickson*, 1833, 12 S. 156; *Heggie* v. *Heggie*, 1858, 21 D. 31.

company's assets, and therefore that such an arrangement would not entitle A. to plead compensation for more than £250.

Retention in debts due to two companies composed of the same individuals.

Where there are two companies, and the individual partners are the same in each, or where the partners in one company are also partners, along with others, of another, it is an unsettled question whether retention or compensation can take place, between debts due by one company to a third party, and debts due by that third party to the other company, on the bankruptcy of one or other company, or on the bankruptcy of the third party. Where the membership of the two companies is not identical, it is difficult to see on what principle such retention or compensation should be allowed. Where the two companies were composed of the same individuals, it was held in one case that compensation could take place;[1] but in a later case, where the point, though not necessary to the decision, was largely discussed, the majority of the judges held that, as the two companies were separate persons in law, there could, so long as both continued to exist, be no compensation between debts due to and by them respectively.[2]

Retention between contributory in winding-up of a company and the liquidator.

When the question arises between the liquidator of a company and a contributory, the law of retention is not very well settled. It would seem to be clear that the winding-up of a company will prevent a shareholder from putting forward a claim to set off against his liability for calls a debt due to him by the company, because he is liable for calls, as a partner, to the liquidator as the representative of the creditors, while the debt due to him is due by the liquidator as the representative of the company. *A fortiori*, he cannot retain the calls demanded on the ground of an illiquid claim against the company. Nor would it render the position of the contributory any better if he had made an agreement prior to the winding-up, with the directors or with the manager, that calls were to be set off against debts.[3] Thus where a builder, who was employed by a company to erect a theatre, agreed to take shares in the company on the condition that the calls thereon were to be deducted from the instalments of the price, it was held, on the company going into liquidation, that this agreement was not binding in a question with the liquidator, and that the builder was liable to pay calls on his shares.[4] And where A. deposited money

[1] *William's Tr.* v. *Inglis, Borthwick, & Co.*, 13 June 1809, F. C.

[2] *Mitchell* v. *Canal Basin Co.*, 1869, 7 Macp. 480.

[3] *Cowan* v. *Gowans*, 1878, 5 R. 581; *Millar* v. *Aikman*, 1891, 28 S. L. R. 955; *Black & Co.'s Case*, 1872, L. R. 8 Ch. 254; *White's Case*, 1879, 12 Ch. Div. 511.

[4] *Cowan* v. *Gowans*, *supra*.

with an investment company, of which he was a shareholder, on the conditions that it should be repayable on a month's notice, and all calls made on his shares should be paid out of it, it was held, on the company being wound up, that this agreement did not entitle him to retain the amount due on calls on the shares held by him.[1] On the other hand, it would seem that if the directors of a solvent company make an arrangement for the payment of shares by compensation, and not an arrangement which gives the shareholder only a right of retention, it will be valid against the liquidator. Thus if A., on taking shares in a company, agrees that the whole amount due, or to become due upon them, shall be set off or deducted from a debt then due and payable to him by the company, and if, in accordance with this agreement, the shares are issued to him as fully paid up, it will be held that this arrangement is equivalent to payment in cash under the 25th section of the Companies Act, 1867,[2] and he will incur no liability on his shares in the winding-up.[3] The distinction between this case and *Millar* v. *Aikman* is very fine, resting, apparently, on the fact that as, in the latter, a month's notice was required before the deposit was repayable, no debt was actually due by the company to the shareholder at the time when the arrangement was made.[4] In England it has been held that the bankruptcy of the contributory makes a material alteration in the situation, and that the debt due to the bankrupt by the company must be set off against calls due by him.[5] From this it has been deduced that even where a contributory has assigned his claim against the company to a third party, after the commencement of the liquidation, but before his own bankruptcy, the assignee takes the claim subject to all equities, and the liquidator, in ranking him for it, is entitled to deduct the amount of the calls due by the contributory.[6] But these cases were expressly decided on a particular section of the English Bankruptcy Act of 1849,[7] and their applicability to Scotland may admit of question.

So far we have dealt with the law of retention as applicable

[1] *Millar* v. *Aikman*, *supra*.

[2] 30 & 31 Vict. c. 131.

[3] *In re Jones, Lloyd, & Co.*, 1889, 41 Ch. Div. 159. See cases on this section in Buckley, *Companies Acts*, 6th ed., p. 553.

[4] In *Jones, Lloyd, & Co.*, the debt was due by the company before A. became a shareholder; in *Millar* v. *Aikman*, A. was a shareholder before the company became indebted to him. *Quære*, Can any distinction be founded on this?

[5] *In re Duckworth*, 1867, L R. 2 Ch. 578.

[6] *In re Universal Banking Corpor.*, 1870, L. R. 5 Ch. 492.

[7] 12 & 13 Vict. c. 106, s. 171.

to debts. We proceed to discuss rights of retention, sometimes also called rights of lien over moveable property.

Distinction between retention and lien.

It is probably impossible to draw any definite distinction between the words retention and lien, when used as applicable to the right of a party to retain moveable property in security of a debt due to him by the party to whom he would, but for the right to retain, be bound to transfer or restore it. Originally, indeed, it would appear that the doctrine of retention is a part of the law of Scotland, derived from the civil law, while lien is an equitable right introduced from the law of England.[1] The right of the owner of property to retain it for debts due to him by one to whom he is under a personal obligation to transfer or deliver, is indeed invariably considered as a right of retention, and not a lien. But a right to retain, founded on mere possession, is indiscriminately spoken of as a right of retention, or as a lien. An attempt has been made by Professor More to distinguish between these words.[2] According to him, retention is the counterpart of the diligence of arrestment or poinding, by which the property of a debtor may be attached by an individual creditor. Since, therefore, a person who happens to be in the possession of property belonging to his debtor cannot arrest or poind it, he has, according to this theory, a right to retain it in every case in which he would be entitled to arrest or poind it were it in the possession of a third party. Lien he holds to be an implied agreement, in particular cases, that the party in possession of property belonging to another shall be entitled to retain it. The difficulty of this theory would seem to be that the definition of a right of retention is so wide that it covers every case in which a lien could be supposed to exist. Even, however, if it were otherwise intelligible, it implies the existence of a general right of retention founded on mere possession,—that is, that a party who is in possession of the property of another should be entitled to retain it until all debts due to him by the owner are paid; and it has been authoritatively decided that no such right of retention is known in the law of Scotland.[3]

Summary of rights of retention and lien.

Without, however, attempting to fix any exact distinction in terminology, it may be said that there are three distinct rights which may entitle a party to retain moveable property: (1) He may hold this property on an *ex facie* absolute title, subject to a personal obligation to transfer it, and may then have a general

[1] See the argument in *Harper* v. *Faulds*, 1791, Bell's *Oct. Cases*, 440.

[2] *Notes to Stair*, cxxxi.

[3] Bell, *Prin.* s. 1431; *Harper* v. *Faulds*, 1791, M. 2666; Bell's *Oct. Cases*, 440; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *National Bank* v. *Forbes*, 1858, 21 D. 79.

right of retention over it. (2) He may be in possession of property in circumstances which will give him a right of general retention or lien over it, for all debts due on a particular course of employment. (3) He may be in possession of property in circumstances which will give him a right of special retention or lien over it, in security of debts incurred with reference to the particular property retained.

Distinction between retention founded on property and retention founded on possession.

The primary distinction to be drawn is that between a right to retain a subject founded on a right of property in that subject, and a right to retain founded on possession of a subject which belongs to the party against whom it is retained. So far a clear distinction may be drawn between retention and lien, as the former right is never spoken of as a lien. Such a right exists when the owner of property is under a personal obligation to transfer it to a party who is in debt to him, whether that debt arises out of the same contract as the obligation to transfer, or from some entirely different cause.[1] A right of retention or lien founded on possession, on the other hand, arises, under limitations which will be pointed out in the ensuing pages, where a person is in possession or is the custodier of property which belongs to a party who is in debt to him. In each case the right may be to retain the property until a particular debt is paid, but in origin the two rights are essentially distinct. Retention founded on property arises by force of law, wherever the necessary relations between the parties exist,—that is, whenever the owner of property is under a personal obligation to transfer it to one who is his debtor,—and it will prevail, in the absence of any express contract to the contrary, even if it was clearly against the good faith of the contract between the parties.[2] Retention founded on possession is a right resting on contract, express or implied, and can therefore only exist when it is included in the contract between the parties, or may be implied as a corollary to that contract.[3]

Retention founded on property.

Retention founded on property is a right resting on a general rule of the law of Scotland. Where a party is invested with a title of property to, or a *jus in re* in, a subject, and this right of property is qualified only by a personal obligation to transfer it to another party, the former has the right to insist that all debts due

[1] See *M'Ewan* v. *Smith*, 1847, 9 D. 434, affd. 1849, 6 Bell's App. 340; *Melrose* v. *Hastie*, 1850, 12 D. 655; and other cases on the right of retention of a seller of goods, *ante*, p. 259 *seq.*

[2] *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

[3] See opinion of Lord Young in *Robertson* v. *Ross*, 1887, 15 R. 67. Some cases founded on usage of trade are perhaps exceptions.

to him by the party who is creditor in the obligation to transfer should be paid, as a condition precedent to the fulfilment of that obligation.[1] To found a right of this kind, it is not necessary that the party having the right of property should also be in possession of the subject, as the right to retain depends on property, and not on possession.[2] "The doctrine," says Professor Bell, "may be laid down generally, that in all cases where one holds an absolute conveyance of property, whether heritable or moveable, under a personal obligation to restore it on payment of certain debts, it will subsist as a good security, not only to cover a specific debt, but under a general stipulation in the back-bond to restore on payment of all advances, it will be effectual to cover every sum advanced previous to the demand for a reconveyance, and this not only against creditors but against purchasers also."[3] The general nature and effect of retention, founded on a right of property, was fully discussed in the case of *Hamilton* v. *Western Bank*.[4] There a bank, in discounting certain bills for A., took as collateral security a delivery-order for some brandy which was standing in the name of A. in the books of a warehouse. This delivery-order was intimated, and the brandy was transferred to the name of the bank. The bills for which the security had been given were retired, but the bank, while still in possession of the brandy, made further advances to A. It was held on the evidence, that there was no agreement that the brandy should be pledged or hypothecated for this further debt. On the bankruptcy of A., his trustee claimed the brandy. It was held that the bank was entitled to a right of retention over it for the balance due to them by A., because the delivery-order, when intimated, transferred the right of property to them, and they were in the position of absolute owners, subject to a personal obligation to reconvey. Lord Ivory, after explaining that the bank had obtained a right of property, and not merely a right of pledge, in the brandy, explains the resulting right of retention as follows:[5] "The former title being thus absolute, the legal right follows by force of law. The property

[1] Bell, *Com.* i. 724. The principal authorities are: *M'Evan* v. *Smith* and *Melrose* v. *Hastie*, *supra*; *Wyper* v. *Harveys*, 1861, 23 D. 606; *Distiller's Co.* v. *Russell's Tr.*, 1889, 16 R. 479 (sales). *Hamilton* v. *Western Bank*, 1856, 19 R. 152; *Nelson* v. *Gordon*, *infra*; *National Bank* v. *Union Bank*, 1885, 13 R. 380, revd. 14 R. (H. L.) 1 (securities). *Robertson* v. *Duff*, 1840, 2 D. 279 (trust).

[2] *Nelson* v. *Gordon*, 1874, 1 R. 1093, per Lord Deas, p. 1099.

[3] Bell, *Com.* i. 724; approved per Lord Pres. Inglis in *National Bank* v. *Union Bank*, 1885, 13 R. 380, at p. 411 (revd. 14 R. (H. L.) 1).

[4] 1856, 19 D. 152.

[5] 19 D. 162.

has passed on absolute title, but on the other side there is a personal obligation to reinstate. This precisely comes within the category of cases with which we are familiar. It is the same as a disposition in security *ex facie* absolute, but with a back-bond apart; or an absolute intimated assignation of a bonded or other debt with back-titles; or an absolute vendition of a ship; or a trust constituted by absolute deed; or a seller's retention for a separate debt; or a cautioner's retention for a separate debt; or, in the case of a purchase under mandate, of the purchaser's refusal to convey; or a wadsetter's right to apply rents; or a refusal to purge encumbrances. These are cases in every one of which decisions have been pronounced by this Court; and in one and all of them the creditor's right of retention has been held to arise by force of law. It thus arises from the shape of the title, from its character as an absolute divestiture of the party granting it, and out of the very circumstance that the formal or legal title is absolute in him, with a mere personal obligation to apply it only in a particular way. It is just a right of retention under our common law, as applied to cases where compensation is shut out. It is compensation applied to the case of a bankrupt. It gets quit of the ground of objection which applies in the case of compensation, if the debts are not of the same character as an obligation *ad factum præstandum* against a money claim, a present against a future claim, and many others. In one and all of these cases the law of retention has been held to apply, more especially where bankruptcy intervenes, for then there is by force of law given a wider right to the party, and he is entitled to all the remedies of retention, which applies alike to liquid and illiquid obligation." And the distinction between a right of retention of the kind now under consideration, and a lien founded on possession, is pointed out by Lord Curriehill in the same case:[1] "Another elementary principle in the law of Scotland is, that in such a case the holder of a security so constituted, when called upon to perform his personal obligation to restore to the original owner the subject of his security, or the balance thereof, on the specific debt in reference to which it was constituted being satisfied, is entitled to retain the same in security or satisfaction of any other debt which may then be owing to him by that original owner. That in the practice of Scotland the plea of retention operates in such a case, is *triti juris*. This right of *retention* is *sua natura* different from a right of *lien*; inasmuch as retention entitles a party who is the owner or *dominus* of property, to with-

[1] *Hamilton* v. *Western Bank*, 1856, 19 D. 152, at p. 163.

hold performance of some personal obligation to transfer his right of ownership to another, until the latter perform a counter obligation, whereas lien entitles a party who is in possession of what is another party's property, to continue to withhold it from its real owner, until the latter perform a counter obligation. And on the other hand the corresponding right to demand possession of the property, on the counter obligation being performed, is, in the former case, merely a personal right, or *jus crediti*; while in the latter case, it is the real right of property."

Examples of retention founded on property: Cases of sales and rights in security.

The cases in which the nature and effect of retention, founded on a right of property, have been illustrated, are varied in character. The circumstances which will give a party who is liable in payment of a liquid debt the right to withhold payment of that debt, in security of an illiquid claim against his creditor, have been fully detailed in the earlier part of this chapter. And one of the most important illustrations of the law of retention, the right of a seller of goods which have not been delivered to retain them in security of a debt due by the purchaser, with the limitations of that right imposed by the Mercantile Law Amendment Act, 1856, and the Sale of Goods Act, 1893, has been considered elsewhere.[1] The same principle gives the holder of a security over heritable subjects, when constituted by an *ex facie* absolute disposition with back-bond, the right to retain the subjects until all debts due to him by the disponer are paid.[2] And where an incorporeal subject, such as a debt, is assigned to a creditor by an assignation which is apparently unqualified in its terms, and that assignation is completed by intimation, the assignee has the right to retain it until all debts due to him by the cedent are paid.[3] In the case of corporeal moveables, it has been held that a vendition of a ship, which gave the creditor an *ex facie* absolute title, conferred on him a right of retention;[4] and the transfer of goods in the hands of a third party, effected by a delivery-order or other document of title, and intimation to the custodier, has been held to confer upon the transferee a similar right.[5] No case, it is believed, can be quoted to prove that a security constituted by the actual transfer of a corporeal moveable subject by delivery *de manu in manum* will confer on the security-holder a right to retain the subject for debts for which it is not specially impignorated.[6] If the result of the

[1] *Ante*, p. 259.
[2] *Ante*, p. 153.
[3] *Dougal* v. *Gordon*, 1795, M. 851 and 2607; cf. *National Bank* v. *Forbes*, 1858, 21 D. 79.
[4] *Balleny* v. *Raeburn*, 1808, M. App. *voce* Compensation, No. 5.
[5] *Hamilton* v. *Western Bank*, 1856, 19 D. 152; discussed *ante*, p. 256.
[6] See *ante*, p. 213.

transfer were to create a pledge of the subject, the right of retention is doubtful; but in the exceptional case where a right of property to the moveable in question was given, it is conceived that the principle of retention would apply.

Other cases.

While the cases of a seller and a security-holder are the most usual examples of a right of property subject to a personal obligation to transfer, other cases, in which also a right to retain has been held to follow, are not wanting. Thus if a trust be constituted by an *ex facie* absolute conveyance, with a back-bond or letter of trust apart, the trustee has the right to retain the subject conveyed until all debts due to him by the truster are paid.[1] And a cautioner has been held entitled to retain, for separate debts, property conveyed to him by an unlimited title in security of his liability under the cautionary obligation.[2] And where A. and B. were *pro indiviso* owners of a subject, and A. was otherwise indebted to B., it was held that B., in whose name the title to the subject stood, was entitled to refuse a conveyance of one-half of the subject, until all debts due to him by A. were paid.[3] Again, where A. instructed B. to purchase a heritable subject for him, and the title was taken in B.'s name, it was held that B. had a right to retain it, and refuse a conveyance, until he was relieved of certain cautionary obligations which he had undertaken on A.'s behalf.[4] And where A., on going abroad, intrusted B. with a sum of money, to meet a claim which he apprehended might be made against him by a third party, and the mandate to pay this claim fell by A.'s death before a demand was made for it, it was held that B. was entitled to retain the deposit in security of cautionary obligations undertaken by him for A.[5] The recent case of *Smith* v. *Harrison & Co.'s Tr.*[6] may also be an illustration of the right of general retention. A tenant had by his lease the right to remove certain buildings at the end of the lease. These buildings, however, were *partes soli*, and thus were the property of the landlord, subject to the obligation to allow the tenant to remove them. The tenant

[1] *Robertson* v. *Duff*, 1840, 2 D. 279.

[2] *Irvine* v. *Menzies*, 1711, M. 2686; *Murray* v. *Chalmers*, 1744, M. 2626; *Crs. of Brough* v. *Jollie*, 1793, M. 2585. But where a cautionary obligation, on which liability was unlikely, was put forward as a plea for withholding payment of a debt of large amount, it was decided that though that might be a reason for withholding payment, interest was due as long as the debt was unpaid—*Duke of Queensberry's Exrs.* v. *Tait*, 1822, 1 S. 466.

[3] *Glass* v. *Hutton's Crs.*, 1794, M. 2587.

[4] *Crs. of Brough* v. *Jollie*, 1793 and 1795, M. 2585.

[5] *Murray* v. *Chalmers*, 1744, M. 2626.

[6] 1893, 21 R. 330.

became bankrupt while several years of the lease were still to run, and it was held that the landlord had a right to retain the buildings in security of his claim for the rent. It is not clear, however, whether this judgment was pronounced on the ground that the landlord was the owner of the buildings, and had thus a right of retention founded on property,—which, it may be noted, would have given him a right to retain them in security of any debt due to him by the tenant at the close of the lease,—or on the more limited ground, that the obligation, on the part of the tenant, to pay the rent, and the obligation, on the part of the landlord, to allow the buildings to be removed, were the counter obligations of the mutual contract of lease, and therefore that the tenant, or his trustee in bankruptcy, could not enforce the obligation of the landlord without fulfilling the counter obligation incumbent on him.

A right of retention must be founded on a title *ex facie* unqualified.

In order to let in the plea of general retention, the property must be held on an *ex facie* absolute title,—that is, in the case of property held on a conveyance, the conveyance must bear to be an absolute and unrestricted transference of the property. Such an absolute right is not intrinsically qualified by the fact that a back-bond or letter is granted by the disponee, setting forth that the absolute conveyance is in reality made in security, or in trust. Such a back-bond is merely a personal obligation, and no bar to retention. But if the same qualification appears in the deed by which the property is conveyed, the right transferred is no longer an absolute, but only a limited and qualified title, and on such a title no right of retention founded on property can be asserted, because no right of property is transferred.[1] Thus, in *National Bank* v. *Forbes*,[2] A. assigned to B. a policy of insurance on his life for £1000, by a deed which expressly stated that the assignation was granted in security of a debt of £500, and bound B. to hold count and reckoning for any sum he might receive under the policy, and on payment of the debt to retrocess A. or his executors after the debt was paid. B. afterwards made other advances to A., but these were not made expressly on the security of the insurance policy. On A.'s death his estates were sequestrated, and a multiplepoinding was brought, of which the fund *in medio* was the balance of the proceeds of the policy of insurance, after the £500, for which it had been expressly assigned, had been paid. B. claimed a right

[1] *Robertson* v. *Duff*, 1840, 2 D. 279, per Lord Fullerton, p. 291; *National Bank* v. *Forbes*, 1858, 21 D. 79; *M'Gregor* v. *Alley & M'Lellan*, 1887, 14 R. 535.

[2] 1858, 21 D. 79.

to satisfy the debt still due to him by A.'s estate, on the plea of a right of retention. The trustee on A.'s sequestrated estate claimed the whole fund as falling under the sequestration. It was held that as the assignation to B. was qualified *in gremio*, he had no right of retention, and therefore no right to the proceeds of the policy after the debt of £500 was paid. The Lord Justice Clerk (Inglis) explained the law on the point as follows:[1] "Now, in every case of retention, the first and most important inquiry is, what is the title on which the party has attained the possession which he proposes to hold till his debt is paid, for this title of possession furnishes the precise measure of his right of retention? If the title of possession be unlimited, as a title of property, the party is entitled to retain till every debt due by the party demanding delivery of the subject is paid. If his title is limited he can retain only for the payment of that particular debt which is secured by his possession. This is very well settled law."

Debts for which holder of title of property can retain.

The very general expression, "a right of retention for all debts," as used in the opinions which have been quoted in the last few paragraphs, may be subject to some limitation. It is conceived that if all parties are solvent, an *ex facie* right of property would not give a party a right to retain for illiquid debts, after all debts due and payable by the party demanding delivery of the subject had been paid, and that delivery had been properly demanded. The question is of little interest, as, if the party demanding delivery were solvent, the party holding the *ex facie* title would seldom care to assert a right of retention. The conclusion that he could not successfully assert such a right is founded on the analogy of the law of retention of debts, by which, as has already been shown, a party who is debtor in a liquid debt cannot withhold payment in security of an illiquid claim, unless the other party is insolvent, or unless the claims arise out of a mutual contract.[2] It would appear, however, that a right of retention may be asserted in security of cautionary obligations undertaken on behalf of the party demanding delivery, even though the liability on the cautionary obligation was entirely illiquid and contingent.[3] Thus A. sued B. on a bond, and was met by a plea of compensation founded on a debt due by him to B. on a bill. To this he answered that he was entitled to retain this debt, in security of a cautionary obligation undertaken by him for B. It was found "that the retention took place against

[1] 21 D. at p. 85.
[2] *Ante*, p. 305.
[3] *Murray* v. *Chalmers*, 1744, M. 2626; *Irvine* v. *Menzies*, 1711, M. 2686.

the liquid compensation, and that he was not bound to let his debt be extinguished by the compensation, till he was relieved of his cautionry."[1] The report of this case is silent on the question whether B. was insolvent, but there would appear to be no reason to suppose that he was. If the party demanding delivery were bankrupt, there is no reason to doubt that the holder of the *ex facie* absolute right would be entitled to exercise his right of retention for all debts due to him, whether liquid or illiquid. The cases establishing this proposition have mostly related to the right to withhold payment of a debt, and have already been discussed.[2]

Limitations of right o retention : By the contract between the parties.

The right of general retention may be subject to equitable limitations. Thus if an *ex facie* absolute right were conferred on a security-holder or trustee, and a back-bond were taken stating that this right was granted for a particular and limited purpose, and that the subject was to be restored on that purpose being fulfilled, it is difficult to see any reason why the contract expressed in the back-bond should not receive effect. It cannot, however, be stated that such a back-bond would necessarily exclude a right of retention. Thus where a ship was conveyed by an *ex facie* absolute vendition, and the disponee granted a back-bond, by which he acknowledged that he received the conveyance in security of his acceptance of two bills, and bound himself, on these bills being retired by the disponee, and produced to him discharged, to reconvey the said ship to the disponee, his heirs or assignees, it was held that, in spite of the obligation contained in this back-bond, the creditor was entitled to retain the ship against the trustee in the bankruptcy of the debtor, in security of advances which he had made to the debtor after the vendition in question was granted.[3] And in *Hamilton* v. *Western Bank*, it was objected to the plea of retention that it was against the good faith of the contract; and Lord Ivory, conceding the fact, replied that this was not a good answer, as the ruling principle was the absolute character of the title.[4] On the other hand, in *Robertson* v. *Duff*, A. was invested by B., by an *ex facie* absolute disposition, with a right to cut down timber on an estate belonging to B. It was held to be proved that the intention of the parties was that the subjects should form a security for a debt in which A. and B. were jointly liable to a bank, and that it was not con-

[1] *Irvine* v. *Menzies*, *supra*.

[2] *Ante*, p. 314, and *Crs. of Brough* v. *Jollie*, 1793, M. 2585; *Smith* v. *Harrison & Co.'s Tr.*, 1893, 21 R. 330. See *ante*, p. 334.

[3] *Balleny* v. *Raeburn*, 1808, M. App. *voce* Compensation, No. 5.

[4] 1856, 19 D. 152, narrated *ante*, p. 331, Lord Ivory, at p. 162.

templated that a debt which was already owing by B. to A. should be covered by it. After the primary purpose of the disposition had been fulfilled, and B. had become insolvent and granted a trust deed for behoof of his creditors, A. claimed a right of retention over the subjects disponed, in security (1) of debts already due to him at the date of the disposition, and (2) of debts incurred to him by B. subsequently. It was held that A. had a right of general retention, because he had been invested with an absolute title of property, subject to a personal obligation to reconvey it, and therefore that he had a right to retain for the second class of debts (*i.e.* those contracted subsequent to the date of the disposition), but that his absolute title was so far controlled by his actual contract that he had no right of retention for the debts which were due to him before the disposition was granted.[1] It is obvious that in a question of retention there is a distinction between those debts which were contracted before the creditor obtained the subject he proposes to retain, and those debts which were contracted after he obtained it, because in the latter case it may be assumed that he gave credit to the debtor in reliance on the security of the property to which he had obtained an absolute title, while in the former case there is no room for such a supposition. This distinction, however, does not go the length of excluding a right of retention for debts previously existing in cases where the absolute right is not qualified by a back-bond, or is only qualified by a back-bond which is perfectly general in its terms. But it would seem to govern the case where the back-bond expresses the absolute right to have been given in security of a specific debt. In such a case, it would seem, from the case of *Robertson* v. *Duff*, that a right of retention will be admitted for debts afterwards contracted, unless this is excluded in very clear terms, but will not be admitted for debts already due. In support of this conclusion, a passage from Lord Fullerton's opinion may be quoted: "In such a case (*i.e.* "a trust ascertained to have been granted in security of a particular debt specially named"), the general principle rather appears to me to be excluded. The trust in that case is a new transaction; and the nature and terms of the transaction are to be determined by the intention of the parties as ascertained by competent evidence. An absolute conveyance with a back-bond, though a trust and security most favourable to the trustee, is at best but a trust and security; and its terms, like those of any other transaction, are a fit subject of judicial inquiry. It may be made a trust, limited to any one debt

[1] *Robertson* v. *Duff*, 1840, 2 D. 279.

the parties choose. If, for instance, the back-bond bore that it was granted only in security of one specific debt, and that the trustee was to reconvey, whether the other debts due to him by the trustee were paid or not, I presume that there could be no doubt that the right of retention for those other debts would be excluded. And I confess that even in the case just supposed, of a trust conveyance proved to be granted as a security for a future advance, and a back-bond binding the trustee to reconvey when that advance was repaid, the total silence of the parties, in regard to other previously existing debts, would go far to support the implication that they were intended to be excluded from the security."[1]

Holder of *ex facie* absolute title cannot retain in disregard of purpose for which the title was granted.

The right of general retention is undoubtedly limited by the contract to this extent, that the party in whom the *ex facie* absolute right is vested for a particular purpose cannot disregard that purpose, on the plea of retaining the subject to meet a debt due to himself. Thus if A. is intrusted by B. with a sum of money, or a subject of security, in order to pay, or to secure a debt due by B. to C., A is not entitled, on the bankruptcy of B., to disregard the object for which he obtained the property, and apply it to meet a debt due by B. to himself.[2]

Retention limited by notice of transfer of the right to demand delivery.

A further limitation of the right of general retention is found where the holder of an *ex facie* absolute title receives notice that the right to demand a reconveyance is assigned or transferred to a third party. He cannot then claim a right to retain the subject for any debt contracted by the original granter to him after he has received such notice, in a question with the party to whom the right to a reconveyance has been transferred. The application of this rule to a security constituted by an *ex facie* absolute conveyance with back-bond has been already dealt with.[3] On the same principle, where a company had by the articles of association a lien on its shares for any debts due to the company by the shareholder, it was held in England that they could not assert such a right for debts contracted by the shareholder after they had received intimation that he had pledged his shares to a third party.[4] The principle of this limitation is that a man holding a security over a subject, whether his title is limited or unlimited, has no right to make further advances in reliance on that security,

[1] *Robertson* v. *Duff*, 1840, 2 D. 279, per Lord Fullerton, at p. 293.

[2] *Stewart* v. *Bisset*, 1770, M. App. *voce* Compensation, No. 2.

[3] *National Bank* v. *Union Bank*, 1885, 13 R. 380; revd. 1886, 14 R. (H. L.) 1; *ante*, p. 157.

[4] *Bradford Banking Co.* v. *Briggs*, 1885, 29 Ch. Div. 149.

when he has been made aware that the radical right to the subject no longer belongs to his debtor, but to a third party. On the same ground, he has no right of retention for debts incurred after his debtor has become bankrupt, as the debtor's estate, and therefore the right to demand a reconveyance of the subject, is then vested in his trustee.[1]

Retention founded on possession.

A right of retention founded on the possession or custody of property belonging to another is in a different category from the right of retention founded on an *ex facie* absolute title of ownership, which has been considered in the preceding paragraphs. In cases of retention, as has been already pointed out, the measure of the right to retain is the title on which the subject is possessed or held. A title which is unqualified *in gremio*, and confers upon a party the right to possess as the apparent owner of the subject, gives him a right to retain it until all debts due to him are paid. A title of a limited and qualified character, on the other hand, which confers on the holder only a right to the possession or custody of the subject, and no title of ownership, confers a right of retention of a much more limited kind. The holder of such a title can only retain the subject in virtue of the express or implied conditions of his contract. Thus if his possession is in security of a particular debt, his right to possess is at an end when that debt is paid. Similarly, if he possesses under a mutual contract, his right to retain the subject is excluded when the other party performs his part under the contract.

Classification.

Rights of retention are usually spoken of as special or general, or as special or general liens, the former being a right to retain a subject in security of a particular debt, the latter a right to retain it in security of a general balance.[2] This division, as thus stated, is not very satisfactory, as it distinguishes these rights only by their results, and not by their nature or origin, and fails altogether to distinguish between two very different rights, both spoken of as general retention. If we consider the rights of retention which a person in possession of goods under a contract may have over these goods, we shall find that the division should not be into two, but into three. Taking, for instance, the case of a bleacher, to whom parcels of goods are sent by a manufacturer

[1] *Callum* v. *Goldie*, 1885, 12 R. 1137, per Lord Pres. Inglis.

[2] Bell, *Prin.* s. 1411. In England rights of lien are known as (1) particular or specific liens, and (2) general liens. The former give a right to retain a subject for work performed upon, or with regard to it; the latter give a right to retain for a general balance arising out of a particular class of employment—Cross on *Lien*, pp. 14, 15.

to be bleached, he may conceivably have a right to retain a particular parcel until he is paid (*a*) the charge for bleaching that parcel, or (*b*) his general bleaching account, or (*c*) all debts due to him by the manufacturer. It will be at once obvious that the second and third of these positions imply rights widely different from each other, although both are known under the head of general retention. The nature of these rights, and the extent to which they are recognised by the law of Scotland, will be further considered after we have dealt with the question of the possession which is requisite to found retention of every character.

Nature of possession necessary.

A right to retain any subject which is the property of another must be founded on possession, and must rest on contract, express or implied.[1] It is therefore necessary that the subject should be lawfully in the possession of the person asserting the right to retain it; that it should have come into his possession by contract, and not by mere chance, fraud, or mistake; and that it should be in his possession on a contract not inconsistent with the right to retain.[2]

Possession a question of fact.

The question whether possession has been actually obtained is in most cases one of fact rather than of law, and only very general rules can be laid down. It is not necessary that the subject should ever have been in the actual custody of the person claiming to retain it, if it is held for him by a servant, agent, or warehouseman. Thus a factor was held entitled to retain a policy of marine insurance belonging to his principal, and thus to obtain a preference over the proceeds on a loss occurring, when the policy was held for the factor by a policy-broker, though it had never been actually in his custody.[3] On the other hand, the civil possession which the indorsee of a bill of lading obtains by the indorsement to him is not sufficient, if he has not obtained actual delivery of the cargo, to entitle him to claim a preference over it, on the ground of retention, on the bankruptcy of the indorser.[4] Again, the possession must be of such a nature as to vest the possessor with the control of the subject. Thus where money was consigned in the joint names of A. and B., it was held that A. was not in possession thereof so as to entitle him to retain for a debt due to him by the consigner.[5] On this principle, it was at one time held that the lien of a ship-carpenter for repairs executed upon a ship

[1] As to maritime liens, where possession is not required, see Chap. XII.

[2] Bell, *Com.* ii. 87. 9.

[3] *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565.

[4] Bell, *Com.* ii. 87; *Kinloch* v. *Craig*, 1789, 3 T. R. 119, 1 R. R. 664.

[5] *Cullen* v. *Smith*, 1845, 8 D. 77.

depended upon whether she was repaired in a public dock or in the carpenter's private slip.[1] But it is now held that the position of the ship is only an element in the question whether she has actually been placed in the custody and under the control of the carpenter, and that the existence of a lien for repairs depends upon an affirmative answer to that question.[2]

Distinction between possession and custody.

It is not easy to draw any definite distinction between possession which will found a lien, and mere custody, or physical detention, which is insufficient to give the custodier any interest or right in the subject on which he could found a right to retain it. It is clear from a number of cases that a storekeeper, who has the mere custody of the subject, without any power of disposal over it, has a sufficient right to found a lien or right of retention, although the extent of the lien may be limited.[3] But if a person has possession of a subject merely in the capacity of a servant of the owner, he is not in a position to claim a lien. Thus it would seem clear that a butler employed to clean plate, or a clerk employed to write out a deed, could not assert a right of retention over the plate or the deed in security of his wages or salary.[4] In such cases the servant, though he may have the actual custody of the subject, is not in possession of it. Thus it was held that persons employed to cut wood under the superintendence of the estate manager had no right of retention over the wood which they had cut.[5] And the secretary of a company has no lien over the minute-book in a question with the liquidator of the company, because he has merely the custody of the book, and not the possession of it. But cases may arise which will raise a very difficult question as to the distinguishing point between the case of a party who has the custody of a subject merely as the servant of the owner, and that of a party who has the possession of a subject under a contract of employment with the owner. A person in the latter position—for instance, the factor on an estate—has sufficient possession to found a right of lien or retention, even though he is employed exclusively by the owner of the subject, and is not an independent professional man, like a law agent.[6] The case of a commercial traveller would seem to be very near the dividing line. In one case, where it was held that a commercial traveller had no right to retain outstanding accounts collected by him in security

[1] *Cooper* v. *Barr & Shearer*, 1873, 11 Macp. 651; revd. 1875, 2 R. (H.L.) 14.

[2] *Ross & Duncan* v. *Baxter & Co.*, 1885, 13 R. 185.

[3] See *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.

[4] *Burns* v. *Bruce*, 1799, Hume, 29.

[5] *Callum* v. *Ferrier*, 1822, 2 S. 102.

[6] *Robertson* v. *Ross*, 1887, 15 R. 67.

of arrears of his salary, an opinion was expressed by Lord Ivory that the traveller was a mere servant, and had no possession on which a lien could be founded.[1] In this case (which was decided upon other grounds) the commercial traveller was employed upon a salary, and had no independent business of his own. And in a case in the Sheriff Court it was held that a commercial traveller, who travelled for several firms, and was paid by commission, was entitled to a lien, or right of retention, over samples belonging to an employer who had dismissed him, in security of a claim of damages for wrongful dismissal.[2]

Possession must have been obtained fairly.

The possession upon which a right of retention is founded must have been obtained fairly,—that is, it must not have been obtained by chance, nor be the result of fraud, error, or misapprehension.[3] Thus although it was once held that where a creditor obtained possession of his debtor's goods by an informal poinding he could assert a right of retention over them, this decision has been uniformly disapproved.[4] And where a son bought goods for his father, and became security for the price, and the goods were, owing to a mere mistake, delivered to his own warehouse instead of his father's, it was held that the possession the son thereby obtained did not entitle him to retain the goods, in security of his liability for the price, in a question with the creditors of the father.[5] In *Patten* v. *Royal Bank*,[6] the Renfrewshire Banking Company failed when liable as indorser of a large number of bills, of which the Royal Bank were the holders. The Royal Bank ranked for these bills, and received a dividend. Afterwards certain of the bills were paid in full by the acceptors. Patten, who was an assignee of the estate, in which the Renfrewshire Banking Company had been reinvested, sued the Royal Bank for repetition of the sums drawn as dividends on the bills which had been paid. The bank pleaded that they were entitled to retain these dividends in security of their claims under the other bills which had not been paid. It was held that the dividends had been paid under a misapprehension, *i.e.* on the assumption that the acceptors would not be able to meet the bills in full, and therefore that the bank

[1] *Dickson* v. *Nicholson*, 1855, 17 D. 1011, per Lord Ivory, at p. 1014.

[2] *Marshall* v. *Bogle*, 1890, Guthrie's *Sheriff Court Cases*, 2nd series, p. 401 (Sheriff Guthrie).

[3] Bell, *Prin.* s. 1413, *Com.* ii. 88; *Lucas* v. *Dorrien*, 1817, 7 Taunt. 278, 18 R. R. 480 (mistake); and cases cited *infra*.

[4] *Glendinning's Crs.* v. *Montgomery*, 1745, M. 2573, disapproved in *Harper* v. *Faulds*, 1791, Bell's *Oct. Cas.* 440, and *Patten* v. *Royal Bank*, 1853, 15 D. 617; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404, per Lord Ivory, p. 409.

[5] *Louson* v. *Craik*, 1842, 4 D. 1452.

[6] 1853, 15 D. 617.

had never had that possession which was requisite to found a right of retention.[1] There is even a certain degree of doubt whether a party who has obtained possession of goods wrongfully can retain them for charges to which he has been put in connection with the goods themselves. Thus where a person wrongfully obtained possession of a cargo, paying freight and other charges, it was held that he had no lien even for those charges.[2] On the other hand, where A. entered into a secret partnership in a pawnbroking business with B., which was afterwards reduced as illegal, and he had, during the course of the partnership, paid a business debt, it was held that he had a right of retention over the parnership assets in security of the sum he had thus paid, in an action of count and reckoning at the instance of the trustee in the bankruptcy of B.[3]

Possession must be obtained before bankruptcy of debtor.

Again, a plea of retention must rest on possession obtained, though not necessarily during the solvency of the debtor, at least before he was actually made bankrupt and deprived of his estate.[4] Thus where a commercial traveller, in the knowledge of the insolvency of his employer, collected debts due to the employer, and claimed a right to retain the amount so collected in security of arrears of his salary, it was held that a right of retention could not be founded on possession obtained in this manner.[5] The mere fact that the debtor was insolvent at the date when possession was obtained, or that that date fell within sixty days of his bankruptcy, will not prevent the creditor from asserting a right of lien, assuming that the possession was obtained in the ordinary course of business. In *Anderson's Trs.* v. *Fleming*,[6] a bleacher printed on his receive-notes a notice that all goods received by him were to be subject to a lien for the general balance of his account. A customer who had been in the habit of employing the bleacher for twelve years was sequestrated when his bleaching account was in arrears, and when a parcel of his goods were in course of being bleached. They had been sent to the bleacher within sixty days of the sequestration. In these circumstances the bleacher claimed a right to retain the goods in security of his account, and the trustee refused to admit this claim, except for the amount due for bleaching the particular goods in

[1] *Patten* v. *Royal Bank*, 1853, 15 D. 617; see opinion of Lord Cunninghame, p. 619.

[2] *Lampriere* v. *Pasley*, 1788, 2 T. R. 485.

[3] *Gordon* v. *Howden*, 1849, 12 D. 253.

[4] Bell, *Com.* ii. 89; *Dickson* v. *Nicholson*, 1855, 17 D. 1011; *ex p. Lee* 1793, 2 Ves. jun. 285; *Meldrum* v. *Clark*, 1826, 5 S. 122; *Finlayson* v. *Russell*, 1829, 7 S. 698.

[5] *Dickson* v. *Nicholson*, *supra*.

[6] 1871, 9 Macp. 718.

question. A special case was presented for the opinion of the Court; and it was held that as the goods had been sent in the ordinary course of business, and primarily for the purpose of bleaching and not of creating a security, the Act 1696, c. 5, did not apply, and the bleacher was entitled to retain for his whole account.[1] But the judges were careful to confine their decision to the case where the lien arose in the ordinary course of business; and it may be inferred from their opinions that if a debtor, within sixty days of his bankruptcy, should place his property in the hands of a creditor for the purpose of subjecting it to a lien, that would be a security for prior debts, and reducible under the Act 1696, c. 5.[2] Thus, for instance, if a law agent should, in contemplation of the bankruptcy of his client, and within sixty days of that event, obtain possession of his client's title deeds, it is submitted that he could not claim a lien over them in a question with the trustee. And it may be doubtful whether possession obtained, even in the ordinary course of business, in the knowledge that the debtor was insolvent, would enable the creditor to assert a lien.[3] But in a recent case, where a firm of house factors were creditors of one of their employers in a loan of £100, and collected the rents of houses belonging to him after a petition for his sequestration had been presented, it was held that they were entitled to deduct the £100 due to them in accounting for the rents, in a question with the bondholders on the houses in question.[4] The case was put by Lord Young as one of retention, and his Lordship intimated an opinion that the house factors could have maintained a right of retention in a question with the trustee in bankruptcy. This case would seem to go the length of admitting a right of lien even although the possession was obtained after the bankruptcy of the debtor. It is true that as the subject of the claim of retention was money, it took the form of a claim, on the part of the house factors, that they were entitled to pay a debt due to themselves out of a sum for which they were bound to account to the bankrupt estate. But there

[1] *Anderson's Trs.* v. *Fleming*, 1871, 9 Macp. 718. Lord Kinloch was of opinion (p. 725) that a special purpose to constitute a security was indispensable to the operation of the Statute.

[2] It might also be reducible at common law; cf. *Thomas* v. *Thomson*, 1866, 5 Macp. 198.

[3] Cf. *Dickson* v. *Nicholson*, 1855, 17 D. 1011 (possession obtained on the eve of bankruptcy). But a payment in cash is good even though the creditor knew that the debtor was insolvent (*Coutts' Tr. & Doe* v. *Webster*, 1886, 13 R. 1112), unless the payment was fraudulent.

[4] *Stevenson, Lauder, & Gilchrist* v. *Macbrayne*, 1896, 23 R. 496.

does not seem to be any difference between a claim to retain a sum of money, earmarked as belonging to a bankrupt, and a claim to retain property of any other description.[1] There is a remarkable similarity between the facts in this case, so far as they relate to the manner in which the house factors obtained the fund which they were held entitled to retain, and the facts in the case of *Dickson* v. *Nicholson*, where the plea of retention was repelled.[2]

Possession must be on a contract not inconsistent with a right to retain.

Again, the possession must be on a contract not inconsistent with a right to retain. In England it would appear to be the rule that lien is excluded if the contract contemplates the delivery of the subject before payment is due. "A lien cannot be claimed, so as to intercept the performance of the actual contract between the parties, whether that contract is express, or is to be inferred from a certain course of dealing. If the contract is to deliver goods at a certain time, or to deliver them whenever demanded, it would be inconsistent with that contract to refuse to deliver them (the proper time having arrived) upon the ground of any lien for the price which by agreement was not then payable."[3] This opinion has been illustrated by several English cases. In *Crawshay* v. *Homfray*,[4] a wharfinger had been in the habit of storing goods, on the system that his dues were to be paid at the Christmas following the storage, whether the goods were then removed or not. It was held that this system of business was quite inconsistent with the exercise of a lien over the goods for the dues, as it contemplated the possibility of the removal of the goods without payment of the dues; and it was therefore decided that he could not claim a lien even over goods which had been left till after Christmas, upon which the dues had not been paid, and in a case where the owner of the goods was bankrupt. In *Kirchner* v. *Venus*,[5] goods were shipped on an agreement whereby a certain payment was to be made by the shippers, in name of freight, in one month from the date and at the port of shipment, whether the goods were lost or not lost. The shippers indorsed the bill of

[1] There is clearly a difference between the case of compensation between an ordinary contract debt due by A. to B. and a similar debt due by B. to A., and the case of retention by A. of a sum of money which is in his hands, but is earmarked as belonging to B. The distinction is noted by Stair, i. 13. 8, but apparently disregarded in the case under discussion.

[2] Narrated *supra*, p. 344; see also *Meldrum* v. *Clark*, 1826, 5 S. 122.

[3] Per Lord Selborne in *Fisher* v. *Smith*, 1878, 4 App. Cas. 1, at p. 12.

[4] 1820, 4 Barn. & Ald. 50.

[5] 1859, 12 Moo. P. C. C. 361; see also *How* v. *Kirchner*, 1857, 11 Moo. P. C. C. 21.

lading to a third party, but became bankrupt without having paid the sum thus agreed upon. The master claimed a lien over the goods at the port of discharge, and refused delivery to the indorsee of the bill of lading. It was held that this agreement, by which a sum payable at the port of shipment was substituted for freight payable at the port of discharge, was inconsistent with the exercise of a right of lien over the goods. Similarly, if it is agreed that a lump sum is to be paid in lieu of freight, at a certain date after the delivery of the cargo, there is no lien.[1] In the application of these cases to Scotland, however, it must be remembered that although a party may have no right to retain a subject for a sum which is not yet payable, if the party who will ultimately be liable in that payment is solvent, yet if he is insolvent, a right to retain may arise even though the debt for which retention is claimed is not yet payable.[2] Thus it would seem to be probable that it would not be held in Scotland that a right of retention is necessarily excluded, in the case where the party against whom it is claimed is bankrupt, merely on the ground that if both parties had remained solvent, and the contract had been carried out according to their original intention, the subject would have been given up before the debt for which retention is claimed had become due or payable. The cases in Scotland where retention has been held to be excluded have been decided either on the ground that the possession was referable to a contract which *sua natura* excluded lien, or that it was obtained subject to some condition which, if fulfilled, would have made a lien impossible. Thus it is held that possession derived from the contract of deposit, from the obligation to restore at any time, and the "exuberant trust" implied by that contract, will not found a right of retention, except for expenses incurred in connection with the subject deposited.[3] Thus where A., on occasional visits to Glasgow, was in the habit of leaving his luggage with B., his partner in trade, it was held that B. could not claim a lien over it, as it was obviously deposited on the understanding that it should be given up when required.[4] And when money was deposited in order to meet a disputed claim which was being submitted to arbitration, it was held that the depositary, who was successful in the arbitration, could not retain the balance of the

[1] *Foster* v. *Colby*, 1858, 28 L. J. Ex. 81.

[2] See *ante*, p. 314, and Bell, *Com.* ii. 92.

[3] Stair, i. 13. 9; Ersk. iii. 1. 27; *Stuart's Crs.* v. *Stuart*, 1709, M. 2629; *Mackenzie* v. *Newal*, 1824, 3 S. 206.

[4] *Mackenzie* v. *Newal*, *supra*.

deposit to meet the expenses which he had incurred in the process.[1] Another illustration of possession in circumstances entirely excluding lien is supplied by an English case where a ship factor got possession of the certificate of registry from the captain in order to pay custom-house dues. It was held that possession so obtained gave him no right to a lien over the certificate in security of a debt due to him by the shipowner.[2] And in the same category may be placed the rule, already explained, that a subject conveyed expressly in security of a particular debt cannot be retained after that debt is paid.

Possession obtained or preserved by breach of contract.

A right of retention cannot be founded on possession which is obtained, or preserved, by a breach of the contract between the parties. Thus if bills are sent to a banker expressly for discount, and he keeps them without discounting them, he has no lien or right of retention over them.[3] And if money is given by A. to B., in order to pay a debt due by A. to C., B. is not entitled to disregard this mandate, and retain the money to meet a debt due by A. to himself.[4] On the same principle, a law agent, into whose hands papers have been put expressly for the purpose of being produced in court, cannot refuse to produce them on the plea of lien.

Possession in cases where a general lien is admitted.

The argument that the possession has been obtained on a contract inconsistent with a lien will be more difficult to maintain where the subjects in question are deposited with a person who exercises a trade or profession in respect of which he is entitled to a general lien, such as that of a banker or factor. It is true that even in those cases specific appropriation will bar lien if inconsistent with it; and it would seem to be the rule, at least in England, that if property is deposited for a specific purpose, or pledged for a specific advance, with a factor or banker, the maxim *conventio vincit legem* applies, and the general lien is excluded by the specific agreement.[5] But if the subject possessed is of the character to which the general lien attaches, it will require very clear evidence to show that the possession was on a contract excluding lien, and the presumption of law is the other

[1] *Macgregor* v. *Alley & M'Lellan*, 1887, 14 R. 535. In this case, however, both parties were solvent.

[2] *Burn* v. *Brown*, 1817, 2 Stark. 272.

[3] See *infra*, p. 375, *Borthwick* v. *Bremner*, 1833, 12 S. 121. If a banker discounts a bill, he has bought it, and cannot therefore have a lien over it, as it is his own property.

[4] *Stewart* v. *Bisset*, 1770, M. App. *voce* Compensation, No. 2.

[5] *Bock* v. *Gorissen*, 1860, 2 De G. F. & J. 434, 30 L. J. Ch. 39; *in re Bowes*, 1886, 33 Ch. Div. 586; *Wolstenholm* v. *Sheffield Union Bank*, 1886, 54 L. T. 746. See *infra*, Chap. XI., Banker's and Factor's Lien.

way.[1] Thus it has been pointed out by Lord M'Laren, and the distinction should be borne in mind in other cases of this kind, that where an express security is claimed, it lies on the security-holder to prove his right, but that where circumstances which justify a general lien exist, the party claiming adversely to the lien must show that the lien is excluded by agreement.[2]

Possession must be obtained from a party who has the right to transfer.

Possession obtained from a party who had no right to the subject, or no right to transfer the possession of it, will not found a lien against the true owner, unless he is bound by his actings in the matter, or the case falls under the Factors Act.[3] This point has already been discussed with regard to pledge, and the conclusions arrived at there are equally applicable to a case of lien.[4]

Meaning of special and general retention.

Under reference to the remarks already made on this nomenclature, rights of retention may be divided into two classes, special and general. In doing so we look only at the result of the right so classed, not at its origin. In result, a right of retention is special if it gives a right to retain only for a debt arising out of a particular contract; it is general if it gives a right to retain for a general balance, or for a balance arising on a course of employment. Looking to the origin of rights of retention, they should rather be classed as follows: (1) rights of retention which are implied conditions of mutual contracts; (2) rights of retention arising from express contract; (3) rights of retention resting on usage of trade; and (4) rights of retention resting on contract implied from advertisement. The first of these rights is the same as special retention, or lien; the last three are alike known as general retention, or lien.

Special retention an implied condition of a contract of employment.

It has already been explained that in mutual contracts one party, whose obligation under the contract consists in the payment of a sum of money, may retain or withhold that payment until the other party performs the obligations imposed by the contract upon him. This rests on the principle that the obliga-

[1] *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12; *Jones* v. *Peppercorne*, 1858, John. 430, 28 L. J. Ch. 158.

[2] Per Lord M'Laren in *Roberston's Tr.* v. *Royal Bank*, *supra*, at p. 20.

[3] An innkeeper is an exception, and may retain luggage, even although he knows that it does not belong to his guest. See *infra*, p. 398.

[4] See *ante*, p. 203 *seq.* This rule, however, is probably not applicable to the case of a claim to retain a subject for labour performed upon it. Thus if A. sent goods which belonged to B. to be bleached, without any right to do so, it is conceived that the bleacher would have a lien over them in a question with B. for the expense of bleaching them, though not for an outstanding bleaching account due to him by A.

tions under such a contract are reciprocal, and therefore that one party is not bound to fulfil his obligation unless the other fulfils his. Special retention rests on the application of the same principle to contracts of the nature of a contract of employment. Thus if an article is placed in the hands of a workman in order that some work should be performed upon it, the obligation of the workman is to perform the work and restore the article; the obligation of the employer is to pay for the work done. On the principle of mutual contract, the workman is not bound to complete his part of the contract by restoring the article until the employer performs his part by paying for it,—in other words, he has a right to retain the article until he is paid for the work he has performed upon it. Again, if an article is placed in the hands of a workman, to be used as an instrument, or tool, for performing a certain piece of work, he is not bound to complete his contract by restoring the implement until the employer completes his contract by paying for the work done. Thus it is a general principle that where one party to a contract of employment places a subject in the possession of the other for the purposes of the contract, the latter party has an implied right to retain it until the former fulfils the obligations under the contract which are incumbent upon him.[1] Thus, even in a gratuitous contract like deposit, the depositary, if he is put to expense in the execution of his obligation, is entitled to retain the subject deposited until he is reimbursed by the depositor. Lord Young, dealing with the lien of a livery-stable keeper, explained the nature of special lien as follows: "Lien is just a contract of pledge collateral to another contract of which it is an incident. If the principal contract be about a horse—that it is to be fed and kept by one man for another—to that contract there is the incident called lien; that is, an agreement that the person to whom the possession of the horse is committed shall have right to retain the possession till his claim for the food and attention given to the horse shall be satisfied. This is a special lien, and it stands, like general lien, upon contract, express or implied."[2]

The actual cases in which a plea of special retention has been taken may be divided into two classes: first, where the subject

[1] Bell *Com.* ii. 92, *Prin.* ss. 1419, and 1430; *Harper* v. *Faulds*, 1791; Bell's *Oct. Cas.* 440, opinion of Lord Pres. Campbell, at p. 471; *Brown* v. *Somerville*, 1844, 6 D. 1267, opinion of Lord Moncreiff, p. 1281; *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69; *Miller* v. *Hutcheson*, 1881, 8 R. 489; *Robertson* v. *Ross*, 1887, 15 R. 67.

[2] Per Lord Young in *Miller* v. *Hutcheson*, 1881, 8 R. 489, at p. 492.

retained is that actually enhanced in value by the work bestowed upon it; and, secondly, where the subject was delivered and received only as a means to the performance of the contract.

Special retention of article on which work performed.

In the former class, it may be stated broadly that any workman who is employed to perform a piece of work on a particular subject has a right to retain the subject until paid for his work, provided that it has been put into his possession.[1] Thus a tailor has a right to retain suits of clothes which he has been employed to make, or a watchmaker a watch sent to him to clean, in security of their charge for the work they have expended.[2] A bleacher has a right to retain each parcel of goods for the expense of bleaching;[3] a miller, corn for the charge for grinding;[4] a ship-carpenter, a ship for the expense of repairing her.[5] On the same principle, a carrier by land or sea may retain for the expense of carriage;[6] a storekeeper or wharfinger for storage due;[7] a salvor for the expenses and reward of salvage.[8] It is perhaps a slight extension of this rule which entitles an innkeeper to retain the luggage of his guest in security of his bill.[9] It may often be a matter of some difficulty to determine the exact extent of the right of retention under a contract of employment. If, for instance, a number of goods are sent to a dyer to be dyed, does his lien extend over the whole of them for his whole account, or is each article subject to a lien only for the charge for dyeing it? The question is one of circumstances, to be solved by the answer given, on the particular facts, to the question whether the whole consignment formed one bargain, or whether the dyeing of each article was a separate contract.[10]

Special retention of article used as an instrument in performing work.

The rule that if an article was placed in the hands of a party under a contract of employment he had an implied right of retention over it, even although he expended no actual labour on the

[1] Bell, *Com.* ii. 100, *Prin.* s. 1430; *Harper* v *Faulds*, 1791, Bell's *Oct. Cas.*, 440, Lord Pres. Campbell, at p. 471; *Chase* v. *Westmore*, 1816, 5 M. & S. 180; *Lilley* v. *Barnesley*, 1844, 1 C. & K. 344.

[2] *Year-Book*, Easter Term, 5, Edw. IV. folio 2B., quoted by Lord Ellenborough in *Chase* v. *Westmore*, *supra*, at p. 187.

[3] *Harper* v. *Faulds*, *supra*; *Andersons's Tr.* v. *Fleming*, 1871, 9 Macp. 718; Bell, *Com.* ii. 104, and cases there reported in note 7.

[4] *Chase* v. *Westmore*, 1816, 5 M. & S. 180.

[5] *Ross & Duncan* v. *Baxter & Co.*, 1885, 13 R. 185.

[6] See *infra*, p. 400.

[7] *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *Moet* v. *Pickering*, 1878, 8 Ch. D. 372.

[8] Bell, *Prin.* s. 1427; see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 544 *seq.*); *Otis* v. *Kidston*, 1862, 24 D. 419.

[9] See *infra*, p. 397.

[10] *Chase* v. *Westmore*, 1816, 5 M. & S. 180.

article itself, was not admitted without difficulty.[1] Indeed, in one case it was held that a printer had no lien over stereotype plates for the expense of printing from them, on the ground that he had expended no labour on the plates themselves, though he was placed in possession of them under a contract of employment.[2] It must now be held that this judgment was wrong, and the opinion of Lord Moncreiff, who dissented, correct. For in more recent cases it has been held that in every case where any articles are placed in the possession of a party under a contract of the nature of a contract of employment, he has a right to retain them in security of a debt arising out of that contract. Thus an accountant has been held to have a right to retain business books, which were placed in his hands for the purpose of collecting debts, in security of his professional account as a debt-collector;[3] a factor or land steward was allowed to retain papers intrusted to him for the carrying out of his duties, in security of his salary and outlays;[4] an architect to retain plans for a building, in security of his professional fees;[5] and a commission agent, who had been placed in possession of a carving machine, to retain the machine in security of his travelling and canvassing expenses, and the sums he had laid out for the supply of fittings and gas-power to the machine.[6]

[1] English law restricts the lien to the article on which the labour or service has been actually performed, and seems also to require that the value of that article should be enhanced thereby (Addison on *Contract*, 9th ed., p. 812; Cross on *Lien*, p. 24), thus denying a lien to livery-stable keepers, because their services do not enhance the value of the animals (*Orchard* v. *Rackstraw*, 1850, 19 L. J. C. P. 303; *Jackson* v. *Cummins*, 1839, 5 M. & W. 342), but allowing a lien to a trainer of horses (*Bevan* v. *Waters*, 1828, 1 Moo. & M. 235), or the owner of a stallion by which a mare is covered (*Scarfe* v. *Morgan*, 1838, 4 M. & W. 270). See also *Sanderson* v. *Bell*, 1834, 2 C. & M. 304, and *Steadman* v. *Hockley*, 1846, 15 M. & W. 553.

[2] *Brown* v. *Sommerville*, 1844, 6 D. 1267. Lord Moncreiff's opinion is a very clear and full explanation of the doctrine of special retention as an implied condition of a contract. The other judges were influenced by an English case, where a lien was refused on facts exactly similar—*Bleaden* v. *Hancock*, 1829, 4 Car. & P. 152.

[3] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69. The English case of *Sanderson* v. *Bell*, 1834, 2 C. & M. 304, was decided, on facts almost exactly similar, in the opposite way, and is instructive as showing the difference between the English lien and the Scotch retention. But in a Sheriff Court case it was held that *Meikle & Wilson* did not extend to the case of an unprofessional person employed to draw up a will, and that such a person had no lien over the will—*Morrison* v. *Watson*, 1883, Guthrie, *Sheriff Court Cases*, 2nd series, p. 502.

[4] *Robertson* v. *Ross*, 1887, 15 R. 67.

[5] *Lindsay* v. *Mackenzie*, 1883, Guthrie, *Sheriff Court Cases*, 2nd series, p. 498.

[6] *Moore's Carving Machine Co.* v. *Austin*, 1896, 33 S. L. R. 613.

Special retention in security of claim of damages.

The last-mentioned case carries the principle of retention as an implied condition of a contract a step further than had ever been done before, by admitting a right of retention for damages for breach of the contract. The contract in question was of a rather exceptional nature. A company established for the purpose of manufacturing carving machines appointed Austin sole agent in Scotland, on an agreement whereby they agreed to supply him with a machine for exhibition, and to sell him other machines at a fixed price, leaving him to make his profit by selling them at a higher rate. It is obvious, therefore, that by the original contract Austin would have had to pay his own travelling expenses, and expenses in connection with the show-machine. But the company fell into difficulties, and a receiver for debenture-holders was appointed, who sold the show-machine which had been fitted up in Austin's premises. It was held that as the company was unable to fulfil its contract by supplying Austin with machines, he had a right to retain the show-machine in his possession until he received damages for this failure. He estimated the damages at the expense to which he had been put in connection with the contract; but the judgment would seem to go the length of entitling him to a lien for any other damages, if he had made a claim for such.[1] This judgment, though it would seem to be new law, is in accordance with the well-established rule that a party is entitled to withold payment of a debt due by him under a contract, in security of a claim of damages for breach of that contract.[2] And in a Sheriff Court case, it has been held that a commercial traveller or commission agent was entitled to retain samples placed in his possession in the course of his employment, in security of a claim of damages for wrongful dismissal.[3]

General retention.

Where a party has been placed in possession of a subject under a contract, but has a right to retain it, not only until he has been paid a debt arising out of that contract, but also in security of other and independent debts, his right is spoken of as a right of general retention, or as a general lien. A general lien differs from a right of retention founded on a title of property, and from a right of special retention, in respect that it is not a general principle of the law of Scotland, but only an exceptional right arising in special cases.

Possession does not imply a right of general retention.

It was at one time maintained that the law of Scotland recognised, as a natural inference from the possession of property

[1] *Moore's Carving Machine Co.* v. *Austin*, 1896, 33 S. L. R. 613.

[2] *Ante*, p. 306.

[3] *Marshall* v. *Boyle*, 1890, Guthrie, *Sheriff Court Cases*, 2nd series, p. 401.

belonging to another, a right in the possessor to retain it until all debts due to him by the owner were paid, or at least until a general balance, arising out of a course of employment of the same kind as that on which the possession was founded, was satisfied. On this theory, a right of general retention or lien was regarded as a counterpart of the diligence of arrestment. A person, it was argued, who was in possession of property belonging to his debtor, could not arrest it in his own hands, and was therefore at a disadvantage as compared with other creditors. He should therefore be allowed the right to retain that property in security of his debt, at all events if the debtor was bankrupt.[1] But this theory arose from a failure to distinguish between retention founded on property and retention founded on mere possession, and is not now maintainable. Possession, *per se*, does not give the possessor a right of retention in security of debts unconnected with the contract under which the possession arose, whether those debts were due on previous contracts of a similar character, or upon general account.[2] This rule was first established in the leading case of *Harper* v. *Faulds*. There Harper, a linen merchant, had for some years employed Faulds as a bleacher, and owed him a balance on his bleaching account. For this balance he granted, in February 1789, a bill payable in the following June. He was sequestrated in May, before the bill became payable, and when several parcels of goods, all of which had been sent after the bill was granted, were in the hands of Faulds. These parcels Faulds claimed a right to retain in security, not only of the charge for bleaching them, but of the bill granted for the previous balance. The case was argued on the question whether possession of goods gave a right to retain them in security of a general balance, and it was settled that no such right of retention was recognised by the law of Scotland.[3] This case has been held to establish the rule that a right of general lien or retention cannot be founded on the mere fact of possession of goods;[4] and the further point has also been settled,

[1] More, *Notes to Stair*, cxxxi; More, *Lectures*, i. 402. Prof. More fails completely to discriminate between a title of property and a title of possession as the basis of a right of retention. His thories are discussed and refuted in *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.

[2] *Harper* v. *Faulds*, 1791, M. 2666; Bell, *Oct. Cases*, 440; *Stevenson* v. *Likly*, 1824, 3 S. 291; *Handyside* v. *M'Intosh*, 1805, Hume, 651; *Stewart & Fletcher* v. *M'Gregor & Co.*, 1829, 7 S. 622; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *Anderson's Tr.* v. *Fleming*, 1871, 9 Macp. 718; Bell, *Com.* ii. 102.

[3] *Harper* v. *Faulds*, 1791, M. 2666; Bell, *Oct. Cases*, 440.

[4] In the recent case of *Stevenson, Lauder, & Gilchrist* v. *Macbrayne*, 1896, 23 R. 496, a right to retain a sum of money, which was earmarked

that possession on a contract of employment does not give a right of retention for a general balance arising out of former instances of similar employment. Thus a shipping company were employed by A. to convey goods from Liverpool to the Clyde. In the course of this employment a balance became due to the company, and, in security of this balance, they detained certain goods consigned to A. They did not inform him that they were doing so, and for some time he was unaware of the fact. On becoming aware of it, he brought an action against the company for damages caused by the goods having diminished in value through being thus detained. It was held that he was entitled to succeed; and the Court was unanimously of opinion that a carrier has no right of retention, or right to refuse delivery of goods, in security of his general balance, though he is entitled to withhold delivery of each parcel until paid the charge for carrying it.[1] Again, a corn merchant was in use to deposit grain with a storekeeper, paying warehouse rent at irregular intervals, and generally by a payment to account. He failed when owing the storekeeper a balance of rent. It was held that the storekeeper had no right to retain the parcels of grain which were then in his store, in security of his general account.[2] These cases may be taken to have established the rule that possession of goods is not of itself sufficient to found a general lien or right of retention over them. In every case in which such a lien has been admitted, it will be found to rest on express contract, usage of trade, or contract implied from advertisement.

General retention may be founded on express contract.

By express contract, goods may be subjected to a lien for a general balance on a particular course of employment, or for all debts due by the owner to the person in possession of them. Such an agreement, if an independent and separate contract, is indistinguishable from pledge. Where it has reference to a continued course of employment,—where, for instance, the contract is that each parcel of goods sent to be operated on by a bleacher or dyer should be subject to a lien for a general balance due on former parcels,—it is in this respect different from a pledge, that the contract, if in the ordinary course of business, is not reducible under the Act 1696, c. 5, and that the right is good, even although the particular parcel retained has come into the possession of the

as belonging to a bankrupt, was allowed to a person who was in possession of the money, in security of a general balance due by the bankrupt. If this case is to be followed to its logical conclusions, it would seem to introduce a great change into the law of Scotland. See also *ante*, p. 345.

[1] *Stevensons* v. *Likly*, 1824, 3 S. 291.

[2] *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.

creditor within sixty days of the bankruptcy of the debtor.[1] But this rule has been limited to a lien for the balance due for the operations of the particular year, on the principle that the whole goods sent to be operated on in any one year might be regarded as one parcel; and an opinion was expressed that a contract under which each parcel should be subject to a lien for a general balance, not arising out of that particular employment, would be illegal; by which it was presumably meant that, on the bankruptcy of the debtor supervening within sixty days, it would be reducible as a fraudulent preference under the Act 1696, c. 5.[2] But it is very doubtful whether a person who is under an obligation to exercise his trade for the public benefit, such as an innkeeper or common carrier, could by agreement establish a general lien in his own favour which would be good in the bankruptcy of his debtor. Thus it has been held that a railway company was not entitled to stipulate that goods carried by them should be subject to a lien for a general balance due by the owner or consignee.[3]

On usage of trade.

By usage of trade a general lien or right of retention has been held to exist in particular trades, for the general balance due on a course of employment. Certain of these liens, such as those of a factor, law agent, banker, or broker, have been long recognised, and the exact limits of the rights conferred in each case have been fixed by decisions. These will be dealt with separately. But there are certain other classes of employment in which there has been a recent tendency to recognise a general lien of a limited character. Thus in trades like that of a bleacher, the usual course of trade is for the manufacturer employing the bleacher to send the goods, in several parcels at different times of the year, as it suits his convenience. On the principle of special retention, the bleacher has a lien over each parcel for the expense of bleaching it,—that is, he is not bound to restore it until he is paid for bleaching that particular parcel. This has been extended, in many trades, to an understanding, not necessarily expressed in the contract, that all the parcels sent in any one year should be regarded as a *unum quid*, and that the operator should have a lien over each parcel as it arrives, for his account for all the parcels sent that year. Where such an understanding is universal in the trade, and not

[1] *Anderson's Tr.* v. *Fleming*, 1871, 9 Macp. 718. In this case, however, a right of general retention would have been implied without express contract.

[2] *Anderson's Tr.*, *supra*, per Lord President, at p. 721.

[3] *Scottish Central Rwy. Co.*, v. *Ferguson*, 1864, 2 Macp. 781; *Peebles & Son* v. *Caledonian Rwy. Co.*, 1875, 2 R. 346. See also *infra*, p. 403.

confined to any particular locality, it may now be stated as a general rule that it will be recognised by the Courts as an implied condition of the contract between the parties.[1] It would seem, further, that a lien for a general balance due on one course of employment, but extending even beyond the operations of a particular year, will be recognised if supported by a well-established custom of trade. In *Harper* v. *Faulds*, as has already been stated, the claim of a bleacher to retain for a general balance was repelled, but this decision went on the ground that mere possession does not infer a right of general retention, and the question of usage of trade was not considered.[2] So in later cases the right of a bleacher to retain for a general balance due for bleaching in that particular year has been recognised.[3] In *Smith* v. *Aikman*,[4] scourers, and in *Laurie* v. *Denny's Tr.*,[5] storekeepers, were held to have no general lien; but on the ground that in the former case the proof of usage was merely local, while in the latter case such proof entirely failed. In a more recent case the right of packers to retain for a general balance, extending beyond the operations of a particular year, was recognised, on the ground that usage of trade had been proved, and that a similar lien was allowed in England.[6] It has been observed that great weight would now be attached to the fact that a general lien was allowed in the same trade in England; but it is of course possible that a custom of trade recognised in England might be unknown in Scotland, and the real question in each case must be whether the custom of trade is proved.[7] In England it has been held that packers,[8] wharfingers,[9] and calico-printers,[10] have liens for their general balances, while fullers,[11] millers[12] and dyers[13] have not.

[1] See opinion of Lord M'Laren in *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12.

[2] *Harper* v. *Faulds*, 1791, M. 2666; Bell, *Oct. Cases*, 440.

[3] *Anderson's Tr.* v. *Fleming*, 1871, 9 Macp. 718, and cases reported in Bell, *Com.* ii. 104.

[4] 1859, 22 D. 344.

[5] 1853, 15 D. 404.

[6] *Strong* v. *Philipps & Co.*, 1878, 5 R. 770. See also *Mitchell* v. *Heys*, 1894, 21 R. 600, where lien of calico-printers over rollers was admitted to exist. Livery-stable keepers, who acted also as auctioneers, and kept horses until they sold them, have been allowed a general lien upon an entirely different ground, viz. that their employment was similar to that of a factor, and that they were entitled to a factor's lien—*Miller* v. *Hutcheson*, 1881, 8 R. 489.

[7] *Strong*, *supra*; Smith, *Merc. Law*, 10th ed., p. 702.

[8] *In re Witt*, 1876, 2 Ch. D. 489.

[9] *Moet* v. *Pickering*, 1878, 8 Ch. D. 372.

[10] *Weldon* v. *Gould*, 1801, 3 Esp. 268; 6 R. R. p. 832.

[11] *Rose* v. *Hart*, 1818, 8 Taunt. 499.

[12] *Ex p. Ockenden*, 1754, 1 Atk. 234.

[13] *Bennett* v. *Johnson*, 1785, 2 Chitty, 455.

Only debts incurred in course of trade are covered by the lien.

But in these and in all other cases of general lien founded on usage of trade, the right of lien will only cover debts incurred to the employé or trader in connection with his course of business, and arising naturally in the ordinary course of that employment or trade. It will not extend to cover advances of money, or debts due on general account. As it was put by an English judge, "Nothing can fall within the custom of trade but what concerns trade."[1]

It will not cover debts incurred in a different trade.

Again, a man may carry on several classes of employment for the same employer, in some of which he has a lien, and in some not. Thus a storekeeper, who has no general lien as such, may also act as a factor. In such cases he cannot retain goods received in the capacity in which he has no lien, on the plea that he also acts in a capacity entitled to a lien. Even if he acts in two capacities, in each of which he is entitled to a general lien, he cannot retain goods received in one capacity for a balance due on his employment in the other.[2] Thus a factor and policy-broker, who had a balance due to him as a factor, was held to have no lien over a policy which he had effected for the same employer, but in the capacity of a policy-broker, because the factor's lien would not extend to property received by him as a broker, and the broker's lien would not cover a balance due to him as a factor.[3]

General lien founded on advertisement.

Again, a general lien may be raised by advertisement, provided that notice of it is brought home to the opposing party. Thus where the dyers of Manchester agreed among themselves, and publicly advertised, that they would not accept goods to be dyed except on the condition that they should be subject to a lien for a general balance, this lien was held good against a manufacturer who was proved to have had notice of the advertisement.[4] No case of public advertisement has occurred in Scotland, but a printed notice on a receive-note, sent by a bleacher with each parcel of goods returned by him, to the effect that all goods sent to be bleached should be subject to a general lien for the balance due by the sender, and for all bills granted by him, was held to be sufficient to extend the bleacher's lien to cover bills granted for a former bleaching account.[5] Such an advertisement, however, will only

[1] Per Heath, J., in *Houghton* v. *Mathews*, 1803, 3 B. & P. 485.

[2] *M'Call & Co.* v. *Black & Co.*, 1824, 2 Sh. App. 188; *Dixon* v. *Stansfield*, 1850, 10 C. B. 398. Cf. *Largue* v. *Urquhart*, 1883, 10 R. 1229.

[3] *Dixon* v. *Stansfield*, *supra*.

[4] *Kirkman* v. *Shawcross*, 1794, 6 T. R. 14, 3 R. R. 103. In England such an advertisement is to be construed in the way most unfavourable to the advertiser—Chitty, *Contracts*, 13th ed., p. 129.

[5] *Anderson's Tr.* v. *Fleming*, 1871, 9 Macp. 718.

found a right of general retention if the goods sent are the property of the person sending them. It will not entitle the bleacher, or other operator, to retain goods belonging to a third party, for a debt due to him by the person sending them.[1]

Right conferred by a lien.

The primary right involved in a lien or right of retention is merely to keep possession of the subject, as a security, and not to realise it.[2] A factor, however, has a right to sell goods belonging to his principal, or to pledge them, and thus satisfy the debt for which he claims retention; but this right does not extend to persons who are not in the position of factors.[3] The mere fact that the retention of an article covered by a lien occasions expense does not entitle the holder of the lien to sell it, and it is extremely doubtful whether an advertisement that he proposes to sell it to defray expenses would put him in any better position.[4] It has been held in England that the effect of a sale without judicial authority is to destroy the lien, and leave the holder thereof no preference over the price.[5] But where the subject retained is of an ordinary commercial nature, authority to sell it may be obtained on application to the Court, though such an application is equivalent to a petitory action for the debt, to the effect of entitling the owner of the subject to set off an illiquid claim for damages for injury done to the subject retained, against the debt for which retention is claimed.[6] And where the subject retained is not of a commercial nature, but consists, for instance, of title deeds or unpublished writings, it is probable that a warrant for sale would not be granted, and that the efficacy of the lien would depend on the inconvenience occasioned to the holder by the want of the papers.

Holder of lien is not in general bound to waive it on caution being found for the debt.

As the holder of a lien has a real security over the subject retained, he is not in general bound to give up his lien on caution being found for the debt due to him. But this right is subject to the equitable control of the Court.[7] And if the subject of a lien is of a nature likely to deteriorate, or diminish in value, by keeping, the Court, on the application of the owner, will order a sale even against the will of the holder of the lien, reserving to him a preference over the price.[8]

[1] *Mitchell* v. *Heys*, 1894, 21 R. 600. Narrated and discussed *ante*, p. 205.

[2] Bell, *Com.* ii. 91; Smith, *Mercantile Law*, 10th ed., p. 706.

[3] Bell, *Com.*, *ut supra*.

[4] *Thames Iron Works Co.* v. *Patent Derrick Co.*, 1860, 1 John. & H. 93; 29 L. J. Ch. 714.

[5] *Mulliner* v. *Florence*, 1875, 3 Q. B. D. 484.

[6] *Gibson & Stewart* v. *Brown & Co.*, 1876, 3 R. 328.

[7] *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536 (law agent); *Wilmot* v. *Wilson*, 1841, 3 D. 815 (factor).

[8] *Parker* v. *Brown & Co.*, 1878, 5 R. 979.

Waiver, exclusion, or discharge of lien.

Apart from express contract, by which, of course, a lien or right of retention may be waived or excluded, and from payment of the debt, by which it is extinguished, a lien may be waived or lost by (1) an agreement or course of dealing inconsistent with it; (2) by giving up possession; (3) by taking a bill or security for the debt; and (4) by claiming to retain the subject on some untenable ground, without mentioning the lien.

Lien may be lost by giving up possession.

A lien is lost by giving up the possession upon which it is founded.[1] Thus if the goods retained are restored to the owner there can be no further right of retention over them, except, possibly, in the case where they are restored on a contract which makes the owner the agent of his creditor—if, for instance, they are placed in his hands for the purpose of being sold.[2] Similarly, if a factor allows goods, over which he has a right of lien, to be sold for the benefit of his principal, without reserving his lien, or if he transmit them to his principal, his lien is gone, and he is not entitled to stop them *in transitu* in order to recover it.[3] It is laid down by Professor Bell that, except in the special cases of a factor and a policy-broker, a lien, if lost by parting with possession, does not revive on that possession being recovered.[4] But it is difficult to understand how this rule would apply to the case of a law agent or a banker, who have a general lien, in the one case over papers, in the other over negotiable securities, for all that is due to them by their client or customer. In either case, supposing the subjects of the lien to be parted with, and afterwards recovered, although the original lien might not revive, the same result would be arrived at, as these subjects would be subject to a lien for the whole balance due.

But possession may be retained though custody is given up.

Possession may be retained though the custody is parted with, if the possessor retains control over the subject. Thus the captain of a ship does not lose his lien for freight by landing the cargo in a dock warehouse, under a stop-order for freight.[5] And a law agent may hand over the title deeds of his client to another agent, without losing the possession on which his lien depends.[6] Again, where several articles are subject to a right of lien, some of this may be restored to the owner without relinquishing the right of lien over the rest, which remain impledged for the whole balance due. This has been held in the case of a law

[1] Bell, *Com.* ii. 89.

[2] *North-Western Bank* v. *Poynter*, 1894, 21 R. 513; revd. 22 R. (H. L.) 1.

[3] *Kruger* v. *Wilcox*, 1755, 1 Dick. 269; 2 Bell, *Com.* 89.

[4] Bell, *Com.* ii. 90.

[5] See *infra*, p. 402.

[6] *Renny* v. *Rutherford*, 1840, 2 D. 676, and 3 D. 1134.

agent,[1] and of a carrier,[2] and is probably applicable to all cases of lien.

Is a lien waived by taking a bill or security for the debt?

It is somewhat doubtful whether, and in what cases, a lien is discharged by taking a bill or other security for the debt. Where a bill is taken, it would appear that novation will, as a rule, take place, the old debt is discharged, and a new one on the bill substituted; but this does not necessarily imply that the security for the old debt should not apply to the new one. Indeed, it would seem that if a bill is taken in the ordinary course of business, and at a currency usual in the trade, the lien remains unaffected.[3] Thus it has been held that a factor does not lose his right of retention over goods that come into his hands, by taking bills from his principal in the ordinary course of business.[4] In a later case a bleacher was held not to have lost his lien by taking bills for his account; but the lien in this case had been raised by an agreement which expressly covered bills, and the question whether the common-law lien would have been lost was reserved.[5] It was afterwards decided in favour of the holder of the lien, in a case where that holder was a law agent.[6] In an English case a ship was placed in the possession of a firm of ship-engineers, in order to have engines fitted. By the contract, payment was to be made by three bills, one at three months from the date when the engines were fitted, and the others at three and six months respectively from the date when the ship was ready and had made her trial trip. When the first bill was current, and before the others were given, the shipowner failed, and it was held that there was nothing in the contract, nor in the fact of a bill having been taken, to exclude the lien of the engineers over the ship.[7] On the other hand, if a bill is taken at an unusually distant date, it would probably be inferred that the right of lien was waived, unless it was expressly reserved.[8] If a separate and independent security, or the acceptance of a third party, is taken, the rule in the earlier English cases was that the lien was discharged, unless expressly reserved.[9] But in recent cases it has been held that this is a

[1] *Gray* v. *Wardrop's Tr.*, 1851, 13 D. 963; revd. (on this point) 18 D. (H. L.) 52, 2 Macq. 435.

[2] *Bannatyne* v. *Malcolm*, 15 Nov. 1814, F. C.

[3] *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565; *Anderson's Tr.* v. *Fleming*, 1871, 9 Macp. 718; *Palmer* v. *Lee*, 1880, 7 R. 651 (law agent).

[4] *Gairdner* v. *Milne & Co.*, *supra.*

[5] *Anderson's Tr.* v. *Fleming*, *supra.*

[6] *Palmer* v. *Lee*, *supra.*

[7] *Ex p. Willoughby*, 1881, 16 Ch. Div. 604.

[8] *Hewison* v. *Guthrie*, 1836, 2 Bing. N. C. 755.

[9] *Mason* v. *Morley*, 1865, 34 Beav. 471; *Chambers* v. *Davidson*, 1866, L. R. 1 P. C. 296.

question to be decided on the circumstances of each case. Thus it was held that an innkeeper, who had accepted a security of doubtful value for his bill, was not thereby precluded from retaining the luggage of his guest.[1] But the opposite rule was applied to the case of a solicitor, on the ground that, as it was part of his duties to explain his legal position to his client, he ought to have made it perfectly clear that he intended to preserve his right of lien.[2] On the other hand, in the only case which has occurred on this subject in Scotland, it was held that a law agent had not lost his lien by accepting an undertaking from a third party for the payment of his account.[3]

In English law a lien is waived by refusing to give up possession on some other ground.

In England it has been held that a lien is waived if the holder thereof, on being asked to restore the subject retained, refuses on some other ground, and makes no mention of the lien.[4] It is not necessary that the demand for restoration of the subject should be made by means of an action at law, nor that payment of the debt for which lien is claimed should be tendered. Thus where a carrier refused to deliver goods except on payment of an old account, which turned out not to be due, it was held that he had lost his lien over the goods for the expense of their carriage, although no express tender of it had ever been made.[5] It is very doubtful whether this rule, though apparently well established in England, would be followed in a Scotch Court.

[1] *Angus* v. *M'Lachlan*, 1883, 23 Ch. Div. 330.

[2] *In re Taylor* [1891], 1 Ch. 590.

[3] *Ayton* v. *Colvil*, 1705, M. 6710; approved by Lord Murray in *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565.

[4] Smith, *Mercantile Law*, 10th ed., p. 705; *Boardman* v. *Sill*, 1808, 1 Camp. 410, note; *Weeks* v. *Goode*, 1859, 6 C. B. (N. S.) 367, other cases there cited.

[5] *Jones* v. *Tarleton*, 1842, 9 M. & W. 675.

CHAPTER XI

PARTICULAR LIENS

Factor's lien.
Banker's lien.
Law agent's lien.
Broker's lien.
Innkeeper's lien.
Carrier's lien.
Trustee's lien.

I. LIEN OF FACTOR

A FACTOR has a general lien over all funds and property of his principal which have come into his possession in the course of his employment as a factor, and is thereby entitled to retain such funds or property against the principal, his trustee in bankruptcy, or third parties, until the balance due on factorial transactions is paid.[1]

Extent of lien.

The lien of a factor extends over all goods purchased by the factor for the principal, or goods sent by the principal to the factor for sale, bills, policies of insurance, shipping documents, and sums of money which have come into his possession legitimately and in the course of his employment as factor.[2] It covers all advances made by the factor to or on behalf of the principal, whether in reliance on the goods retained or not, and even although the factor knew that the principal was insolvent when he made the advance;[3] salary or commission due to the factor on the present or on past transactions;[4] expenses to which the factor has been put in relation to goods belonging to the principal;[5] *del credere* and other guaranties undertaken for and with the knowledge of the principal.[6] But it will not cover the price of goods supplied to the principal

[1] Bell, *Prin.* s. 1445, *Com.* ii. 109; Ersk. iii. 4. 21; Smith, *Merc. Law*, 10th ed., p. 703; Cross on *Lien*, 246.

[2] *Stephens* v. *Crs. of York Buildings Co.*, 1735, M. 9140; *Wilmot* v. *Wilson*, 1841, 3 D. 815.

[3] *Foxcroft* v. *Devonshire*, 1760, 2 Burr. 931, per Lord Ellenborough.

[4] *Sibbald* v. *Gibson*, 1852, 15 D. 217.

[5] *Curtis* v. *Barclay*, 1826, 5 B. & C. 141 (expense of action to recover goods wrongfully detained by captain of ship).

[6] *Hammonds* v. *Barclay*, 1802, 2 East, 227; *Houghton* v. *Mathews*, 1803, 3 B. & P. 485, 7 Revd. Rep. 815.

by the factor as an independent merchant,[1] nor to debts due to the factor before the factory commenced.[2] Thus a factor, acting for A., sold goods in his own name to B., by whom the price was not paid. B., who had never employed the factor before, afterwards sent him goods for sale, but failed before the factor had succeeded in selling them. It was held, in a question with B.'s assignees in bankruptcy, that the factor could not assert a lien over those goods for the price of the goods which he had sold to B., because at the time that debt was incurred he was not a factor for B.[3] And the factor cannot exercise his lien to secure debts due by the principal to third parties, and assigned to him, unless in so acquiring them he was acting under the instructions of the principal.

Meaning of "factor."

The class of employment to which the lien of a factor properly belongs is that of a mercantile agent, a person employed to buy or sell goods, or otherwise to manage the business of a merchant in a particular place, and intrusted with the possession and disposition of goods by him.[4] But in Scotland the lien would seem to be the right of any general agent, whether he was engaged in mercantile affairs or not, and to be a counterpart of the contract of agency. Thus it has been held that the lien of a factor over the property of his principal rests upon a stronger footing than either compensation or retention, and is founded on strict law, as being implied in the mutual contract between the parties, and on the *actio contraria* to the *actio directa* of the principal or his representatives.[5] And where a firm of auctioneers received horses for sale on commission, and were in the habit of making advances to the party who sent them, it was held that they had a general lien over the horses in a question with the trustee in the bankruptcy

[1] *Miller* v. *M'Nair*, 1852, 14 D. 955, per Lords Cockburn and Murray.

[2] *Houghton* v. *Mathews*, 1803, 3 B. & P. 485 ; 7 Revd. Rep. 815.

[3] *Houghton*, *supra*.

[4] There would appear to be a difference in the use of the word factor, as applied to mercantile agents, in England and Scotland. The word factor in England is exclusively an agent intrusted with the possession of goods for the purpose of sale (Smith, *Merc. Law*, 10th ed., 118 ; *Stevens* v. *Biller*, 1882, 25 Ch. Div. 31 ; *ex p. Dixon*, 1876, 4 Ch. Div. 133) ; in Scotland he is a general agent for the management of all the mercantile affairs of his principal in a particular place, and of the nature of a mercantile agent as defined by the Factors Acts (Bell, *Com.* i. 506). Thus the powers which are given to a factor in England only by the Factors Acts, such as the power to pledge (per Lord Blackburn in *Cole* v. *North-Western Bank*, 1875, L. R. 10 C. P. 354, at p. 362–3), he had in Scotland at common law (Bell, *Prin.* s. 1364).

[5] *Stephens* v. *Crs. of York Buildings Co.*, 1735, M. 9140 ; cf. opinion of Lord M'Laren in *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12.

of the owner, on the ground that they were in the position of factors.[1] And in a recent case, house factors employed to collect rents were held entitled to apply the rents they had collected to meet a debt due to them by the proprietor, and arising out of an entirely different matter. The exact ground on which this claim of retention was sustained is not easy to gather, but the case would seem to be an extension of the lien of a factor to a person in the position of a house factor.[2]

Factor and broker.

A distinction is recognised between the lien of a factor and that of a mere broker, who is employed as an intermediary to find a purchaser for goods, but who is not intrusted with the possession, or with the power of disposal, of the goods, and who therefore has a lien of a kind much more limited than that of a factor. But the distinction is a narrow and difficult one, as a man may be a factor though he has no authority to sell in his own name, or to fix the price,[3] and a broker may have the custody of goods as an intermediary without being a factor.[4] In *M'Call & Co.* v. *Black & Co.*, a mercantile agent, employed to purchase goods for export, acted under a contract by which he was entitled to charge a commission of 3 per cent. on the price when he advanced the money, or became liable for it, and a brokerage of 1 per cent. when he merely acted as an intermediary. He purchased goods for which he incurred no liability, as they were paid by bills accepted by the principal, and in his accounts he charged a commission of 1 per cent. on the price of these goods. On the bankruptcy of the principal he claimed a right of retention for a general balance, due to him on previous transactions, in which he had acted in the capacity of a factor. The goods which it was proposed to retain were, at the date of the bankruptcy of the principal, shipped under a bill of lading in favour of the mercantile agent. It was held that in this particular case he had bought the goods as a broker, and not as a factor, and therefore, whether he had a lien as a broker or not, he was not entitled to exercise it for debts which were due to him in the capacity of factor.

Lien does not cover debts incurred in a different capacity.

The case above narrated is an example of the rule, that where a party combines the functions of a factor with some other occupa-

[1] *Miller* v. *Hutcheson*, 1881, 8 R. 489. Opinion of Lord Justice Clerk (Moncreiff). Lord Young's opinion would appear to be rested on the ground that the auctioneers had expressly contracted for a lien.

[2] *Stevenson, Lauder, & Gilchrist* v. *Macbrayne & Co.*, 1896, 23 R. 496.

[3] *Stevens* v. *Biller*, 1883, 25 Ch. Div. 31.

[4] *M'Call & Co.* v. *Black & Co.*, 1824, 2 Sh. App. 188. *Dixon* v. *Stansfield*, 1850, 10 C. B. 398.

tion, he cannot apply his factor's lien to debts due to him in his other capacity. Nor can he retain goods received in the other capacity, to meet a debt due to him as factor. Thus the lien of a factor cannot be exercised by a storekeeper, or by a wharfinger, even although he also act as a factor, if the goods have been received, or the balance incurred, in the capacity of storekeeper or wharfinger, and not in that of factor.[1]

Sub-factor.

If a sub-factor is employed, he is clearly entitled, on the principle of special retention, to retain goods placed in his hands in security of expenses incurred in relation to these particular goods. And if he acted in ignorance of the existence of the principal, he is entitled to retain the goods in security of advances made on the faith of these particular goods.[2] It is laid down by Professor Bell that a sub-factor has no lien, in a question with the principal, for a general balance due to him by the factor, even although he was unaware of the existence of the principal.[3] This is rested on the authority of the decision of the Court of Session in *M'Call & Co.* v. *Black & Co.*,[4]—a decision which is only incidentally reported, and which was affirmed by the House of Lords on a totally different ground. In an English case, it was held that the question whether a sub-factor had a lien for a general balance due to him by the principal factor depended on a question of fact, and that question was whether he knew, before his lien accrued (*i.e.* before he obtained possession of the subject), that the primary factor was acting for a principal.[5] Goods were shipped by a firm of shipping agents in Havannah to a firm of merchants in London, as agents for their sale. The London merchants knew that the shipping agents were acting for an unnamed principal. They effected a policy of insurance on the cargo on behalf and for the benefit of all whom it might concern. The cargo being totally lost, the London merchants received the proceeds of the policies, and claimed a lien over them for a general balance due to them by

[1] *Monk* v. *Whittlebury*, 1831, 2 B. & A. 484; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *Cole* v. *North-Western Bank*, 1875, L. R. 9 C. P. 470, and 10 C. P. 354; cf. *Miller* v. *Hutcheson*, 1881, 8 R. 489 (where this rule seems to be disregarded by the Lord Justice Clerk). But if the subject over which the factor claims a lien is a money debt,—for instance, the price of goods sold, or the proceeds of a policy of insurance,—he may have a right to compensate that debt by any debt due to him by the principal, whether incurred in his capacity of factor or not—*Miller* v. *M'Nair*, 1852, 14 D. 955, per L. J. C. Hope, p. 960.

[2] Bell, *Com.* i. 518; *Ede and Bond* v. *Findlay, Duff, & Co.*, 15 May 1818, F. C.

[3] Bell, *Prin.* s. 1446; *Com.* i. 519.

[4] 1824, 2 Sh. App. 188.

[5] *Mildred* v. *Maspons*, 1883, 8 App. Cas. 874.

the shipping agents. In a question with the owner of the goods, it was held that as they had notice that the shipping agents were acting as factors and not as principals, they were not entitled to a lien for a general balance due by those agents, though they were entitled to a lien for the expenses and commission in respect of the insurance policy.[1]

Possession by factor.

The lien of a factor, like other rights of retention, is dependent on possession. Under reference to a former page for the general rules of possession in questions of retention or lien,[2] certain points with special regard to factors may be noticed here. It is held to be sufficient possession if the goods or other property, over which a lien is claimed, are in the hands of an agent for the factor, though they have never come into his actual possession. Thus it is settled that a factor may have a lien over the policy of insurance on a cargo, or the proceeds after a loss has occurred, although the policy has remained in the hands of the policy broker by whom it was effected.[3] But the mere fact that a factor has accepted bills, or made advances on the faith of a consignment about to be made, does not, if he has not received a bill of lading, vest the possession of the goods in him so as to give him a lien over them; and therefore, if the principal is bankrupt before the consignment is delivered, the trustee may stop *in transitu*, and will thereby prevent the factor from obtaining a lien.[4] If, however, the particular consignment has been expressly pledged to the factor, and the principal became bankrupt, or died, before it was delivered, it would seem in England that the factor would have a right to delivery in order to satisfy the debt for which the consignment was pledged.[5]

Lien over price of goods sold by factor.

The factor's lien is held to entitle him to a preference over the price of goods sold by him on behalf of the principal and delivered to the purchaser, in the case where the principal becomes bankrupt before the purchaser has paid the price. This right is, however, not recognised in every case where a factor sells goods for the principal, and delivers them, but only if the price is payable to him, or if he obtains the bills for it, blank indorsed, or if he has a general power to receive payment and grant a receipt.[6]

[1] *Mildred*, *supra*.

[2] *Ante*, p. 341.

[3] *Wilmot* v. *Wilson*, 1841, 3 D. 815; *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565.

[4] *Kinloch* v. *Craig*, 1789, 3 T. R. 119; *Bruce* v. *Wait*, 1837, 3 M. & W. 15.

[5] *Hammonds* v. *Barclay*, 1802, 2 East, 227; *Fisher* v. *Miller*, 1823, 1 Bing. 150.

[6] Bell, *Com.* ii. 111, approved in *Miller* v. *M'Nair*, 1852, 14 D. 955; *Hudson* v. *Granger*, 1821, 5 Barn. & Ald. 27; 24 Revd. Rep. 268.

And if a factor sells in his own name, and afterwards declares his principal, and consents to a bill for the price being drawn in favour of the principal, he will be held to have waived his lien on the price, even if the principal is bankrupt before the bill is actually sent.[1]

Purchaser may set off price against debt due to him by factor.

The factor's lien over the price of goods sold by him may entitle the purchaser of the goods, if he happens also to be a creditor of the factor, to set off the price against a balance due to him by the factor. Thus where a factor to whom his principal was largely indebted, sold coals to a person to whom he was himself in debt, and in so doing acted expressly as a factor, it was held, on the bankruptcy of the factor, that the principal could not object to the purchaser setting off the price of the coals against a debt due by the bankrupt estate, because the factor had a lien over that price for the debt due by the principal to him.[2]

Lien excluded by specific appropriation.

The lien of a factor may be excluded by the specific appropriation of the goods sent to him. In England the rule would appear to be, that if the goods are sent to the factor on a definite contract, and not merely in the general course of business,—if, for example, they are sent to him in security of a particular advance,—he cannot claim a lien for a general balance;[3] but it is doubtful whether this rule would be followed in Scotland unless the terms of the contract definitely excluded a lien. Where goods or bills are sent to a factor in order to satisfy particular debts due by the principal, they are held to be specifically appropriated; and the factor's lien is excluded if the principal has agreed with the creditors to satisfy or reduce their debts by that particular remittance, or if the factor has agreed with the creditors to hold the consignment for them; or even where instructions are sent to the factor to hold a consignment for the benefit of particular creditors, and the proceeds are arrested by general creditors, without having been used for the purpose for which they were sent.[4] But where goods are consigned to a factor, and bills of exchange, containing a reference to these particular goods, are drawn upon him in favour of a third party, and a letter of advice mentioning the drawing of the bills is sent to him, this does not in any ordinary case amount to a specific appropriation of the goods. If, therefore, the principal fails, the factor, if in consequence of the failure he has refused to accept the bill of exchange, may exercise a lien over the goods for a general balance due to him by the

[1] *Miller* v. *M'Nair*, 1852, 14 D. 955.

[2] *Hudson* v. *Granger*, 1821, 5 Barn. & Ald. 27; 24 Revd. Rep. 268.

[3] *Walker* v. *Birch*, 1795, 6 T. R. 258; see Bell, *Com.* ii. 110.

[4] Bell, *Com.* ii. 13 and 111.

principal, in a question with the indorsee of the bills of exchange.[1] In this case the following remarks by Mellish, L. J., were quoted with approval: "The indorsement of a bill gives only a right to the bill; and I do not think that any mercantile man would suppose, because he saw in the bill the words, 'which place to account cargo per A.,' that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have a bill of lading annexed; if there is no bill of lading annexed, he only expects to get the security of the bill itself."[2]

Waiver of lien.

It has been held that a factor does not lose his lien over goods which he has bought for the principal, or over the policy of insurance on such goods, by taking a bill from the principal for the amount due on that particular transaction.[3] The bill, if it is merely the acceptance of the principal, and not an obligation of a third party,[4] is only a method of constituting the debt, and not a security for it, or an agreement by the factor to restrict his claim to personal credit; and the factor is consequently entitled, on the bankruptcy of the principal and the consequent dishonour of the bill, to assert a lien over the goods or policy of insurance for his general balance.[5]

A factor loses his lien over any particular goods by transmitting them to the principal, and he is not entitled to stop them *in transitu* in order to preserve it.[6] And he loses his lien over the price of goods sold by him by assenting to a bill being drawn by the purchaser in favour of the principal.[7]

Lien in questions with purchasers.

In questions with third parties who have purchased goods from a factor as such, he is not entitled to retain the goods in security of a general balance due to him by the principal, if the purchaser has paid the price of the goods to the principal.[8] Even in a case where a factor had sold on a *del credere* commission, and had guaranteed the purchaser's bill for the price, it was held, on the purchaser becoming bankrupt, and the principal discharging his claim on the bankrupt estate on a composition, that the factor could not retain the goods against the purchaser's trustee in

[1] *Brown, Shipley, & Co.* v. *Kough*, 1884, 29 Ch. Div. 848, overruling *Frith* v. *Forbes*, 1862, 4 De G. F. & J. 409.

[2] Per Mellish, L. J., in *Robey & Co.'s Perseverance Ironworks* v. *Ollier*, 1872, L. R. 7 Ch. 695, at p. 699.

[3] *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565.

[4] *Horncastle* v. *Farran*, 1820, 3 Barn. & Ald. 497 (acceptance of "approved bills" held to waive a lien).

[5] *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565.

[6] *Kruger* v. *Wilcox*, 1755, 1 Dick. 269, Bell, *Com.* ii. 89.

[7] *Millar* v. *M'Nair*, 1852, 14 D. 955.

[8] Bell, *Prin.* s. 1447.

bankruptcy, in security of his liability to the principal under his guarantee.[1] If a purchaser to whom goods are sold through a factor should reject them as disconform to contract, and claim damages against the principal, he cannot retain the goods he has thus rejected, in a question with the factor. Thus goods were sold by A., acting as factor for B., and were rejected by the purchaser as disconform to contract. He had already paid for them by a bill in favour of B. On the rejection of the goods the factor repaid the invoice price to the purchaser, and obtained from him the shipping documents; but pending the question as to the right to reject, the purchaser had resold a portion of the goods, under an arrangement with the factor that his doing so should not prejudice his position in any way. He claimed a right to retain the price of the portion thus resold in security of his claim of damages against B. for breach of contract. It was held that when A., as factor, repaid the invoice price and obtained the shipping documents, he acquired a right of lien or retention over the goods for the advances he had made for the principal, which was preferable to the right of the purchaser to retain in security of his claim of damages.[2]

Power of factor to sell under lien.

In English law it is held that a factor has no power to sell goods against the instructions of the principal, in order to satisfy his general balance.[3] In America it is decided that a factor may sell the goods at a fair market price, and reimburse himself for advances, after giving reasonable notice to his principal, even although the latter has limited him to a higher price, or given him express instructions not to sell.[4]

II. LIEN OF BANKER

Lien of banker.

A banker has a general lien over all bills, notes, and negotiable securities deposited with him by a customer, and is thereby entitled to retain such property in security of any balance which may be standing against the customer. This right is usually spoken of as banker's lien.[5] A banker has also a right, in the case where a customer keeps two or more accounts, to set off a credit balance on one account against a debit balance on the other. And,

[1] *Stirling & Son* v. *Duncan*, 1823, 1 Sh. App. 389.

[2] *Scott & Neill* v. *Smith & Co.*, 1883, 11 R. 316.

[3] *Smart* v. *Sandars*, 1848, 5 C. B. 895.

[4] Jones on *Lien*, i. s. 476.

[5] Bell, *Prin.* s. 1451, *Com.* ii. 113; Smith, *Merc. Law*, 10th ed., ii. 702; Cross on *Lien*, p. 316; Grant on *Bankers and Banking*, 4th ed., p. 244.

by the constitution of most banks, there is provided a lien or right of retention over the bank stock; that is, a right in favour of the bank of refusing to transfer shares until the shareholder has paid a balance standing against him in the bank books. It is proposed here to discuss these several rights of a banker in the order in which they are above set forth.

Nature of the lien.

The effect of the banker's lien is so largely settled by decisions, that any consideration of the origin of the right may seem academic and unnecessary. Still, cases may arise in which the question may be of importance, especially as its consideration leads to the conclusion that the lien of a banker, in the law of England, is founded on entirely different principles from the similar lien, or right of retention, recognised by the law of Scotland. In England the lien of a banker, like other general liens, is founded entirely on usage of trade.[1] It has been stated that it is "part of the lawmerchant, and is to be judicially noticed, like the negotiability of bills of exchange, or the days of grace allowed for their payment."[2] In Scotland, it would rather appear that the lien of a banker, like the lien of a factor or broker, is a condition or counterpart of the contract of agency on which he is employed. Thus Professor Bell introduces the subject by the statement: "A banker is a money factor; and in all cases where he acts as agent, he has a right of retention."[3] And the lien of a banker has been described by Lord President Inglis as "simply the right of retention which is known to the common law;" and more fully by Lord M'Laren, as follows: "It is a general principle of our law that every agent has a lien or right of retention against his principal for the balance due to him; and this right of retention is not confined to moneys collected, such as rents and dividends, but may extend to securities, the precise extent or nature of the lien being determined by the nature or character of the agency. The so-called banker's lien is an example of this rule of law."[4] From those quotations it would appear that this right, which in England rests solely on usage of trade, is with us an implied condition of the contract on which the banker is employed; and the distinction suggests doubts as to the reliance to be placed in the English authorities on the point. Whatever may be the exact origin of the lien of a banker, it is clear that it is a right of

[1] Cross on *Lien*, pp. 15 and 316; *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787.

[2] Per Lord Campbell in *Brandao*, *supra*, at p. 805.

[3] Bell, *Prin.* s. 1451.

[4] *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12—Lord President at p. 16, Lord M'Laren at p. 20.

retention founded on possession, and not on a title of property. The securities over which the lien extends do not become the property of the banker, but are only in his possession on a contract of agency or deposit.[1]

Subjects of the lien.

The subjects which a banker may retain under his lien are bills of exchange, promissory notes, bonds or share warrants payable to bearer, and other negotiable securities, provided that they have been placed in his possession on a contract which is not inconsistent with lien.[2] The lien has never been extended in Scotland to share certificates, which are transferable only as accessories of the shares to which they refer, or to any subject except a negotiable instrument, or one which has at least this characteristic of negotiability, that the *jus exigendi* is transferable by the indorsement and delivery, or mere delivery, of the instrument. A banker may indeed have a right of retention over share certificates or documents of title, in the case where the shares or property represented thereby has been transferred to the bank by an *ex facie* absolute title, subject to an obligation to reconvey. He has then a right of retention founded on property; that is, he is not bound to fulfil the personal obligation to transfer a subject of which he obtained the *dominium*, until all obligations due to him by the party who is creditor in the obligation to transfer are fulfilled.[3] On the same principle a banker may have a right to retain heritable property conveyed to him by an *ex facie* absolute disposition, with back-bond. But rights of this kind, resting on a title of property, are entirely different in origin, and result from the right known as banker's lien, which rests on possession on a contract of agency. In England the usage of trade gives a banker a lien over certain subjects which are not negotiable, such as a policy of insurance, or a lease.[4] But neither in England nor in Scotland does the lien extend over plate deposited with a banker for safe custody.[5]

Debts covered by the lien.

The lien covers all advances made by the banker to the customer in the ordinary course of his business as a banker, but not debts due to him in another capacity.[6] If the customer is bankrupt, or *vergens ad inopiam*, the banker may also retain in security any bills which he has discounted for the customer, even

[1] See per Lord M'Laren in *Robertson's Tr.*, *supra*; per Lord Kyllachy (Ordinary) in *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740.

[2] Bell, *Prin.* s. 1451.

[3] *Hamilton* v. *Western Bank*, 1856, 19 D. 152. As to this, see *ante*, p. 330.

[4] *London Chartered Bank of Australia* v. *White*, 1879, 4 App. Cas. 413; *in re Bowes*, 1886, 33 Ch. Div. 586; *Wolstenholme* v. *Sheffield Union Banking Co.*, 1886, 54 L. T. 746; cf. *Wylde* v. *Radford*, 1863, 33 L. J. Ch. 51.

[5] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787, per Lord Campbell at p. 809.

[6] Bell, *Com.* ii. 115.

though the terms of payment has not yet arrived.[1] In England he would appear to have this right whether the customer was solvent or not.[2] In Scotland the exact point has not been considered; but it has been held that a banker was not entitled to retain a balance standing in the customer's favour, and to refuse to honour his cheque, in security of a bill which had not yet matured, unless the customer was *vergens ad inopiam*.[3] And the fact that the banker proposed to apply for the customer's sequestration is not sufficient to justify a refusal to honour a cheque.[4]

Effect of lien in relation to bills.

The question whether a banker has a lien over a particular bill of exchange must be solved by considering the contract upon which he obtained possession of it. Bills may be sent to a banker for discount, or for presentment and collection.[5] Now if a banker discounts a bill, either by paying for it over the counter, or by crediting his customer with its amount, he has bought it, and, as it is then his own property, he cannot have a lien over it. If, on the other hand, he takes the bill merely as agent, to collect, it remains the property of the customer, and the banker has a lien over it for his general balance.[6] The practical importance of this distinction is found on the bankruptcy of the parties to the bill. If a banker discounts a bill for his customer, and ranks on the sequestrated estate of another party who is liable on it, and receives a dividend, he can only draw from his customer's estate the amount of the bill, less the amount of the dividend which he has received. If, in the same circumstances, he had not discounted the bill, he could rank on his customer's estate for the whole sum due to him, and keep the dividends received on the bill from the other estate in security of any deficit which the customer's estate might show.[7] This may be illustrated by an example. Suppose a party who has overdrawn his account to the extent of £200 sends a bill worth £100 for discount. The banker discounts it, and thereby reduces the overdraft to £100. A party liable on the

[1] *British Linen Co.* v. *Ferrier*, 1807, Bell, *Com.* ii. 115, note.

[2] *Davis* v. *Bowsher*, 1794, 5 T. R. 588; Bell, *Com.* ii. 114, note.

[3] *Paul & Thain* v. *Royal Bank*, 1869, 7 Macp. 361; *Ireland* v. *North of Scotland Bank*, 1880, 8 R. 215.

[4] *Ireland*, *supra*.

[5] As to facts which show that a banker has discounted a bill, see Bell, *Com.* ii. 113; Wallace & M'Neill, *Banking Law*, pp. 22–24.

[6] Bell, *Prin.* s. 1451; *Com.* ii. 113; Byles on *Bills*, 15th ed., p. 479. Thus if the bank fails, the property in undiscounted bills is still in the customer, and does not pass to the liquidator—*Thompson* v. *Giles*, 1823, 3 D. & R. 733; *ex parte Sergeant*, 1810, 1 Rose, 153; *ex parte Pease*, 1812, 1 Rose, 232, and cases noted there at p. 255.

[7] Bell, *Com.* ii. 113.

bill becomes bankrupt, and the banker, ranking on his estate, receives a dividend of 15s. in the £. On the customer becoming bankrupt, the banker may rank on his estate for the bill, and for the overdraft of £100. But he is not entitled to receive more than 20s. in the £ on the bill, and as he has already received 15s., can only draw 5s. Thus, assuming that the customer's estate pays 10s. in the £, the banker will draw from it in all £75, *i.e.* £50 as a dividend on the overdraft, and £25 on the bill. He has thus obtained in all £150—£75 from his customer, and £75 from the estate of the other obligant. Taking the same circumstances, but assuming that the banker, instead of discounting the bill, took it as an agent to collect, he would then, as before, rank on the estate of the other party, and receive a dividend of £75. Over this dividend he would have a lien, in security of the balance due to him by his customer. Then, on the bankruptcy of the customer, he would rank for £200, the sum due on the overdraft, and, at 10s. in the £, would receive £100. He would thus obtain in all £175, instead of £150, the sum he obtained if he had discounted the bill.[1]

A banker, whether he holds a bill as an agent or as a discounter, has no right to draw more than 20s. in the £ from the various parties liable on the bill; and if, by ranking on the various estates, he does obtain more than that amount, he has no right to retain the surplus in security of other bills on which his customer is liable to him.[2] Thus in *Patten* v. *Royal Bank*, the A. bank were the holders of a large number of bills indorsed to them by the B. bank. The B. bank was sequestrated, and the A. bank ranked for the bills, and received a dividend of 5s. 8d. in the £. Thereafter certain of the bills were paid in full by the acceptors. The A. bank had thus received, on these particular bills, £1, 5s. 8d. in the £. They maintained that they had a right to retain this surplus in security of the other bills on which the B. bank was liable to them, and on which they had only received a dividend. It was held that they had no right to be in possession of more than 20s. in the £, and had therefore no right of retention over the surplus.

[1] In England the rule is that unless a bill has been deposited without being indorsed, or in such circumstances that the customer would not be liable upon it, it is regarded merely as a cautionary obligation given by the customer to the banker; and the latter, in ranking on the customer's estate, need not value and deduct the bill from the amount of his debt—*Ex parte Schofield*, 1879, 12 Ch. Div. 337.

[2] *Patten* v. *Royal Bank*, 1853, 15 D. 617.

Where a bill is sent to a banker for discount, he is not entitled, if he declines to discount it, to retain it in security of his general balance.[1] Thus where a bill was sent for discount and the banker declined to discount it, but did not return it, it was held that he had no lien over it, and could not retain it for his general balance. He was, however, allowed to retain it in security of a specific advance, which he proved to have been made expressly on the security of that particular bill, and with the authority of the customer.[2] In a later case, a bank gave a charge upon a bill, of which they were the holders. A suspension was brought, on the ground that the bank had received the bill for discount only, and had improperly retained it; but these grounds of suspension were refused.[3] At first sight these cases appear to be in conflict; but in reality the case of *Glen* appears to have been decided on the ground that it was incompetent to suspend a charge on a bill by a mere offer of parole proof;[4] and the question whether the facts alleged, if they had been competently proved, would have excluded the banker's lien, was hardly touched upon in the judgments.

Bills sent for discount cannot be retained in security of a general balance.

The lien of a banker will not cover securities deposited with him either (1) outwith his ordinary course of business as a banker, or (2) on a contract whereby they are appropriated to a specific purpose.

Limitations of lien.

The ordinary course of business of a banker, in the exercise of which he has a right to a lien over negotiable securities, might be described as that of a monetary agent. Thus if he receives bills for presentment, negotiation, or collection, or debentures for the collection of the interest, or securities as cover for an advance, he is acting in the ordinary course of banking business. But where a banker receives securities for safe-keeping in the strong-room of the bank, though he is acting in a capacity in which bankers usually do act, still he is not engaged in the business of a banker as a monetary agent.[5] Where, therefore, it is proved that a banker has received securities in the capacity of a mere depositary, he has no lien or right of retention over them.[6] It is

Does not apply to securities unless they are received by bankers in the ordinary course of business.

[1] *Matheson* v. *Anderson*, 1822, 1 S. 486; *Haig* v. *Buchanan*, 1823, 2 S. 412; *Borthwick* v. *Bremner*, 1833, 11 S. 716, and 12 S. 121; *Glen* v. *National Bank*, 1849, 12 D. 353.

[2] *Borthwick* v. *Bremner*, 1833, 11 S. 716, and 12 S. 121.

[3] *Glen* v. *National Bank*, 1849, 12 D. 353.

[4] This has been altered by sec. 100 of the Bills of Exchange Act, 1882.

[5] As to the ordinary course of business of a banker, see *Giblin* v. *M'Mullen*, 1868, L. R. 2 P. C. 317; *in re United Service Co., Johnston's Claim*, 1870, L. R. 6 Ch. 212.

[6] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787; *Leese* v. *Martin*, 1873, L. R. 17 Eq. 224; see also *Lucas* v. *Dorrien*, 1817, 7 Taunt. 278, 18 Revd. Rep. 480, where it was held that a lease left with a banker by mistake was not subject to lien.

not the custom of bankers to make any charge for the safe custody of documents; but even if they were to do so, it would seem that they would be acting as custodiers, and not as monetary agents, and would therefore have no general lien. In *Leese* v. *Martin*,[1] a stockbroker, who was in the habit of obtaining advances from his bankers on the deposit of securities, placed in their hands certain boxes containing securities. The boxes were locked, and the bankers had no key to them, or knowledge of their contents, and they were not employed to collect the interest or dividends on the securities. It was held that they had possession of the boxes merely as gratuitous bailees, and were not entitled to a lien over them or their contents, in security of a balance due to them by the stockbroker. In a case presenting similar features, Exchequer bills were kept by a customer in the strong-room of a bank, and in a box of which the bankers had no key. The bills were taken out and given to the banker, in order that he might draw the interest and get the bills replaced by new ones. In these circumstances, it was held that the banker had no lien over the new bills, because the old bills, while in the box, were in his possession as a custodier, and not in the ordinary course of his business as a banker, and the means by which he obtained possession of them for the purpose of collecting the interest implied a promise to return then as soon as he had accomplished that purpose.[2] But the terms of a formal receipt are not conclusive evidence of the conditions on which the banker received the documents. In *Robertson's Tr.* v. *Royal Bank*,[3] bonds payable to bearer were deposited with the bank, and a receipt was taken in the following terms: "We hold for safe keeping on your account, and subject to your order." On the bankruptcy of the customer when his account was overdrawn, his trustee argued that this receipt excluded lien, because it showed that the bank received the bonds simply as a custodier. It was held that the terms of the receipt were not conclusive evidence of the contract between the parties; and as it appeared from a proof that the bank had been in use to make advances on the security of these bonds, it was held that their possession was in the ordinary course of business, and that they had therefore a right to retain them in security of their general balance.[4]

[1] *Supra.*

[2] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787.

[3] 1890, 18 R. 12.

[4] Since this case bankers, on receiving negotiable securities on which they contemplate making advances, usually take a formal letter of pledge from the customer, and do not trust to lien.

Lien does not cover securities specifically appropriated.

It is clear that if a security is deposited with a banker for a particular purpose, the banker cannot be entitled to disregard that purpose, and claim a right of lien or retention for his general balance. Thus, as has already been stated, if bills are sent for discount, the bank must either discount or return them, and cannot keep them in security of a general balance.[1] And where a bill is sent to a banker to meet a particular debt, the banker is bound to apply it to that purpose. Thus in *Allan* v. *Allan & Co.*, A. drew, and B. accepted, a bill for £704, which was discounted with a bank. When it became due, A. sent another bill for £140 to the bank, instructing them to apply this bill, together with the balance standing in his favour in his current account, to meet it. Immediately afterwards, he stopped payment. The bank maintained that they had a right to retain the bill for £140 to meet other obligations due by A., and charged B. for payment of the bill for £704. In a suspension of this charge, it was held that the banker, having received the bill for £140 for a specific purpose, was not entitled to disregard this appropriation, and retain the bill for his general balance.[2] And where a customer took bills out of a box and gave them to his banker to collect the interest, and get them exchanged for new ones, it was held that the banker took them under an engagement to return the new bills when obtained, and was not entitled to claim a lien over them.[3] But where the customer keeps two or more accounts,—for instance, a loan, a discount, and a general account,—the fact that a security is deposited in one account does not, in the absence of a contract appropriating it to a particular purpose, amount to specific appropriation; and the banker has, as a rule, a lien over it for the balance which may be due to him on the whole three accounts, on the bankruptcy of the customer.[4]

Lien of banker over subjects deposited for a special purpose, after that purpose is fulfilled.

It is a further question how far the lien of a banker is excluded by the fact that a security has been sent for a particular purpose, in the event of the security, or a balance of its proceeds, remaining in the possession of the banker after that purpose has

[1] *Ante*, p. 375.

[2] *Allan* v. *Allan & Co.*, 1831, 9 S. 519. On the same principle, if money is sent to a bank to meet a particular bill, and the banker accepts it on that footing, he is bound so to apply it, and cannot use it to reduce a balance due by the customer—*Hill* v. *Smith*, 1844, 12 M. & W. 618; *Prince* v. *Oriental Bank*, 1878, 3 App. Cas. 325—opinion of Sir M. E. Smith, at p. 334, explaining *De Bernales* v. *Fuller*, 1810, 14 East, 590, note; *in re Barned's Banking Co.*, 1870, 39 L. J. Ch. 635.

[3] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787.

[4] *In re European Bank*, 1872, L. R. 8 Ch. 41.

(1) Where deposit is an isolated transaction.

been fulfilled. If, for instance, a security has been sent to a banker to cover a particular advance, or to meet a particular debt, has he a right of retention over it, or over the balance of its proceeds, after the particular advance has been paid, or the debt satisfied? In certain cases where a security was pledged, to be held as a security for an advance not exceeding a certain sum, it has been held without difficulty that the banker had no lien for any amount beyond the sum specified, because the terms of the pledge were inconsistent with a right of lien.[1] But certain English cases would appear to go beyond this, and to exclude a lien in every case where the security was originally obtained by the banker as a pledge, even although the terms of the pledge were quite consistent with the exercise of a lien. Thus a customer sent two securities to the bank, with a letter expressly pledging one of them. It was held that as the transaction has thus been brought within the limits of express contract, the banker had no general lien, and therefore could not retain the security, which had not been expressly pledged.[2] The same rule was applied in a case where a firm, and an individual partner, had each an account at the same bank, and the partner, on applying for a further overdraft, deposited a security to cover both accounts. It was held that the correspondence between the parties indicated that the security was deposited to meet that particular overdraft, and that the banker had therefore no right to retain it in security of a general balance which ultimately became due on the account of the firm.[3]

(2) Where deposit is an incident in a course of business.

But the principle of these cases would not appear to apply where the deposit of a security is only an incident in the course of dealing between the parties. Thus if a customer, who is a stock-broker or money broker, is in the habit of depositing securities with his banker, and receiving advances from him on the understanding that the securities are pledged *en bloc*, and that the banker has a lien over the whole of them for the balance due to him, that lien will not be excluded or limited by the fact that a particular security has been sent to meet a particular advance. The banker will be entitled to a lien over it, even after the particular advance has been repaid.[4] The question whether a lien is absolutely excluded in

[1] *Vanderzee* v. *Willis*, 1789, 3 Brown, Ch. Cas. 21; *in re Meadows*, 1859, 28 L. J. Ch. 891; *Earl of Strathmore* v. *Vane*, 1886, 33 Ch. Div. 586; *Alston's Tr.* v. *Royal Bank*, 1893, 20 R. 887, Lord Low (Ordinary).

[2] *Wylde* v. *Radford*, 1863, 33 L. J. Ch. 51.

[3] *Wolstenholme* v. *Sheffield Union Banking Co.*, 1886, 54 L. T. 746.

[4] *Jones* v. *Peppercorne*, 1858, Johnson, 430, 28 L. J. Ch. 155.

Scotland by the fact that the securities have been pledged to the banker has not yet been decided. In *National Bank* v. *Dickie's Tr.*, it was held that a bank could not claim a lien for a general balance over securities pledged to them by a customer; but this was decided on the ground that the securities did not belong to the customer, but to his clients; though, from some expressions in the opinion of the Lord Ordinary (Kyllachy), it would appear that he was prepared to hold that the fact that the securities had been pledged for a specific advance of itself excluded a claim of lien.[1] Lord President Inglis has, however, expressed his opinion on the point as follows: "Of course the doctrine of retention is subject to this exception, that if a negotiable instrument is lodged with a banker for the purpose of securing payment of a particular debt, or for any specific purpose, then in that case the general rule does not apply; but, on the other hand, that specific purpose must be clearly ascertained, otherwise the general rule will prevail."[2]

Lien over securities in question with third parties.

As the brocard *assignatus utitur jure auctoris* does not apply to negotiable instruments which pass from hand to hand and are transferable by delivery, the banker may have a right of lien over securities deposited with him, even though his customer had no right to them, or no right to subject them to a lien. The question is entirely one of notice—whether the banker knew, or had good means of knowing, that the title of his customer was deficient, or his authority limited. There is in this respect a distinction between an express pledge and an implied lien. If negotiable securities are pledged with a banker by a customer who is a stockbroker, or money broker, or engaged in any analogous business, the banker, if the transaction is in the ordinary course of business, is entitled to assume that the customer has authority to pledge the securities he offers.[3] In the latest case in Scotland on the subject, it was admitted that the bank, in dealing with a stockbroker, presumed that the securities which he pledged belonged to his clients, but it was held that they were entitled to assume that the clients had given him authority to pledge them; and their right to retain them in security of the advances for

[1] *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740; *Alston's Tr.* v. *Royal Bank*, *supra*.

[2] *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12, at p. 16.

[3] *Attwood* v. *Kinnear*, 1832, 10 S. 817; *National Bank* v. *Dickie's Tr.* *supra*; *Bentinck* v. *London Joint Stock Bank* (1893), 2 Ch. 120; *London Joint Stock Bank* v. *Simmons* (1892), A. C. 201, where it was held that *Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333, was to be followed only on identical facts.

which they were pledged, even in a question with clients whose securities had been fraudulently pledged by the stockbroker, was not disputed.[1] But the bank is not entitled to assume that their customer has any authority from his clients to subject securities belonging to them to a lien for his own general balance; and therefore they cannot assert such a lien if the circumstances disclosed the fact that the securities did not belong to the customer.[2] Thus where a bill was sent to a bank for discount by a bill-broker, with a letter which indicated that he was only an agent in the matter, it was held that the parties to whom the bill belonged were entitled to demand the sum for which it was discounted, and that the bank had no right to retain the bill, or its proceeds, to meet another debt due by the bill-broker.[3] And where a stockbroker fraudulently pledged securities belonging to his clients, and the bank admitted that they did not in fact believe that they were the stockbroker's own property, it was held that although the pledge was good the bank could not claim a further right of lien or retention for a general balance due by the stockbroker.[4]

Rights of banker to realise the subject of his lien.

It appears that in English law the lien of a banker, differing in this respect from other general liens, confers a right to realise the securities which are subject to it, on the ground that the banker is in the position of a pawnee.[5] And it would appear to be probable that if a stockbroker was in the habit of depositing negotiable securities and obtaining advances upon them, it might be held that the bank had a right to realise them without any express contract to that effect. But the general rule in Scotland would appear to be that a banker has no right to realise securities over which he has a lien, except in the case of bills or notes of which the date of payment has arrived. Thus in a case where the subjects covered by the lien were bonds payable to bearer, it was remarked by Lord M'Laren that the bank had no right to sell them, and could have been interdicted if they had proposed to do so.[6] If bills are sent to a banker for collection, it is his duty to present them for payment when they fall due; and he is entitled,

[1] *National Bank* v. *Dickie's Tr.* 1895, 22 R. 740.

[2] *National Bank, supra*; *Farrer & Routh, infra*; *Murray* v. *Pinkett*, 1846, 12 Cl. & Fin. 764; *Locke* v. *Prescott*, 1863, 32 Beav. 261.

[3] *Farrer & Rooth* v. *North British Banking Co.*, 1850, 12 D. 1190.

[4] *National Bank* v. *Dickie's Tr.*, *supra*.

[5] Smith, *Mercantile Law*, 10th ed., ii. 697 (note *a*), quoting *Donald* v. *Suckling*, 1866, L. R. 1 Q. B. 585, at p. 604, where, however, the point does not appear to be considered; and see Grant, *Bankers and Banking*, 4th ed., p. 250.

[6] *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12.

on obtaining payment, to apply it in reduction of his customer's account.[1] If, however, bills are sent to a banker unindorsed, it is laid down by Professor Bell that his right is only to detain, and not to realise them.[2]

Right of banker to set off separate accounts kept by customer.

Where a customer keeps more than one account, the right of the banker to set off a balance at the credit of one account against a debit balance on the other, is sometimes spoken of as a right to retain the balance on the one account to meet the balance against the other. But it is not really a right of retention, but a right to readjust the form of the account. The relations of a banker and customer are those of debtor and creditor; and therefore, where the banker is the creditor, he is entitled to ascribe any payment made by the customer to the reduction of his debt, and is not bound to set it aside as a fund upon which the customer can draw, unless there is a special contract to that effect.[3] The keeping of separate accounts is merely a matter of convenience, and, where there is no question of the property of third parties, the banker is entitled to recast his account at any time, and satisfy the debit balance on one account by the credit balance on the other.[4] And the customer, on the bankruptcy of the bank, has a similar right, and may meet a demand for a balance standing against him on one account by a balance in his favour on the other.[5]

Right of set-off excluded by notice that one or other account is kept by customer as trustee.

The right to set one account against the other is excluded if the bank had notice that the customer kept one account in his private, and the other in a representative capacity. The rule has been stated to be, that the bank has a lien over the contents of each account, unless it is excluded by special agreement, or the bank were aware that a specific article belonging to a third party had been paid in, or knew that the customer, in drawing a cheque upon a particular account, would be committing a breach of trust.[6] Thus a bank cannot take money, lodged by an executor, to meet

[1] *Peacock* v. *Pursell*, 1863, 32 L. J. C. P. 266. See, however, *Hood* v. *Stewart*, 1890, 17 R. 749, where it was held that the transfer for value of an unindorsed bill was equivalent to an intimated assignation of the debt, in a question of compensation.

[2] Bell, *Com.* ii. 23.

[3] *Pott* v. *Clegg*, 1847, 16 M. & W. 321; *Foley* v. *Hill*, 1848, 2 H. L. C. 28.

[4] *In re European Bank*, 1872, L. R. 8 Ch. 41; *Teale* v. *Brown & Co.*, 1894, 11 T. L. R. 56. Even if the two accounts are kept at different branches of the bank, the banker is entitled to set off a credit balance at one account against a debit balance on the other, and, if the result is to wipe off the credit balance, he may refuse to honour his customer's cheques—*Garnett* v. *M'Kewan*, 1872, L. R. 8 Ex. 10.

[5] *Bailey* v. *Finch*, 1871, L. R. 7 Q. B. 34; *ex p. Pearce*, 1841, 2 M. D. & D. 142.

[6] See opinion of Wright, J., in *Teale* v. *Brown & Co.*, 1894, 11 T. L. R. 56.

a balance due by the executor in his private capacity, except to the extent to which the executor is beneficially interested in the executry estate.[1] And where a solicitor, who was a treasurer of county rates, had two accounts with a bank, one headed private, and the other "Police Account," it was held that sums paid into the latter account were earmarked as belonging to the county, just as much as if they have been placed in a box labelled "County Moneys," and therefore that the banker had no right to set off a balance in favour of the police account to meet a balance due to them on the solicitor's private account.[2] And where a customer has a private and a trust account, the banker is not entitled to accept a cheque on the trust account in payment of a balance due on the private account; and will be liable in repayment if it appears that the customer, in drawing it, was committing a breach of trust.[3] In *Gray's Trustees* v. *Royal Bank*, a party died largely indebted to a bank. His executors, in the course of ingathering the estate, deposited money in the same bank. The banker claimed a right to apply this money to meet the debt due to them, as they alleged, by the executry estate, on the principle that an executor was *eadem persona cum defuncto*. The executry estate was insufficient to meet the debts due by the deceased. It was held that the bank had no right to apply the executry funds to meet a debt due by the deceased on the grounds (1) that the executry and the deceased were really different and separate estates, and (2) that no creditor of a person who died insolvent could acquire any preference after his death.[4]

[1] *Bailey* v. *Finch*, 1871, L. R. 7 Q. B. 34.

[2] *Ex p. Kingston*, 1871, L. R. 6 Ch. 632.

[3] *Pannell* v. *Hurley*, 1845, 2 Coll. 241; *Bodenham* v. *Hoskins*, 1852, 2 De G. M. & G. 903; *Bridgeman* v. *Gill*, 1857, 24 Beavan, 302. On the other hand, if the bank fails, the customer would seem to be entitled to set off one account against the other, even if one or other is opened in a representative capacity. Thus where a corporation kept two accounts, one municipal and the other as a local Board of Health, it was held that, on the failure of the bank, they might set a credit balance on the Board of Health account against a debit balance on the municipal — *Pedder* v. *Mayor, etc., of Preston*, 1862, 12 C. B. (N. S.) 535.

[4] *Gray's Trs.* v. *Royal Bank*, 1895, 23 R. 199. In a later case, *Hewitt* (*Clark Kennedy's Factor*) v. *Symons*, 1896, 3 S. L. T. No. 366, Lord Stormonth Darling (Ordinary), though constrained to follow *Gray's Trs.*, points out that the second of these grounds of judgment is erroneous, and in direct conflict with the decision of the House of Lords in *Globe Insur. Co.* v. *Scott's Trs.*, 1849, 11 D. 618; affd. 1850, 7 Bell, 296, 22 Jur. 625. The case has been settled.

Banker is not bound to make inquiries as to the means by which the customer obtained money paid in.

A banker, however, is not bound anxiously to inquire whether an account is kept by a customer in a representative capacity. Thus a solicitor had originally three accounts, called the office, private, and deposit accounts, and he had informed the banker that the deposit account would be mostly client's money. He afterwards united the deposit and the office accounts, and it was held that there was nothing in the circumstances to inform the bank that money in the office account, after the union, belonged to clients. The banker was held entitled to apply a balance on this account to meet a deficit on the private account.[1] And when a payment is made to account the banker is not bound to inquire where the customer obtained the money, and is entitled to assume, unless he has notice to the contrary, that the money is the customer's own, or that, if it belongs to clients, he has their authority to pay it into his own account. In order to compel the bankers to treat a payment made to him as trust money, they must be shown to have been aware that in the particular case the customer was not justified in paying in the particular amount.[2] Thus a banker was allowed to retain a sum paid in by a stockbroker, a day or two before he absconded, though it was admitted that the belief of the bank was that the money was in the stockbroker's hands as a broker acting for clients.[3] In an American case a customer opened an account with a bank in his own name. The bank knew that he was agent for an insurance company, that this was almost his sole business, and that the account was mostly used for keeping the insurance premiums which he collected. The customer, however, kept his own money in the same account, and occasionally drew cheques for private business. It was held that the bank had notice that the money at the customer's credit belonged to the insurance company, and therefore that they were not entitled, on the bankruptcy of the customer, to apply it to meet a debt due by him.[4]

Lien of banking companies over shares of bank.

By the constitution of most banking companies it is provided that the bank shall have a lien on the shares of any shareholder for all moneys due to them from him, and a right to decline to register any transfer while the transferring shareholder is indebted to them. This gives the bank an effectual security for any balance

[1] *Teale* v. *Brown & Co.*, 1894, 11 T. L. R. 56.

[2] Per Lord Herschell in *Thomson* v. *Clydesdale Bank*, 1893, 20 R. (H. L.) 59, p. 61.

[3] *Thomson* (*Dunlop's Trs.*) v. *Clydesdale Bank*, 1891, 18 R. 751; affd. 1893, 20 R. (H. L.) 59; (1893) A. C. 282.

[4] *National Bank* v. *Insurance Bank*, 104 U. S. 54; cited in Jones on *Lien*, vol. i. s. 250.

due by its own shareholders.[1] In one case this lien was held to be effectual over shares of which the shareholder was only a trustee;[2] but this would not hold if the bank had notice of the trust,[3] and, even without notice, would seem to be questioned in the House of Lords in *Murray* v. *Pinkett*.[4] The lien will cover dividends declared on the shares,[5] and a sum payable to the shareholder in lieu of his shares on the winding up of the bank.[6] A somewhat similar lien is provided, in the case of companies registered under the Companies Acts, by clause 10 of Schedule I., Table A of the Act of 1862.[7] It is there provided that "the company may decline to register any transfer of shares made by a member who is indebted to them." This clause gives a company a right to refuse to transfer shares wherever the shareholder is indebted to them, not merely where he is in arrears with calls.[8] But it does not give the company any right to realise the shares;[9] and it has been held to apply only to voluntary transfers of the shares, and not to the legal transfer to a trustee in bankruptcy. The trustee therefore had, under this clause, a title to demand registration, and could then dispose of the shares.[10] The article is therefore usually altered in the articles of association of a company.[11]

III. LIEN OF LAW AGENT

A law agent has a general lien for his professional account over title deeds and other documents belonging to his client, which have been placed in his custody or possession in the course of his employment as agent. This right has been long established; and a lien, similar in its effects, is allowed in England to a solicitor.[12]

[1] *Burns* v. *Laurie's Tr.*, 1840, 2 D. 1348; *re London, Birmingham, etc., Bank*, 1865, 34 Beav. 332; *in re General Exchange Bank*, 1871, L. R. 6 Ch. 818.

[2] *Burns* v. *Laurie's Tr.*, *supra*.

[3] *Murray* v. *Pinkett*, 1846, 12 Cl. & Fin. 764; *Bradford Banking Co.* v. *Briggs*, 1886, 12 App. Cas. 29.

[4] *Supra*.

[5] *Hague* v. *Dandeson*, 1848, 2 Ex. 741.

[6] *In re General Exchange Bank*, 1871, L. R. 6 Ch. 818.

[7] 25 & 26 Vict. c. 89.

[8] *Ex p. Stringer*, 1882, 9 Q. B. D. 436. But the debt must be due and payable—*in re Stockton Malleable Iron Co.*, 1875, 2 Ch. D. 101.

[9] Buckley, *Comp. Acts*, 6th ed., p. 459. By Article 75 of the same Table (A) the company has a right to apply any dividends due on a share in reduction of a debt due to them by the shareholder.

[10] *In re Bentham Mills Co.*, 1879, 11 Ch. Div. 900.

[11] Buckley, *Comp. Acts*, 6th ed., 458–461; Palmer, *Company Precedents*, 6th ed., i. 320.

[12] Ersk. iii. 4. 21; Bell, *Prin.* s. 1438; Bell, *Com.* ii. 107; Begg, *Law Agents*, p. 209; English law in Coote, *Mortgage*, 5th ed., i. 688.

Nature of the lien.

It is clear that in England the lien of a solicitor rests on professional usage. But it is doubtful whether the lien of a law agent should be treated in Scotland as an instance of a general lien resting on usage, or as a special lien, or right of retention, on the principle that a party who has been employed to bestow labour or skill on, or in relation to, a particular subject, has a right to retain that subject until he is paid his account for the labour or skill bestowed. In other words, it may be asked whether retention of title deeds for a general balance is a right allowed solely to law agents as such, or whether it is to be regarded as a counterpart of the contract on which the agent is employed, and therefore open to anyone employed on a similar contract, whether he is a law agent or not. In Erskine's *Institutes* the lien of a law agent is treated as an example of the right of retention enjoyed by a person bestowing labour or skill on the article retained;[1] in Bell's *Principles* it is treated as an exceptional right resting on usage of trade.[2] It may be assumed to be clear, that a person into whose hands papers are placed for the purpose of performing a particular piece of work has a right to retain them until that work is paid for, whether he is a member of a professional body or not.[3] But the lien of a law agent is something more than this, as it confers on the agent a right to retain papers put into his hands for one piece of work in security of a balance for work already executed, with which the particular papers may have no connection.[4] *Primâ facie*, therefore, it would seem to be a right resting on professional usage, and of an exceptional character. And in one of the earliest cases in which the law agent's lien was considered, it was described as "a creature of the Court introduced for the agent's security, who otherwise would not undertake the affairs of a person of doubted circumstances.[5] But there are not wanting authorities of an opposite tendency, and judicial *dicta* which seem to treat law agent's lien as an example of the ordinary right of special retention under a contract of employment. Thus in the earlier cases it was held that the governor of a company had a right to retain papers, placed in his possession in that capacity, in security of arrears of his salary;[6] and that an accountant could retain papers, lodged

[1] Ersk. iii. 4. 21; see also *ante*, p. 349 *seq.*

[2] Sec. 1438; see also Begg, *Law Agents*, 210.

[3] See *ante*, p. 352.

[4] See opinion of Lord Fullerton in *Menzies* v. *Murdoch*, 1841, 4 D. 257; *Paul* v. *Meikle*, 1868, 7 Macp. 235.

[5] *Crs. of Lidderdale* v. *Nasmyth*, 1749, M. 6248.

[6] *York Buildings Co.* v. *Robertson*, 1805, M. App. Hyp. No. 2.

with him under a judicial remit, until his fee was paid.[1] And an opinion has been expressed that an accountant, privately employed to make up a state of affairs, could retain papers placed with him for that purpose.[2] The question was not again raised till the case of *Meikle & Wilson* v. *Pollard*.[3] It was there held that a firm of accountants, who were employed as debt collectors, could retain books, put into their hands for the purpose of collecting the debts, until they were paid their account. This case, it is true, may be rested on the principle of the counter obligations under a contract, as the claim to retain was only made over papers in regard to which the debt had been incurred; but Lord Rutherfurd Clark, commenting on it, described it as an innovation in the law, and expressed an opinion that if this right had been previously known, the lien of a law agent would never have been heard of as an exceptional right.[4] It was followed, in a later case, by allowing the factor on a landed estate to retain papers put into his hands in the course of his professional employment, and in order to enable him to perform his duties.[5] The case was described by the Lord Justice Clerk as one, not of lien, but of retention under a contract. Lord Young, however, put it as follows: "The case is, I think, one of lien, a word which expresses a legal right of retention. . . . The notion is that there is a special law which entitles admitted law agents to retain deeds—a right which does not exist in other persons. I think that is unfounded. The right to retain books and papers which the law allows to law agents is just the lien implied under the contract on which they possess them."[6] It is respectfully submitted that if this last sentence were a correct statement of the law, a law agent could only retain a particular paper for a debt outstanding for work done in connection with it.

By whom lien may be exercised.

The question who may exercise the lien of a law agent depends upon the answer to be given to the questions considered in the last paragraph. In England it is quite clear that this lien is confined to attorneys and solicitors, and does not extend to unprofessional persons, or even to persons like certificated conveyancers, who are ordinarily engaged in business analogous to

[1] *Stewart* v. *Stevenson*, 1828, 6 S. 591.

[2] *Bruce* v. *Edinburgh Trs.*, 1835, 13 S. 437.

[3] 1880, 8 R. 69.

[4] Per Lord Rutherfurd Clark in *Robertson* v. *Ross*, *infra*, at p. 72.

[5] *Robertson* v. *Ross*, 1887, 15 R. 67; see also *Reid*, *Petr.*, 1893, 1 S. L. T. No. 279 (auditor of company).

[6] Per Lord Young in *Robertson*, *supra*, at p. 71.

that of a solicitor.[1] In Scotland a lien has been denied to the cashier and to the secretary of a company, but on the ground that they were the servants of the company, and had no independent possession of the papers they claimed to retain.[2] The governor of a company has been allowed a very wide right of retention over papers of which he had obtained possession as manager of the company's affairs.[3] A lien has been allowed to accountants, but has been claimed only for an account for a particular piece of work, and never for a general balance;[4] and the question is still doubtful whether an accountant, employed in a variety of transactions, could assert a lien over all the papers placed in his possession, in security of a general balance thence arising.

Subjects which may be covered by lien.

The lien of a law agent covers papers of every description which have been placed in his possession, such as bonds, title deeds of heritable subjects, deposit receipts,[5] a letter for indemnity for illegal imprisonment,[6] and even the client's will or *mortis causa* disposition.[7] But the law agent of a company cannot assert a lien over the Register of Shareholders, because the company has a statutory duty to keep the register open for the inspection of parties interested, and has no right to impignorate it.[8] And the lien will not cover papers which have come into the possession of a law agent as the holder of an office. Thus a town clerk has no lien over the muniments or records of the corporation;[9] and a solicitor, employed in England as steward of a manor, was held to have no right to retain documents intrusted to him solely in that capacity.[10] And an agent employed to conduct an action cannot obstruct the action by claiming a lien over papers intrusted to him for the purposes of the case. Thus if a client changes his agent while an action is pending to which he is a party, the former agent cannot retard the progress of the action by claiming a lien over the papers in the case, or over title deeds which have

[1] *Hollis* v. *Claridge*, 1813, 4 Taunt. 807; *Steadman* v. *Hockley*, 1846, 15 M. & W. 553; *Sanderson* v. *Bell*, 1834, 2 Cr. & M. 304.

[2] *York Buildings Co.* v. *Dalrymple*, 1738, Elch. Hypothec, No. 9; Bell, *Ill.* i. 462; *Gladstone* v. *M'Callum*, 16 June 1896, 33 S. L. R. 618.

[3] *York Buildings Co.* v. *Robertson*, 1805, M. App. Hyp. No. 2.

[4] *Stewart* v. *Stevenson*, 1828, 6 S. 591; *Bruce* v. *Edinburgh Trustees*, 1835, 13 S. 437; *Meikle & Wilson*, v. *Pollard*, 1880, 8 R. 69.

[5] *Wight's Tr.* v. *Allan*, 1840, 3 D. 243.

[6] *M'Intosh* v. *Chalmers*, 1883, 11 R. 8.

[7] *Paul* v. *Meikle*, 1868, 7 Macp. 235. The will may be retained either against the client or against a beneficiary.

[8] *Liquidator of Garpel Hæmatite Co.* v. *Andrew*, 1866, 4 Macp. 617.

[9] *The King* v. *Sankey*, 1836, 5 A. & E. 423.

[10] *Champernown* v. *Scott*, 1821, 6 Madd. 93.

been intrusted to him solely for the purpose of being produced in Court.[1]

Debts for which lien may be exercised.

The debts for which the lien of a law agent may be exercised consist of the taxed amount of his account for professional services, and outlays which fall within the normal scope of his employment.[2] Thus it will cover fees to counsel, if not of extraordinary or unusual amount, fees of Court, and the account of a London agent or parliamentary solicitor.[3] It was formerly held that the lien of a country agent covered the account of an Edinburgh agent employed on behalf of the client.[4] But this was on the ground that the country agent incurred liability for the Edinburgh agent's account, a liability which is removed by the Law Agents Act, 1873 (36 & 37 Vict. c. 63, s. 21), and therefore such an account will probably no longer be covered by the lien.[5] But an agent employed to borrow money has a lien for the account of the lender's agent, if paid by him.[6] The lien does not extend to secure cash advances made to the client, even although they are made expressly on the security of title deeds in the possession of the agent, and even although the question is with the client, and not with third parties, because the law of Scotland does not admit of the impignoration of title deeds.[7] Nor will it cover cautionary obligations undertaken for the benefit of the client,[8] relief or composition duty paid to the superior on his behalf,[9] or recognisances for the expenses of the opposite party in an appeal to the House of Lords.[10] And it will not cover a yearly salary as agent,[11] nor the salary of an office such as the clerkship to a corporation or local board, though, if an agent holds such an appointment, he may have a lien for professional services rendered to the corporation or board, and falling outside the scope of his official duties.[12] And where a law agent acts as factor for his

[1] *Callman* v. *Bell*, 1793, M. 6255.

[2] See *Gray* v. *Wardrop's Tr.*, 1851, 13 D. 963, affd. 18 D. (H. L.) 52, 2 Macq. 435; *Skinner* v. *Paterson*, 1823, 2 S. 354; *Largue* v. *Urquart*, 1883, 10 R. 1229.

[3] *Kemp* v. *Young*, 1838, 16 S. 500; *Richardson* v. *Merry*, 1863, 1 Macp. 940.

[4] *Walker* v. *Phin*, 1831, 9 S. 691.

[5] *Largue* v. *Urquhart*, 1883, 10 R. 1229.

[6] *Inglis & Weir* v. *Renny*, 1825, 4 S. 113.

[7] *Christie* v. *Ruxton*, 1862, 24 D. 1182; *Grant's Reprs.*, *infra*; *Crs. of Lidderdale* v. *Nasmyth*, 1749, M. 6248. See, however, opinion of Lord Young in *Robertson* v. *Ross*, 1887, 15 R. 67, at p. 71.

[8] *Grant's Reprs.* v. *Robertson*, 1801, M. Hypothec, App. No. 1.

[9] *Skinner* v. *Paterson*, 1823, 2 S. 354.

[10] *Kemp* v. *Young*, 1838, 16 S. 500.

[11] *Cuthberts* v. *Ross*, 1697, 4 Bro. Supp. 374; *York Buildings Co.* v. *Dalrymple*, 1738, Elch. Hypothec, No. 9; Bell, *Ill.* i. 462.

[12] *The King* v. *Sankey*, 1836, 5 A. & E. 423; *Newington Local Board* v. *Eldridge*, 1879, 12 Ch. Div. 349.

client, the law agent's lien will not cover expenses incurred in the course of an action which he undertook in the capacity of factor, and not of law agent.[1] Again, a law agent has no lien for the expense of constituting his claim against the client, as, in so doing, he is not acting on the employment of the client.[2] But he may be entitled to a lien for an account incurred on the employment of the client, even although he has a personal interest in the matter. Thus it has been held that an agent had a lien for the expense of constituting a security in favour of a bank, to cover a bill upon which, though the client was the principal obligant, the agent was subsidiarily liable.[3] And it would seem to be irrelevant for a third party to allege that the litigation in which the account arose was improperly incurred, provided that the account is good as a charge against the client.[4]

Law agent must have obtained possession of the papers in the course of his employment.

In order to found a lien the papers must have come into the possession of the agent in his capacity as agent, and not for some purpose unconnected with the agency. Thus where they had come into his possession after his employment as law agent had terminated, it was held that he could not assert a lien in a question with a heritable creditor.[5] But documents may be subjected to a lien for an account which was incurred before they were placed in the agent's hands,[6] and may be retained by him against third parties,—for instance, heritable creditors,—whose interest in the subjects was prior to his account.[7]

Lien excluded by express contract.

It is clear that papers may be placed in the hands of a law agent for a definite purpose, or a particular occasion, without necessarily entitling him to a lien over them for his general account. But such a contract will not be easily inferred, and may readily be held to be waived. Thus where a client handed papers to his agent on a definite promise to return them next day, and the agent failed to return them, and was subsequently employed in other business while they were still in his possession, it was held that the obligation to return them had been waived, and that the agent was entitled to a lien.[8] And if papers

[1] *Largue* v. *Urquhart*, 1883, 10 R. 1229.

[2] *Gray* v. *Wardrop's Tr.*, 1851, 13 D. 963; affd. 1855, 18 D. (H. L.) 52, 2 Macq. 435.

[3] *Palmer* v. *Lee*, 1880, 7 R. 651.

[4] *Largue* v. *Urquhart*, 1883, 10 R. 1229. But the agent's account, even if constituted by a decree in absence against the client, is subject to taxation in a question with third parties—*Gray* v. *Wardrop's Tr.*, *supra*.

[5] *Renny & Webster* v. *Myles*, 1847, 9 D. 619.

[6] *Menzies* v. *Murdoch*, 1841, 4 D. 257; *Renny & Webster* v. *Myles*, *supra*, per Lord Fullerton.

[7] *Campbell & Clason* v. *Goldie*, 1822, 2 S. 16.

[8] *Kerr* v. *Beck*, 1849, 11 D. 510.

are given to an agent for the purpose of producing them in Court, it is thought that while he would clearly be bound to produce them, he might nevertheless be entitled to a lien over them.[1]

Right of law agent is merely to retain the papers.

The right conferred on the law agent by his lien is merely a right to retain the papers, and thus secure the payment of his account from his client, or from some third party deriving right from him, whose interests require their production. He is not entitled to sell the papers.[2] Nor does the existence of a lien interrupt the triennial prescription of the agent's account.[3]

Lien of law agent in a question with third parties deriving right from the client.

In questions with third parties the agent may retain the papers until his account is paid, even although the effect of his right of retention may be to nullify heritable rights derived from his client. Thus he is entitled to refuse to give up or produce the title deeds of his client's estate to a heritable creditor, whether he obtained possession of them before or after the security was constituted, or even if the security was a reserved burden constituted by the deed forming the original title to the property.[4] If the heritable creditor requires possession of such titles, he must pay the law agent's account. But an agent has no direct action against a heritable creditor or purchaser of the estate, and cannot prevent a purchaser from taking the estate without the title deeds, if he chooses to dispense with them.[5] And the right of lien is subject to an equitable restriction, in the case where the same agent acts for borrower and lender in arranging a security over heritable property. The agent then cannot retain the title deeds of the subjects against the lender for an account due to him by the borrower, unless he had previously informed the lender of his intention to claim a lien.[6] The same equitable restriction of the lien would probably be applied to the case where the same agent acted for seller and purchaser in the sale of the property, as it is founded on the consideration that an agent, in acting for both parties to a contract, undertakes a very delicate duty, and is

[1] Bell, *Prin.* s. 1439; Begg, *Law Agents*, p. 215.

[2] *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536, per Lord Curriehill at p. 538.

[3] *Foggo's Exrs.* v. *M'Adam*, 1780, M. 6252; *Couper* v. *Ogilvy*, 1753, M. 11107; *Adam & Winchester* v. *White's Tr.*, 1884, 11 R. 863.

[4] Bell, *Prin.* s. 1442; *Provenhall Crs.*, 1781, M. 6253; *Campbell* v. *Smith*, 1 Feb. 1817, F. C.; *Campbell & Clason* v. *Goldie*, 1822, 2 S. 16; *Cameron* v. *Burns*, 1824, 3 S. 176; *Smith* v. *Lamont*, 1858, 20 D. 912.

[5] *Grant* v. *Bain*, 1840, 2 D. 618.

[6] *Allan* v. *Sawers*, 1842, 4 D. 1356; *Paterson* v. *Currie*, 1846, 8 D. 1005; *Gray* v. *Wardrop's Tr.*, 1851, 13 D. 963, affd. 18 D. (H. L.) 52, 2 Macq. 435.

bound to furnish to each client the fullest information regarding his position.[1]

Lien not effectual against third parties having independent rights.

The lien of a law agent is not effectual in a question with a third party who has an interest in the title deeds which is not derived from the client by whom the agent's account is due. Thus where the client is an heir of entail, the agent cannot retain the title deeds of the estate against a subsequent heir irritating the client's right,[2] or against a creditor adjudging for entailer's debts,[3] or against the trustees under a private Act of Parliament for the sale of the estate,[4] or, probably, against a subsequent heir of entail who does not represent the client.[5] On the same principle, the agent of a liferenter cannot retain the title deeds against the fiar;[6] and where several persons have a joint interest in an estate, the agent of any one of them has no right to retain the titles against the others.[7]

Lien in question with trustee in the sequestration of the client.

Where the client is sequestrated, the trustee is entitled and bound to call for all papers necessary to the sequestration, and the agent cannot retain them against him. But he is entitled to an acknowledgment or receipt recognising his right to a preferential ranking in the sequestration; and would indeed be preferably ranked without any such acknowledgment, as the trustee takes the estate subject to all preferable securities.[8] A receipt by the trustee for the papers, bearing to be subject to the agent's claim

[1] The same rule is observed in England; and where the solicitor of a company prepared a mortgage deed in favour of trustees for debenture-holders, it was held that he could not maintain a lien over the title deeds in a question with the debenture-holders for an account which had been due to him by the company before the debentures were granted—*in re Snell*, 1877, 6 Ch. Div. 105. In this case the duty of the solicitor, if he had been acting solely for the debenture-holders, would have been to obtain delivery of the title deeds. If this were not his duty, he could maintain a lien—*Macfarlane* v. *Lister*, 1887, 37 Ch. Div. 88. And where the solicitor of a company drafted debentures in a form whereby they were declared to be a "floating security," but so that the company should not "be at liberty to create any mortgage or charge in priority to the said debentures," it was held that the solicitor was not precluded by these terms from asserting his lien for costs in preference to the debenture-holders—*Brunton* v. *Electrical Engineering Co.* (1892), 1 Ch. 434.

[2] *Murray* v. *Elibank*, 1829, 8 S. 161.

[3] *Callender* v. *Laidlaw*, 1834, 12 S. 417.

[4] *Scott & Gillespie* v. *Thomson*, 1854, 17 D. 124.

[5] Per Lord Cowan in *Scott & Gillespie* v. *Thomson*, *supra*, at p. 141.

[6] Bell, *Prin.* s. 1442.

[7] *Smith* v. *Lamont*, 1858, 20 D. 912.

[8] *Skinner* v. *Henderson*, 1865, 3 Macp. 867; *Adam & Winchester* v. *White's Tr.*, 1884, 11 R. 863. By the Companies Act, 1862 (25 & 26 Vict. c. 89, s. 165), the lien of the law agent is declared to confer a preferential ranking in the winding up.

for a preference, does not indeed debar him from afterwards challenging the validity of the lien.[1] But, assuming the lien to be unchallengeable, the trustee, by calling for the papers, recognises the right of the law agent to a preferential ranking on the estate, even although it turns out that the papers are valueless; and this preference extends over the whole estate, and not merely over the subjects to which the papers refer.[2] In one case opinions were expressed to the effect that the trustee, by taking the papers subject to the agent's lien, became personally liable for the payment of the agent's account should the estate prove insufficient; but, by the terms of the Bankruptcy Act of 1856, the trustee is apparently bound to call for the papers, and would only be held personally liable in very exceptional circumstances.[3] The agent of the bankrupt ought to proceed by claiming in the sequestration, valuing his security and deducting the value from his claim; and a personal action by him against the trustee would usually be incompetent.[4] But where he is appointed agent in the sequestration, and has acquired a lien for his professional services after the sequestration has commenced, he would seem to be entitled to proceed by direct action against the trustee.[5]

Right of agent to refuse to produce papers as a haver.

The right to retain the papers and title deeds of his client necessarily entitles the law agent to refuse inspection of them, and to decline to produce them, when such inspection or production would be prejudicial to the lien, and where the person demanding it is either the client, or someone deriving right or interest through him. Thus the agent is entitled to refuse to produce documents as a haver, in a diligence at the instance of the client;[6] and would probably be entitled to refuse to allow a heritable creditor, or the trustee in the sequestration of the client, to inspect them, in order to see if they were necessary to the security or in the sequestration. But he is not entitled to refuse to produce the title deeds or other documents in an action at the instance of a third party against the client;[7] or, probably, in an action between two third parties. Thus where a creditor im-

[1] *Renny & Webster* v. *Myles*, 1847, 9 D. 619.

[2] *Skinner* v. *Henderson*, 1865, 3 Macp. 867, per Inglis (L. J. C.) and Lord Benholme.

[3] *Adam & Winchester* v. *White's Tr.*, 1884, 11 R. 863; *Craig* v. *Mitchell*, 1895, 2 S. L. T. No. 484, and 3 S. L. T. No. 24.

[4] *Craig* v. *Mitchell*, *supra*.

[5] *Renny* v. *Rutherford*, 1840, 2 D. 676, and 3 D. 1134.

[6] *Finlay* v. *Syme*, 1773, M. 6250; *Bruce* v. *Edinburgh Trustees*, 1835, 13 S. 437; *Boughton* v. *Boughton*, 1883, 23 Ch. Div. 169; *Mackinnon* v. *Guildford*, 1894, 2 S. L. T. No. 299 (Outer House, Lord Kincairney).

[7] *M'Intosh* v. *Chalmers*, 1883, 11 R. 8; Bell, *Prin.* s. 1443.

prisoned his debtor, and obtained from him, while in prison, a letter of indemnity from legal proceedings for false imprisonment, and this letter got into the hands of the creditor's law agent, it was held that he was bound to produce it in an action of reduction and damages at the instance of the debtor.[1] But this limitation of the right of lien is only applicable where the documents called for are to be used *in modum probationis*, or where, as in the case above narrated, their reduction is attempted; and not where, as in an action of maills and duties, they are required by a heritable creditor for the purpose of making up a title, and thus evading the law agent's security.[2] And where an agent was compelled to produce documents in a diligence at the instance of a defender in a jury trial in which the client was pursuer, he was held entitled to do so under the reservation that the client should not be entitled to use them at the trial without paying the account for which they were impignorated.[3]

Transmission of law agent's lien.

The lien of a law agent passes to his personal representatives,[4] and to his trustee in bankruptcy. But the latter has no higher right than the bankrupt; and therefore, if the agent himself were personally barred from claiming a lien, his trustee would be equally unable to do so.[5] It has never been decided in Scotland whether an agent can assign his account, with the lien attaching to it, to a third party who is not acting as agent for the client. In England, it has been held that a solicitor may assign his claim, with the lien, to a banker;[6] but the balance of opinion would appear to be that this case would not be followed in Scotland, and that an agent, though he can of course assign his debt, cannot transmit the lien for its recovery.[7]

Does a lien subsist after a change in the firm of of the law agent?

There is a similar absence of authority in Scotland on the question whether the lien subsists after a change in the firm of law agents, and whether it can be transmitted to a new partner. In England, it is held that a lien is not lost by a mere change in the firm,[8] but that papers which come into the possession of the firm after the introduction of a new partner, or the retirement of an old one, cannot be subjected to a lien for debts which were

[1] *M'Intosh* v. *Chalmers*, *supra*.

[2] *Dalrymple* v. *Earl of Selkirk*, 1751, Elch. Hypothec, No. 17.

[3] *Montgomery* v. *A. B.*, 1845, 7 D. 553.

[4] *Paul* v. *Meikle*, 1868, 7 Macp. 235.

[5] *Inglis* v. *Moncreiff*, 1851, 13 D. 622.

[6] *Bull* v. *Faulkner*, 1848, 2 De G. & S. 772.

[7] *M'Queen* v. *Dickie*, 1851, 13 D. 502; Begg, *Law Agents*, p. 212.

[8] *Pelly* v. *Wathen*, 1849, 7 Hare, 351; 1851, 1 De G. M. & G. 16; Lindley on *Partnership*, 6th ed., p. 128.

outstanding before the change.[1] But in this respect the death of a partner is not equivalent to his retirement, and leaves the lien unaffected.[2] But as in Scotland the firm constitutes a legal *persona*, it is doubtful whether these distinctions would be followed, and whether the introduction or retirement of a partner would make any difference in a question of lien. Thus in *Vaughan* v. *Vanderstegen*,[3] a bill of costs was incurred to the firm of A. & B. B. retired; and it was held that A. had no lien for his account, on the ground that he could not sue for it alone, a ground of judgment which would not be tenable in a Scotch case.

Law agent may be barred from claming a lien.

A law agent may be personally barred from asserting a lien over his client's papers, in questions with third parties. One instance, where the agent acts for both parties in arranging a loan, has already been discussed. And where an agent arranged a series of loans in which he and his client were both obligants, and from the receipts of which they both profited, it was held that the agent could not retain the papers against the creditors to whom he was himself bound.[4] But, in such a case, he would have a lien good against the client, or against any party other than the creditor in the bond on which he was himself liable.[5]

Lien is not lost by transmitting papers to another agent, or giving up part of them.

The lien of a law agent, like any other right of retention, may be lost by parting with the possession on which it is founded. But a law agent does not lose his lien by transmitting the papers, on a borrowing receipt, to another agent, even although that other agent is thenceforward employed by the client. In that case, it is held that both agents have a lien over the papers for their accounts, and that the lien of the original agent is preferable.[6] And although, in consideration of partial payment, the agent gives up part of the title deeds, or the title deeds of a particular property, he has a lien for his whole balance over the rest.[7]

When agent may be compelled to waive his lien on caution.

A law agent cannot be compelled to waive his lien, on caution being found for the account, because he is not bound to exchange a real for a personal security; but this right would, in exceptional

[1] *In re Forshaw*, 1847, 16 Simon, 121; *Vaughan* v. *Vanderstegen*, 1854, 2 Drew. 408.

[2] Lindley on *Partnership*, 6th ed., p. 128.

[3] *Supra.*

[4] *Inglis* v. *Moncreiff*, 1851, 13 D. 622. Question whether, if the agent for a borrower became bound for payment of the interest in a bond and disposition in security, he could claim a lien over the title deeds in a question with the bondholder.

[5] *Palmer* v. *Lee*, 1880, 7 R. 651.

[6] *Renny* v. *Rutherford*, 1840, 2 D. 676; 3 D. 1134.

[7] *Gray* v. *Wardrop's Tr.*, 1851, 13 D. 963; revd. (on this point) 1855, 18 D. (H. L.) 52, 2 Macq. 435.

cases, be restrained by the equitable jurisdiction of the Court.[1] And if the account is disputed, the agent is bound to give up the papers, on caution being found for the amount of his claim.[2]

Effect of taking bill or security.

The law agent does not, as a rule, lose his lien by taking his client's bill for his account.[3] And where the agent took a written obligation from his client, it was held that he might still retain his lien.[4] The effect on the lien of a security, or the acceptance of a third party, does not seem to have been considered in Scotland. But the English rule, that the agent is bound to put his position fairly before his client, and therefore that he loses his lien if he accepts a security without expressly reserving it, would probably be followed.[5]

IV. LIEN OF BROKER.

Distinction between broker and factor.

A broker is an intermediary employed to introduce business, or to carry out a particular contract. The distinguishing point between a broker and a factor would seem to be that the former is employed only in one particular contract, or in a series of contracts of one particular kind, while the latter has a general authority to transact all the mercantile affairs of his principal. Where, however, the principal is a merchant engaged solely in one business, and employs an agent in another place to carry out his business for him there, it would often be a matter of great difficulty to decide whether that agent was a factor or a broker. Thus if an iron merchant should employ an agent to buy and sell iron for him, is that agent a factor or merely a broker?

Extent of lien.

A broker has a general lien for all debts due to him by his principal in that particular employment,[6] but not, as a rule, for advances made to the principal, nor for debts due to him for transactions in which he acted as a *factor*.[7] But in order to found a right of retention at all, he must have possession; and it is conceived that if a broker is employed merely to introduce business, which is afterwards transacted by the principal himself, he could have no lien for his commission, or for a general balance due to him, either over the goods which form the subject of the contract

[1] *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536.

[2] *Craig* v. *Howden*, 1856, 18 D. 863; *Skinner* v. *Henderson*, 1865, 3 Macp. 867, per Lord Neaves, p. 869.

[3] Bell, *Com.* ii. 109; *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565; *Palmer* v. *Lee*, 1880, 7 R. 651.

[4] *Ayton* v. *Colville*, 1705, M. 6247 and 6710; *Linning* v. *Douglas*, 1821, 1 S. 87.

[5] *In re Taylor, Stillman, & Underwood* (1891), 1 Ch. 590.

[6] Bell, *Com.* ii. 112; Smith, *Mercantile Law*, 10th ed., p. 703.

[7] *M'Call & Co.* v. *Black & Co.*, 1824, 2 Sh. App. 189; *Dixon* v. *Stansfield*, 1850, 10 C. B. 398. *Ante*, p. 365.

or over the debt which results from it, because in the one case he has never had possession of the goods, and, in the other, he has taken no part in the contract out of which the debt arises. On the other hand, if the broker is employed to buy or sell commodities, and is intrusted with the possession of them, or of the documents of title, it is probable that he would be held to have a lien over them, or over their price if sold, for a general balance due to him on brokerage transactions.

Stockbroker.

A stockbroker has a general lien over securities deposited with him, which will extend not only to cover a balance due for stock-broking transactions, but even a general balance, consisting of advances made by the stockbroker to the owner of the securities.[1]

Insurance broker.

Subjects covered by lien.

The lien of an insurance broker has frequently come before the Court. Most of the cases have related to policies of marine insurance, but there would seem no reason to doubt that the same principles would apply to policies of life insurance. The general rule is that an insurance broker has a general lien over policies effected by him, which will entitle him to retain the policy, or, in case of a loss, the sum recovered under it, in security of a balance due to him by the insured.[2] This lien, however, will only cover a balance due to him on insurance transactions, and not a general balance made up of debts otherwise incurred.[3]

Possession requisite.

In order to found a lien, the insurance broker must be in possession of the policy, or must be the immediate creditor of the underwriter or insurance office. It would appear to be usual for insurance brokers to effect policies of marine insurance in their own names, in which case they have sufficient possession even if the actual policy is handed to the insured.[4] But as a rule, such policies, when effected by an insurance broker, whether in his own name or in that of his client, are retained by the broker, and the premiums are paid by him. He is then clearly entitled to retain the policy, or to claim a preference over the proceeds, on the bankruptcy of the insured. Even if the policy is effected by a sub-broker, and the proceeds thereof are paid to him, the principal broker has a lien over them in a question with the principal or his creditors.[5] But mere possession of a policy of insurance by a person who did not effect it, will not give him a right of general retention over it, even although he pays the premiums. Thus

[1] *Jones* v. *Peppercorne*, 1858, Johnson, 430, 28 L. J. Ch. 155.

[2] Bell, *Com.* ii. 115; Smith, *Mercantile Law*, 10th ed., p. 703; Arnould, *Marine Insurance*, 6th ed., i. p. 211.

[3] Arnould, i. p. 215.

[4] *Leslie & Thomson* v. *Linn*, 1783, M. 2627.

[5] *Ross's Assignee* v. *Galloway*, 1806, M. App. *v. Periculum*, No. 1.

where a policy was left for safe custody with A., and he paid the premiums on it, and also made advances to the owner, it was held that he had no general lien over it, unless he could instruct a contract to that effect.[1]

Broker bound to produce policy in action between insured and underwriter.

It has been held in England that a policy broker is bound to produce a policy, even although he claims a lien over it, in an action by the insured against the underwriter.[2]

Lien of broker for debts due to him by an agent by whom he is employed.

Where a policy broker is employed by a factor or agent, or by another policy broker, he has a lien over the policy for debts due to him by the factor, agent, or broker employing him, unless he knew, or in the circumstances ought to have known, the fact that his immediate employer was only an agent.[3] If he knows that his employer is acting as an agent, he has no lien, in a question with the principal, for a general balance due to him by the agent, but is, however, entitled to retain the policy in security of the premiums he has paid on it.[4] Thus where a policy broker was employed by A., whom he knew to be merely an agent, he was held to be entitled to a special lien over the policy for premiums he had paid upon it, although the principal had paid them to A.[5]

V. LIEN OF INNKEEPER

An innkeeper has a lien over his guest's luggage for the amount of his bill.[6] This lien presents special features which make it difficult to classify it as a special or as a general lien, and it is held to be allowed as a counterpart of the obligation of the innkeeper to receive the guest and his luggage, and of his liability should that luggage be stolen.[7]

Extent of lien.

An innkeeper cannot detain his guest, or the clothes he is wearing.[8] But he has a lien over all his guest's effects for every part of his charges, and thus is entitled to retain his horse for personal charges, or his luggage for the keep of his horse.[9] The lien extends over everything which is brought to the inn by the guest as his luggage, even though not of a personal nature. Thus

[1] *Muir* v. *Fleming*, 1822, Dow. & Ry. N. P. C. 29.

[2] *Hunter* v. *Leathby*, 1830, 10 B. & C. 858.

[3] *Masson* v. *Forrester*, 1814, 4 Camp. 60; *Westwood* v. *Campbell*, 1815, 4 Camp. 349; Smith, *Mercantile Law*, p. 703.

[4] *Losh, Wilson, & Bell* v. *Douglas & Co.*, 1857, 20 D. 58; *Fisher* v. *Smith*, 1878, 4 App. Cas. 1.

[5] *Fisher* v. *Smith*, *supra*.

[6] Bell, *Com.* ii. 99.

[7] *Robins* v. *Gray* (1895), 2 Q. B. 78 and 501.

[8] *Sunbolf* v. *Alford*, 1838, 3 M. & W. 248.

[9] *Mulliner* v. *Florence*, 1875, 3 Q. B. D. 484.

where the clerk of an attorney brought a letter-book belonging to his employers in his bag, the innkeeper was held to be entitled to retain it.[1] And the lien has been held to extend to a piano, brought to the inn by the guest as a part of his luggage,[2] to a carriage and horses,[3] and to samples brought by a commercial traveller.[4] But the lien will not extend to articles sent for the use of the guest by tradesmen, but not of the nature of personal luggage, nor brought by the guest as a part of his luggage. So it was held not to cover a piano, which the guest had hired, and which was sent for his use after he had been some time at the inn.[5]

Lien over articles belonging to third parties.

An innkeeper may exercise his right of lien over his guest's luggage, even though that luggage is the property of some other party, and the innkeeper was aware of the fact. Thus luggage belonging to a wife, and part of her separate estate, was held to be subject to a lien for a bill incurred by her husband for their joint maintenance at an inn.[6] And where a commercial traveller brought packages of goods belonging to his employers, and the innkeeper was aware of the fact, it was decided that he was nevertheless entitled to retain them for the bill due by the traveller.[7]

Livery-stable keeper.

A livery-stable keeper has been held in England not to be entitled to a lien; and therefore an innkeeper who acts as a livery-stable keeper for a person who is not living in the inn cannot retain the horses put under his charge.[8] And the fact that the owner of the horses was occasionally served with refreshment, the charges for which were added to his stable bill, was held not to be enough to make him a guest, and so entitle the innkeeper to a lien.[9] The reason of this rule in England is held to be that the services of the livery-stable keeper add nothing to the value of the horses. There does not seem to be any reason to suppose that this rule would be followed in Scotland; and Lord Young has intimated an opinion that a livery-stable keeper has a lien over the horses for their keep.[10]

[1] *Snead* v. *Watkins*, 1856, 1 C. B. (N. S.) 267.

[2] *Threlfall* v. *Borwick*, 1875, L. R. 7 Q. B. 711, and 10 Q. B. 210.

[3] *Mulliner* v. *Florence*, *supra*.

[4] *Robins* v. *Gray* (1895), 2 Q. B. 78 and 501.

[5] *Broadwood* v. *Granara*, 1854, 10 Exch. 417.

[6] *Gordon* v. *Silber*, 1890, 25 Q. B. D. 491. It was held that the wife was not liable for the bill, though her luggage might be detained for it.

[7] *Robins* v. *Gray* (1895), 2 Q. B. 78 and 501.

[8] *Jackson* v. *Cummins*, 1839, 5 M. & W. 342; *Orchard* v. *Rackstraw*, 1850, 19 L. J. C. P. 303; *Smith* v. *Dearlove*, 1848, 6 C. B. 132.

[9] *Smith* v. *Dearlove*, *supra*.

[10] *Miller* v. *Hutcheson*, 1881, 8 R. 489, at p. 492.

Lien over effects of guest not staying at the inn.

It has never been decided whether an innkeeper has a lien over the effects of a person who comes to the inn merely for refreshment, and does not lodge there. But as the innkeeper is responsible for the safety of articles belonging to such a guest, it is probable that he would also be entitled to a lien.

Lien lost by parting with possession.

The lien of an innkeeper, like other rights of retention, is lost by parting with possession of the subject covered by it; so if he allows the guest to take away his luggage, he has no further right over it. But if the guest, during a prolonged stay, is occasionally absent *animo revertendi*, the lien revives on his return.[1] The lien is not lost by the innkeeper accepting a security for his bill; and if he keeps possession of the luggage, he may claim a lien over it if the security turns out to be insufficient.[2]

Right of sale: Innkeepers Act, 1878.

It was held in England that an innkeeper had no right to sell the articles detained under his lien.[3] This was remedied by the Innkeepers Act, 1878, which is probably applicable to Scotland.[4] By this Act the landlord of an hotel, inn, or public-house has, in addition to his ordinary lien, the right to sell by auction any goods, chattels, horses, carriages, wares, or merchandise deposited with him or left in his house, coach-house, or stable, where the person depositing or leaving such property is or becomes indebted to him, either for board or lodging, or for the keep or expenses of any horse or other animal left with him, or standing at livery in his stable or field; provided (1) that the goods have been six weeks in the landlord's possession without the debt having been paid; (2) that the landlord, after having satisfied his bill, and the expenses of the sale, hand over the surplus to the person who left or deposited the goods; (3) that the sale be made only for the debt for which the landlord has a lien over the goods; and, (4) that the sale be advertised, one month beforehand, in a London newspaper,[5] and in a local newspaper circulating in the district, with a description of the goods, and the name of the person who left them, if known.

Lodging-house keeper.

The question has been raised in the Sheriff Courts whether a lodging-house keeper is entitled to a lien over the luggage of the lodger similar to that of an innkeeper. It has been answered in the affirmative,[6] chiefly on the authority of the case of *Scott* v.

[1] *Allen* v. *Smith*, 1862, 12 C. B. (N. S.) 638.

[2] *Angus* v. *M'Lauchlan*, 1883, 23 Ch. Div. 330.

[3] *Mulliner* v. *Florence*, 1875, 3 Q. B. D. 484.

[4] 41 & 42 Vict. c. 38.

[5] The necessity of advertisement in a London newspaper renders it doubtful whether the Act was meant to be applicable to Scotland.

[6] *Skirving* v. *Skirving*, 1869, 1 Guthrie's Sh. Ct. Cas. 508 (Sheriff Shand); *Macbeth* v. *Hutton*, 1891, 8 Sc. Law Review Reports, 25 (Sheriff Grierson).

Yates, where it was held that a lodging-house keeper incurred liability, under the edict *nautæ caupones*, for any property of the lodger which was lost or stolen from the lodgings.[1]

VI. LIEN OF CARRIER

For fare of passenger.

Among special liens, that of a carrier requires particular attention. In passenger traffic a carrier by land or sea has a lien for the fare or passage money over the luggage of the passenger, but no right to detain the passenger himself, or his wearing apparel.[2]

For carriage of goods by sea.

As a carrier of goods, a shipowner has a lien over the cargo for freight, and for general average,[3] but not, without special contract, for dead freight,[4] demurrage,[5] or port charges.[6] This is a special lien, no right of retention being admitted at common law for a general balance.[7]

Lien of shipowner.

It is extremely doubtful whether an express contract between the shipowner and the shipper for a general lien over the cargo would be upheld in a question with the creditors of the shipper, and it would certainly be invalid against an indorsee of the bill of lading. In the case where the whole cargo is supplied by one shipper, the lien extends over the whole cargo for the whole or any part of the freight, unless different parcels are sent under separate contracts, when no lien can be claimed over one parcel for the freight due on another.[8] In a general ship, where goods are supplied by different shippers, the lien attaches to each parcel for the freight appertaining thereto.[9]

This depends on whether the goods are placed in the possession of the carrier.

As in other cases of this kind, the lien of the shipowner depends upon possession. Whether the shipowner has possession depends on the contract on which the cargo is shipped. If the ship is hired on time (*locatio navis*), the master and crew are the servants of the charterer, and the shipowner has no possession of the cargo, and

[1] *Scott* v. *Yates*, 1800, Hume, 207; see also *Watling* v. *M'Dowall*, 1825, 4 S. 83, where question of liability of lodging-house keeper held to be still doubtful.

[2] *Wolf* v. *Summers*, 1811, 2 Camp. 631; 12 Revd. Rep. 764.

[3] Maclachlan on *Shipping*, 4th ed., p. 456; Abbott on *Shipping*, 13th ed., p. 446.

[4] *M'Lean & Hope* v. *Fleming*, 1871, 9 Macp. (H. L.) 38.

[5] *Birley* v. *Gladstone*, 1814, 3 M. & S. 204; Maclachlan on *Shipping*, 4th ed., p. 535.

[6] *Faith* v. *East India Co.*, 1821, 4 Barn. & Ald. 630, per Abbott, C. J., p. 642.

[7] *Stevenson* v. *Likly*, 1824, 3 S. 291.

[8] Maclachlan on *Shipping*, 4th ed., p. 536; Abbott on *Shipping*, 13th ed., p. 446; *Black* v. *Rose*, 1864, 2 Moo. P. C. (N. S.) 277.

[9] *Gilkison* v. *Middleton*, 1857, 2 C. B. (N. S.) 134, per Cresswell, J., at p. 154.

therefore no lien over it.[1] On the other hand, if a cargo, or a part thereof, is shipped merely on a bill of lading, without a charter party (*locatio vehundarum mercium*), the shipowner is clearly in possession, and he has a lien for the freight which appears in the bill of lading. An intermediate contract is known as *locatio navis et operarum magistri et nauticorum*, where the ship is chartered, but the master and crew remain the servants of the shipowner. In this case, if the ship is chartered at a definite freight, but the charterer ships goods on a bill of lading at a lower rate, the owner has a lien over such goods for the whole freight contained in the charter party, if the question is with the charterer or his agent.[2] But if the bill of lading is in the hands of a third party, who is not the agent of the charterer, the lien of the shipowner will only extend to the freight which is contained in the bill of lading,[3] even if the indorsee of the bill of lading knew of the existence and the terms of the charter party.[4] But the shipowner may retain for the whole of the freight contained in the bill of lading, even if the shipper has already paid part of it to the charterer.[5]

Lien not effectual against an indorsee of bill of lading.

Where there is a bill of lading, and the rate of freight is expressed therein, any indorsee thereof is entitled to obtain the goods on payment at that rate, whatever may be the equities between shipowner and shipper. Thus if goods are shipped freight free "on owner's account," and a mortgagee of the ship enters into possession before they arrive, he has no lien for freight against an indorsee of the bill of lading.[6] So where the rate of freight is fixed by a charter party, and a nominal rate is mentioned in the bill of lading, the shipowner cannot retain the goods against the indorsee for the freight mentioned in the charter party.[7] Even if the bill of lading refer to the charter party, the indorsee is still entitled to the goods on payment of the freight named in the bill of lading.[8] But if no rate of freight is mentioned in the bill of lading, and a reference is made therein to the charter party, the

[1] Bell, *Prin.* s. 1423; Abbott, p. 250; Maclachlan, pp. 455, 535; *Hutton* v. *Bragg*, 1816, 7 Taunt. 14, 17 Revd. Rep. 431.

[2] *Faith* v. *East India Co.*, 1821, 4 Barn. & Ald. 630; *Gledstanes* v. *Allen*, 1852, 12 C. B. 202; *Kerr* v. *Deslandes*, 1861, 10 C. B. (N. S.) 205, 30 L. J. C. P. 297.

[3] *Mitchell* v. *Burn*, 1874, 1 R. 900; *Foster* v. *Colby*, 1858, 28 L. J. Ex. 81.

[4] *Gardner* v. *Trechmann*, 1884, 15 Q. B. D. 154; *Shand* v. *Sanderson*, 1859, 28 L. J. Ex. 278; Abbott, p. 261 *seq.*

[5] *Youle* v. *Cochrane*, 1868, 6 Macp. 427.

[6] *Keith* v. *Burrows*, 1877, 2 App. Cas. 636; *Gumm* v. *Tyrie*, 1864, 4 B. & S. 680, 33 L. J. Q. B. 97.

[7] *Foster* v. *Colby*, 1858, 28 L. J. Ex. 81.

[8] *Fry* v. *Chartered Mercantile Bank*, 1866, L. R. 1 C. P. 689.

owner has then a lien for the whole freight provided by the charter party.[1]

Means of making this lien effectual.

The shipowner's lien may be made effectual by detaining the goods in the ship, and demurrage may be claimed for the delay thus occasioned.[2] At common law the master is entitled to land the cargo at a warehouse under a stop for freight; but he is then not entitled to a lien for warehouse charges, and may incur responsibility as a warehouseman.[3] At any British port he may by Statute land the cargo in a warehouse, and preserve his lien by giving notice to the warehouseman, either at the date fixed for landing the goods, or, if no such date is fixed, then on the expiry of seventy-two hours, exclusive of Sundays and holidays, after the report of the ship.[4] After the expiration of ninety days from the time when the goods are landed in the warehouse, or earlier if they are of a perishable character, the shipowner, if the lien for freight is not then removed, may require the warehouseman to sell the goods, or part of them, by public auction; the proceeds, after paying all duties exigible, the expenses of the sale, and the warehouse dues, to be expended in payment of freight and other charges due to the shipowner, and the balance to be paid to the owner of the goods.[5]

Waiver or discharge of lien of carrier by sea.

The lien of the shipowner is lost by giving up possession of the goods, as by delivering them to the holder of the bill of lading, or landing them in a warehouse without a stop for freight. But partial delivery does not interfere with a lien over the remainder for the whole freight.[6] The lien is also held to be waived by a provision in the contract, either in the charter party or in the bill of lading, that the freight is to be paid at a certain date after the landing of the cargo, as it is to be presumed that in making such a provision the lien for freight is given up.[7] This has been held even in a case where a lien for freight, dead freight, and demurrage was specially provided in the charter party.[8]

Lien of carrier by land.

A carrier by land has a similar lien on the goods conveyed by him, for the rates due on these particular goods. He has no lien at common law for a general balance, and, probably, if he is a common carrier, no right to create one by special agreement.

[1] *Smith* v. *Sieveking*, 1855, 5 El. & Bl. 589, 24 L. J. Q. B. 257.

[2] Maclachlan, p. 457; Abbott, p. 450.

[3] Bell, *Prin.* s. 1424.

[4] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 493, 494).

[5] *Ib.* ss. 497, 498.

[6] *Bannatyne* v. *Malcolm*, 15 Nov. 1814, F. C.

[7] *Foster* v. *Colby*, 1858, 28 L. J. Ex 81; *Kirchner* v. *Venus*, 1859, 12 Moo. P. C. C. 361.

[8] *Foster* v. *Colby*, *supra*.

Thus a notice by a railway company, that they should be entitled to retain goods carried by them for a general balance due by the owner or by the consignee, was held not to be "just or reasonable" within the meaning of the Railway and Canal Traffic Act.[1] By sec. 90 of the Railway Clauses Act (8 & 9 Vict. c. 33), a railway company has a right to detain and sell goods for a general balance of "tolls." But this has been held to apply only to tolls for the use of the line, in the case where goods are conveyed in the owner's own carriages, and not to rates for goods conveyed in the ordinary way in carriages belonging to the railway company.[2]

VII. LIEN OF TRUSTEE.

Retention where trust is *ex facie* absolute.

A trustee in a trust constituted by an *ex facie* absolute disposition, assignation, or conveyance, qualified only a back-letter or personal obligation, has a right to retain the subjects thus vested in him until all debts due to him by the party entitled to demand a reconveyance are paid.[3] This right is an example of general retention founded on property, which has been already discussed.[4] The case of a trustee presents no specialties which could be usefully dwelt on here.

Nature and extent of lien of trustee.

A trustee, however, has the further right, whether the trust was constituted by a conveyance *ex facie* absolute or by an ordinary trust disposition, to retain the trust estate which is vested in him until he is relieved from all expenses incurred, or obligations undertaken, on behalf of the trust. This right is usually known as the lien of a trustee. The effect is to give the trustee a right, so long as the trust estate remains entire and has not been divided among the beneficiaries, to retain the estate under his control until relieved of all expenses and obligations properly undertaken by him on behalf of the trust.[5] The right to reimbursement of expenses will usually result in a right to indemnify himself out of the trust funds under his charge. But should there be no funds immediately available, or should the obligations undertaken imply a future liability, the trustee has a right to retain the trust estate in security, even although his

[1] 17 & 18 Vict. c. 31, s. 7; *Scottish Central Rwy. Co.* v. *Ferguson*, 1864, 2 Macp. 781; *Peebles & Son* v. *Caledonian Rwy. Co.*, 1875, 2 R. 346.

[2] *Highland Rwy. Co.* v. *Jackson*, 1876, 3 R. 850; *Wallis* v. *London and S.-W. Rwy. Co.*, 1870, L. R. 5 Ex. 62.

[3] Bell, *Com.* ii. 117; *Brough* v. *Jollie*, 1793, M. 2585; *Robertson* v. *Duff*, 1840, 2 D. 279.

[4] *Ante*, p. 330 *seq.*

[5] Bell, *Prin.* s. 1998, *Com.* ii. 117; *Brodie* v. *Wilson*, 1837, 15 S. 1195; *Henderson* v. *Norrie*, 1866, 4 Macp. 691.

doing so would involve the continuance of the trust after all its purposes have been fulfilled. Thus where the purposes of a trust were fulfilled, and the beneficiary called upon the trustees to denude, but at the same time intimated certain claims against them, it was held that the trustees were entitled to retain the trust estate in security of any expenses they might incur in meeting these claims, and could not be called upon to denude unless they could obtain an exoneration and discharge.[1] And where the trustees defended an action brought against them by a beneficiary in reference to the trust, and were found entitled to expenses, it was held that they were entitled to a lien over the estate for these expenses, in a question with a creditor of the beneficiary who had arrested the funds in their hands before the decree for expenses was pronounced.[2] It has, however, been held that a trustee in a private trust for behoof of creditors could not retain the estate in security of expenses incurred by him in connection with the trust, after a trustee in sequestration had been appointed.[3]

Where liability is purely formal.

If the liability incurred by the trustee is only of a formal character, and unlikely to result in any real loss to him, the Court will interfere to prevent him from using his right of lien as a means of unnecessarily prolonging the trust. Thus in *Henderson* v. *Norrie* five persons took a feu as a building speculation, taking the title to themselves and the survivors as trustees, for the benefit of themselves and their heirs. In process of time, after much of the land had been sub-feued, and the original feu-duty had thus been amply secured, the trust became vested in A. and B. A. had ceased to have any beneficial interest in the matter. He then refused to concur in any more sub-feus, or to resign his position as trustee, and claimed a right to retain the trust estate until relieved of the obligation he had undertaken for the original feu-duty. The superiors were the trustees for the Church of Scotland, and they declined to grant a discharge. In an action at the instance of all the beneficiaries it was held, in effect, that the plea of lien was unreal and vexatious, as the original feu-duty was amply secured by the sub-feus, and A. had no legitimate interest to insist on the trust being continued. He was ordained to denude.[4]

[1] *Elliott's Trs.* v. *Elliott*, 1828, 6 S. 1058.

[2] *Brodie* v. *Wilson*, 1837, 15 S. 1195.

[3] *Dall* v. *Drummond*, 1870, 8 Macp. 1006. This case is very inadequately reported, and the reasons for the judgment are not given.

[4] *Henderson* v. *Norrie*, 1866, 4 Macp. 691.

Where trust estate is allocated to beneficiaries.

If the trust estate, although still in the hands of the trustee, has been allocated amongst the various beneficiaries, the trustee has no lien over the share allotted to one beneficiary, in respect of expenses incurred in regard to the other shares. So if, in a case of this description, the trustee carries on a trade, or holds shares involving liability, for the benefit of one beneficiary only, he has only the share of that beneficiary to look to in the event of loss being incurred. He cannot exercise a lien over the rest of the estate, even although he was acting quite properly, and in accordance with the instructions of the truster.[1] Thus where a trustee allocated certain shares in the City of Glasgow Bank to one beneficiary, but remained on the register, and was therefore liable for calls on the liquidation of the bank, it was held that although he had a claim to be indemnified out of the share of that beneficiary, he had no claim against the rest of the trust estate.[2]

Lien for advances.

Where a trustee makes advances on behalf of the trust estate, his lien would seem to depend upon whether the trust estate was *lucratus* thereby. In trusts for payment of debts, in which it is contemplated that the trustee should make advances, the form of the trust is either *ex facie* absolute, when the trustee may retain for all debts due, or the reimbursement of the trustee is expressly provided for in the trust. In such cases a power to sell the trust estate is usually conferred.[3] But if the trustee, in an ordinary family trust, makes advances,—for instance, for the payment of the premiums on policies of life insurance,—his right of lien depends on the principle of recompense, and it is therefore conditional on his being able to show that the estate is *lucratus* by his expenditure.[4] Thus where a trustee paid the premiums for several years on certain life policies which formed the sole trust estate, and which would otherwise have lapsed, with the result, however, that whereas the surrender value before the premiums were paid would have been £48, after the payment of the premiums the surrender value would only meet the trustee's advances, it was held that he had no right to have the policies realised to meet his claim, as, if that were done, the estate would, instead of being *lucratus*, be a loser by his advances.[5]

[1] *Robinson* v. *Fraser's Tr.*, 1880, 7 R. 694, revd. 1881, 8 R. (H. L.) 127; *ex p. Garland*, 1804, 10 Vesey, 110; *M'Neillie* v. *Acton*, 1853, 4 De G. M. & G. 744.

[2] *Robinson* v. *Fraser's Tr.*, *supra*.

[3] *Innes* v. *Innes*, 1828, 7 S. 206.

[4] *Brown* v. *Meek's Tr.*, 13 June 1896, 4 S. L. T. No. 69 (Outer House, Lord Stormonth Darling).

[5] *Brown* v. *Meek's Tr.*, *supra*.

CHAPTER XII

HYPOTHECS

Rights of hypothec.
Hypothec of law agent.
Hypothec of landlord.
Hypothec of superior.
Maritime hypothecs.

Nature of hypothec.

A HYPOTHEC is a real right in security, in favour of a creditor, over subjects which are allowed to remain in the possession of the debtor. It is an exception to the general rule, that a real security requires to be completed by actual or symbolical delivery of the subject. In the earlier authorities, some confusion may be observed between a hypothec and a lien or right of retention. Thus the cases referring to the right of a law agent to retain papers placed in his hands in security of his professional account are collected in Morrison's *Dictionary* under the head of hypothec, and certain maritime hypothecs are usually known as maritime liens. But the distinction between the two rights, one of which dispenses with possession, while the other depends upon it, is now regarded as clear. It is more important to distinguish hypothec from the right of preference over the estate of a debtor which is given, by common law or statute, to certain classes of debts; for instance, to deathbed and funeral expenses. Such a preference is distinguished from a hypothec by the fact that the latter is a real security, by which a certain subject, or class of subjects, is impignorated, while a privileged debt confers on the creditor only a personal security—a right to a preference in any distribution of the debtor's estate.

Hypothecs are conventional and legal; cannot be constituted by mere consent.

Hypothecs are distinguished as conventional, and legal or tacit, the former being founded on the agreement of parties, the latter being attached by law to certain relations. In the civil law, and in certain foreign systems, conventional hypothecs were numerous and well recognised; in Scotland, on the other hand, the only rights of this kind which are recognised are bonds of bottomry and respondentia, which have been already considered. No other conventional hypothec is recognised as conferring any

preference over the general creditors of the debtor.[1] Nor is it competent for a person who has a legal hypothec to stipulate for its extension to debts which would not be covered by it at common law. Thus a landlord who has let a mill with the machinery, cannot exercise his hypothec for the rent or hire of the machinery.[2] And an agricultural hypothec, now abolished by Statute, cannot be set up by contract.[3]

Legal hypothecs recognised.

"A tacit hypothec is a species of pledge, constituted without paction, in which the debtor retains the possession of the subject impignorated."[4] Of these there are recognised: (1) The hypothec of a law agent for expenses of an action. (2) The hypothec of a landlord (in urban subjects) for rent. (3) The hypothec of a superior for his feu-duties. (4) Certain maritime hypothecs.

HYPOTHEC OF LAW AGENT.

Nature of right:

A law agent has a right of hypothec for his account for conducting a litigation over any expenses found due to his client by the opposing party. This hypothec would seem to be of the nature of an implied assignation, and it is usually made effectual by the law agent taking decree for the expenses in his own name as agent-disburser. In the Court of Session this right is recognised at common law, and the same privilege is given to the agent for the party to a submission to whom expenses have been found to be due.[5] In the Sheriff Court it is provided by Act of Sederunt that the Sheriff may, on application, and if he thinks fit, allow decree to go out in the name of the agent.[6] Even in the Court of Session, however, the right of the law agent to have decree in his own name, though usually granted as a matter of course, is subject to the control of the Court in exceptional cases. Thus in an action by a husband against his wife for the custody of a child, in which he was found entitled to the custody, but liable in certain expenses, and the wife removed the child out of the jurisdiction of the Court, it was held that as she was in manifest contempt of Court, the award of expenses fell, and her agent was not entitled to a decree for them as agent-disburser.[7]

[1] Stair, i. 13. 14; Ersk. iii. 1. 34; Bell, *Com.* ii. 25.

[2] *Catterns* v. *Tennent*, 1834, 12 S. 686; revd. 1835, 1 S. & M'L. 694 (rubric in 1 S. & M'L. is wrong).

[3] *M'Gavin* v. *Sturrock's Tr.*, 1891, 18 R. 576.

[4] Ersk. iii. 1. 34.

[5] Bell, *Prin.* s. 1396.

[6] A. S. 10 July 1839, s. 106; Dove-Wilson, *Sheriff Court Practice*, 4th ed., p. 197.

[7] *Bloe* v. *Bloe*, 1882, 9 R. 894.

Over subject of litigation.

Though in some early cases there was a tendency to extend the law agent's hypothec to a right over the subject of the litigation, it is now settled that at common law the right did not extend over anything but the expenses found due by the opposing party, and that the agent had no special or preferable right over any money or property recovered in the action he was employed to conduct. This has been altered by the Law Agents Act, 1891.[1] Sec. 6 of that Act provides as follows:—"In every case in which a law agent shall be employed to pursue or defend any action or proceeding in any Court, it shall be lawful for the Court or judge before whom any such action or proceeding has been heard or shall be depending, to declare such law agent entitled to a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding, and it shall be lawful for such Court or judge to make such order or orders for taxation of, and for raising and payment of, such expenses out of the said property as to such Court or judge shall appear just and proper; and all acts done or deeds granted by the client after the date of the declaration, except acts or deeds in favour of a *bonâ fide* purchaser, shall be absolutely void and of no effect as against such charge or right." In the only case which has been reported on this section, the Lord Ordinary (Low) expressed doubts whether, looking especially to the *proviso* regarding a *bonâ fide* purchaser, the Act was intended to cover the case of a sum of money recovered by an action, or whether its effect was restricted to the case where some corporeal property was recovered. There a sum of £40 was found due to a pursuer in an action. He was soon afterwards sequestrated, and the trustee did not sist himself as a party to the action. Thereafter the law agent who had conducted the action moved for taxation of his account, and gave notice to the party who had been found liable, and to the trustee. The £40 was meanwhile paid to the trustee. The agent moved for a declaration, under the above section of the Law Agents Act, that the £40 should be attached for his expenses. It was held that he was not entitled to a declaration, because the sequestration of the client, before he had applied for the declaration, had carried to the trustee the right to the £40 found due to the bankrupt.[2]

[1] 54 & 55 Vict. c. 30, s. 6.

[2] *Tait & Co.* v. *Wallace*, 1894, 2 S. L. T. No. 252.

Cases where hypothec applicable.

The agent is only entitled to a hypothec over expenses where he has actually conducted the action, or, if the earlier stages of the action have been conducted by another agent, where he has paid that agent's account. An agent who has been superseded may, if his account has not been paid, obtain decree in his own name for the expenses incurred to him.[1] The hypothec is available to the agent's representatives and to his trustee in bankruptcy.[2] It is not a good objection to an application by an agent for decree in his own name, that his client is solvent and able to pay the account.[3]

Agent has a *jus quæsitum* in expenses.

Where a finding for expenses has been pronounced, the agent has a *jus quæsitum* in them, which the client is not entitled to disappoint, by compromising the claim with the opposite party before decree has been taken.[4] And the intervening sequestration of the client or the diligence of his creditors do not interfere with the right of the law agent to obtain decree in his own name.[5] But if the client dies after he has been found entitled to expenses, it has been held that his representatives must be sisted before the agent can obtain decree in his own name.[6]

Decree in name of agent.

The implied assignation involved in the law agent's hypothec is usually put into force by the agent taking decree for the expenses in his own name. The effect is to render him the creditor for the expenses, instead of his client; and thereafter no payment to the client will discharge the claim, unless the agent assents to it.[7] It is doubtful whether, by taking decree in his own name, the agent becomes a party to the action, so as to be cited in an appeal. If the agent obtain the expenses under a finding in the Court of Session, and that finding is reversed in the House of Lords, the party who has paid the expenses may recover them from him.[8]

[1] *Hunter* v. *Pearson*, 1835, 13 S. 495.

[2] *Ib.*

[3] *Russel* v. *Greig*, 1826, 4 S. 403.

[4] *Barr* v. *Wotherspoon*, 1850, 13 D. 305.

[5] *Hunter* v. *Pearson*, 1835, 13 S. 495. It was, however, held that where a creditor of the client's arrested the expenses in the hands of the opposite party, and the agent took decree in his own name, this was sufficient double distress to entitle the opposite party to bring a multiplepoinding, though it was obvious that the agent must be preferred—*Pollard* v. *Galloway & Nivison*, 1881, 9 R. 21.

[6] *Baillie* v. *Baxter & Mitchell*, 1872, 10 Macp. 414.

[7] *Black* v. *Kennedy*, 1825, 4 S. 124. But unless the agent has charged upon the decree, the client is still a creditor, and entitled to petition for the sequestration of the party who is liable in expenses—*M'Creadies* v. *Douglas*, 1882, 10 R. 108.

[8] *Cormack* v. *Tod*, 1845, 7 D. 812. The same rule would apply if the agent obtained decree for expenses in the Sheriff Court, and the decision were reversed on appeal—Dove Wilson, *Sheriff Court Practice*, 4th ed., p. 197.

Intimation to opposite party.

It is not indispensable for an agent to take decree for expenses in his own name, in order to enforce his hypothec. He may acquire a preference over these expenses, as long as they are outstanding, and distinguishable from the general funds of his client, by giving notice of his claim to the opposite party, provided that he gives such notice before that party has established a right of compensation, or anyone else has obtained a right to the expenses. There is no special form for such notice, but it should be of a formal character. The fact that the client has taken decree for the expenses in his own name, and has been sequestrated, does not prevent the agent from obtaining a *nexus* over the expenses by intimation of his right to the opposite party, provided that the expenses are still unpaid.[1] But if the expenses due are arrested in the hands of the opposite party by a creditor of the client's, before the agent has taken any steps to intimate or enforce his claim, the arrester will be preferred.[2] "So long as the agent remains unpaid, he retains a right to call on the client to renounce the decree for expenses, and let decree go out in the agent's name; and provided he intimates this in time to the person liable for the expenses, he saves his preference entire. But the intimation must be given before any *jus quæsitum* has accrued to a third party; for if the debtor in the expenses has paid them to the agent's client, or if the client has assigned the right to the expenses, and this assignation has been intimated, or if a third party in any mode acquires a *jus quæsitum* before the intimation of the agent's claim, the agent's preference is cut off."[3] The *jus quæsitum* may consist of a right, on the part of the debtor in the expenses, to plead compensation on a debt due to him by the client. As will be explained, such a plea of compensation is not, as a rule, a good answer to the demand of an agent for decree in his own name. But where the agent allows decree to go out in the name of the client, the party debtor in expenses would seem to acquire a right to plead compensation, if he has advanced that plea before the agent has intimated that he claims the expenses under his hypothec. Thus where a client obtained decree in his own name, and the agent then intimated his right, it was held that the debtor in the expenses could not suspend a charge given for them, on the plea of compensation for a debt due to him by the client, even although the charge was given in the name of the client.[4] But in a very similar case, where, however,

[1] *MacTavish* v. *Pedie*, 1826, 4 S. 704; and 1828, 6 S. 593.

[2] *Stephen* v. *Smith*, 1830, 8 S. 847.

[3] Per Lord Mackenzie in *Fleeming* v. *Love*, 1839, 1 D. 1097, at p. 1101.

[4] *Mackenzie* v. *Ross*, 1823, 2 S. 401.

the agent did not intimate his right until after the debtor in the expenses had suspended a charge on the plea of compensation, it was held that the debtor had obtained a *jus quæsitum* to maintain that plea, and that, in a question with him, the right of the agent was barred by his delay in giving notice.[1]

The chief questions which have been raised with regard to the law agent's hypothec have related to the right of the litigant who has been found liable in expenses to plead compensation on a debt due to him by his opponent, as an objection to the agent of that opponent obtaining decree in his own name; and to the right of the law agent, if his client abandons or compromises an action, to have himself sisted as a party, and to proceed with the action, for the purpose of obtaining a decree in his own favour for expenses.

Opposite party cannot, as a rule, plead compensation on debt due by client to him.

The opposite party cannot plead compensation on a debt due to him by the client, and unconnected with the action in which the expenses were found due, either as an objection to the agent obtaining decree in his own name, or in answer to a demand for payment of the expenses by the agent after he has obtained such a decree.[2] But in one case where the decree was in the name of the agent, but the client, with consent and concurrence of the agent, brought an action against a party who was alleged to have guaranteed the expenses, it was held that as the action was at the instance of the client, the party against whom it was directed might plead compensation.[3] This case, however, was exceptional. Even if the result of an action is to establish that a debt is due by one party to the other, but the creditor in that debt is found liable in expenses, compensation cannot be pleaded between the debt and the expenses, in a question with the law agent.[4] Thus where, in a small debt action, A. was found liable to B. for £4 and 4s. of expenses, and B. was found liable to A. in £3, 15s. of expenses, it was held that, in a question with the agent of A., B. could not plead compensation except to the extent of the 4s. of expenses awarded to him.[5]

Exception, where there are counter decrees of expenses: In separate actions.

If two actions are pending between the same parties, with the result that each obtains an award of expenses, neither party can plead compensation between the two awards, so as to disappoint the hypothec of his opponent's agent.[6] This is subject to an

[1] *Fleeming* v. *Love*, 1839, 1 D. 1097.

[2] Bell, *Prin.* s. 1390; *Smyth* v. *Gemmill*, 1802, M. 6257; *Russel* v. *Greig*, 1826, 4 S. 403; *Miller* v. *Geils*, 1848, 10 D. 1384. Where decree is in client's name, see *ante*, p. 410.

[3] *Harvey* v. *Muir*, 1843, 5 D. 1113.

[4] *Munro* v. *Bothwell*, 1846, Arkley, 118.

[5] *Ib.*

[6] *Paterson* v. *Wilson*, 1883, 11 R. 358; *Stuart* v. *Moss*, 1886, 13 R. 572.

exception in the case where the two actions relate to the same matter, and might have been conjoined, in which case compensation may be pleaded.[1] In this case, one action was a petition at the instance of a company that their former manager, who had a certificate for the sale of exciseable liquors, should be ordained to assign it to their new manager; the other action was a petition by the former manager for interdict against the company selling exciseable liquors during the currency of his certificate. The Court refused to extend this principle in a later case, where, in the course of litigation between a husband and wife, who had been judicially separated, the husband was found entitled to expenses in an action against him for wilful failure to pay aliment, and the wife had obtained expenses in an action by him for recall of the separation order. It was held that the two actions were not concerned with the same subject-matter, and the agent for the wife was allowed to have decree for expenses in his own name.[2]

In the same action.

On the other hand, where each party to an action obtains a decree for expenses, compensation may be pleaded; and the law agent is not entitled to decree in his own name, even if his client is insolvent, and the result is to deprive him of his expenses.[3] This rule holds even where the findings for expenses are pronounced at different stages of the action,[4] and even if one party is on the poor roll.[5] Thus where two appeals were taken to the Court of Session from the Sheriff Court in the course of an action between A. and B., and in one appeal A., and in the other B., was found entitled to expenses, it was held that A. could plead compensation between the two findings, and that B.'s agent was not entitled to decree in his own name.[6] In this case Lord Adam stated the law as follows:—"I think the rule is that if there are separate actions between the same parties, the agent for the party in the one case is entitled to decree in his own name as agent-disburser, and therefore the other party cannot set off against that decree a decree obtained by him in the other action. But it is also, I think, equally established that where one of the parties in an action has obtained decree for expenses in the action, the agent for the other party is not entitled to decree for expenses to

[1] *Portobello Pier Co.* v. *Clift*, 1877, 4 R. 685.

[2] *Strain* v. *Strain*, 1890, 17 R. 566.

[3] *Warburton* v. *Hamilton*, 1826, 4 S. 631; *Graham* v. *M'Arthur*, 1826, 5 S. 49; *Gordon* v. *Davidson*, 1865, 3 Macp. 938; *Macgillivray* v. *Mackintosh*, 1891, 19 R. 103.

[4] *Gordon* v. *Davidson* and *Macgillivray* v. *Mackintosh*, *supra*.

[5] *Gordon* v. *Davidson*, *supra*.

[6] *Macgillivray* v. *Mackintosh*, 1891, 19 R. 103.

which his client has been found entitled. In that case the agent-disburser is not entitled to decree in his own name, and the one account must be set against the other."[1]

Right of agent to proceed with action.

The question as to the right of an agent to have himself sisted as a party to an action, and to proceed with it in order to obtain a decree for his expenses, when his client has abandoned or settled the action, is one of some difficulty. He is not entitled to go on with an action merely because his client has incurred an account to him, and there is a probability that the action would ultimately be successful.[2] Thus where a draft summons for an action for debt was prepared, and the defender offered payment of the amount sued for before it was served, it was held that neither the pursuer nor his agent were entitled to refuse payment, and go on with the action, in order to make the defender liable for the expense of preparing the summons.[3] In one case, where the question was discussed, it was stated to be the rule that there were three cases which would entitle the agent to go on with an action which his client had settled, viz.: (1) where expenses had been actually found due; (2) where they followed as a necessary consequence from the interlocutor previously pronounced; (3) where the parties had entered into a compromise for the purpose of defeating the agent's claim.[4] These rules have, on the whole, been recognised in subsequent decisions as the criterion of the question, though they are not held to exclude the discretion of the Court in particular cases.

(1) Where finding of expenses has been pronounced.

Where a finding for expenses has been actually pronounced, the agent has a *jus quæsitum* to a decree in his own name, which his client is not entitled to disappoint by compromising the claim before decree has been taken.[5] And where a decree for expenses has been pronounced in the Sheriff Court, and an appeal is taken to the Court of Session, the agent has been allowed to sist himself as a respondent, where his client did not think fit to do so.[6]

(2) Where expenses naturally follow interlocutor.

Where an interlocutor has been pronounced of which a finding for expenses is the necessary consequence, the agent is entitled to proceed with the case, in order to obtain a decree for expenses. But some difficulty arises as to what is an interlocutor necessarily implying expenses, because the award of expenses to either party

[1] 19 R. 103, at p. 107.

[2] *Macqueen* v. *Hay*, 1854, 17 D. 107.

[3] *Minton* v. *Hawley & Co.*, 1882, 20 S. L. R. 126.

[4] *M'Lean* v. *Auchinvole*, 1824, 3 S. 190.

[5] *Barr* v. *Wotherspoon*, 1850, 13 D. 305; *Sloss* v. *Kennedy*, 1823, 2 S. 344.

[6] *Hamilton* v. *Dixon*, 1824, 3 S. 242; *Ferguson, Halliby, & Co.* v. *Richardson*, 1826, 4 S. 814.

is always a matter for the discretion of the Court. It would appear that an interlocutor which would in ordinary circumstances be followed by expenses is sufficient to entitle the agent to proceed. Thus where in a bill of suspension and liberation, on the ground of informality in a charge, the bill was passed, and the party was liberated, it was held that expenses followed as a natural sequence, and that, on the client compromising the action, the agent was entitled to be sisted, and to proceed with it.[1] The same result was arrived at where, in an action for aliment by a wife against her husband, decree for interim aliment was pronounced, and the action was sisted to allow the wife to bring an action of separation and aliment, if so advised. No further steps were taken by the parties; and the agents of the wife were held to be entitled to be sisted, in order to obtain decree for expenses.[2] Again, where a woman who had divorced her husband, sued him for *jus relictæ*, and the husband defended the case on the merits, it was held that an interlocutor remitting to an accountant to ascertain the amount of the wife's claim was one which necessarily implied a finding for expenses, and that her agent was entitled to be sisted.[3] On the other hand, where a younger son sued his father's executors for legitim, and they defended the case on the merits, and also on the ground that his claim had been extinguished by advances made to him, it was held that an interlocutor repelling the defences on the merits, and ordering an accounting, was not an interlocutor of which expenses were a necessary sequence, and did not entitle the agents to proceed with the action.[4]

Where compromise entered into to defeat agent's claim.

Where no interlocutor finding expenses due, or inferring such a finding as a natural consequence, has been pronounced, the agent can only proceed with an action which his client has compromised, if he can prove that the compromise was collusive, on the part of both litigants, for the purpose of depriving him of his right to expenses. The mere fact that an action has been compromised for a lump sum in name of damages and expenses, and that this has been done without the intervention of the agents, is not enough to infer collusion.[5] "There is no case that I am aware of where the Court have in respect of *mala fides* sustained the agent's right to appear, where there was not circumstances beyond the mere fact of the action having been compromised, and without the intervention of the agents, by which the *mala fides* and

[1] *M'Lean* v. *Auchinvole*, 1824, 3 S. 190.

[2] *M'Gregor & Barclay* v. *Martin*, 1867, 5 Macp. 583.

[3] *Cornwall* v. *Walker*, 1871, 8 S. L. R. 442.

[4] *Murray* v. *Kyd*, 1852, 14 D. 501.

[5] *Macqueen* v. *Hay*, 1854, 17 D. 107.

corrupt object of defeating the right was instructed, or taken to be sufficiently indicated to warrant their so far disregarding the settlement as to let in the claim of the agent for expenses.[1] The plea of collusion or *mala fides* was sustained in a case where an action of accounting was raised, and an accountant, to whom the question had been remitted, gave in a report, exhibiting three schemes, according to each of which the pursuer was entitled to a considerable balance, and the action was then discharged by the pursuer by a settlement which was reduced at the instance of his creditors, under the Act 1621, c. 18, as granted to a conjunct and confident person without any true, just, and necessary cause. The agent for the pursuer was held entitled to be sisted, and to proceed with the action, although no interlocutor had been pronounced since the closing of the record.[2] And where an action for the reduction of a deed as a fraudulent preference, under the Act 1696, c. 5, was brought by A., and was taken out of Court to be submitted to arbitration, and the deed in question was then reduced at the instance of other creditors, it was held that A.'s law agent might proceed with his action, in order to obtain decree for his expenses; on the ground that the submission to arbitration was a collusive device between A. and the defender to deprive the agent of his expenses.[3]

Hypothec in consistorial actions.

In consistorial actions at the instance of a wife against her husband, the husband is *primâ facie* liable for the expenses incurred by the wife. If the wife compromises or abandons the action before any decree has been pronounced, her agent will not, as a rule, be allowed to sist himself and proceed with the action,[4] but he is entitled to bring a separate action against the husband for his expenses.[5]

Assignation by client to agent.

The hypothec of a law agent has been stated to be largely of the nature of an implied assignation. In certain cases, however, the agent may place himself in a better position by obtaining an actual assignation from his client. Thus a minister of a parish, who was *ex officio* the trustee of a charitable endowment, brought an action in the Court of Session to regulate the disposal of the trust funds. The action was opposed by certain parties interested; the pursuer was deposed from his church before it was concluded, and, as his successor declined to sist himself, it fell to the

[1] Per Lord Wood in *Macqueen* v. *Hay*, *supra*, at p. 113.

[2] *Cheyne* v. *Cheyne*, 1832, 10 S. 202.

[3] *Tod & Wright* v. *Wilson & M'Lellan*, 1822, 1 S. 381. *Macqueen* v. *Hay*, *supra*, at p. 111.

[4] *Smith* v. *Smith*, 1871, 9 Macp. 538. *Ante*, p. 414.

[5] *Clark* v. *Henderson*, 1875, 2 R. 428.

ground. The agents of the minister who had raised the action obtained from him an assignation of his right to obtain his expenses out of the trust funds. They then applied to the Court, and were found entitled to receive their expenses, as between agent and client, out of the trust.[1]

HYPOTHEC OF LANDLORD.

Nature of hypothec.

A landlord has a hypothec over the *invecta et illata*, *i.e.* goods brought on to the premises of his tenant on urban subjects during the currency of the lease, and had, until recent legislation, a similar right over the crop, stocking, and cattle of his tenant in agricultural subjects, in security of his rent.[2] By this hypothec a real right over the subjects affected is conferred on the landlord without possession or diligence, which gives him a right to obtain a preference over them on the bankruptcy of his tenant, and, in certain cases, a right to insist on these subjects being left on the premises, or brought back if they have been removed.[3]

Agricultural hypothec abolished.

By the Hypothec Abolition Act, 1880,[4] the hypothec of a landlord in agricultural subjects has ceased to be of any importance. By sec. 1 it is provided that, after the commencement of the Act (11th Nov. 1881), the landlord's hypothec "for rent of land, including the rent of any buildings thereon, exceeding two acres in extent, let for agriculture or pasture, shall cease and determine." The Act is declared not to apply to any claim for rent due or to become due under any lease, bargain, or writing current at its commencement. It is thus quite possible that questions as to hypothec in agricultural subjects may still arise, but it is thought that this contingency is not sufficiently important to make it worth while to enter into the subject. Probably, however, the landlord may still have a hypothec over agricultural subjects, in the case of a house and policies, if the policies were used for agricultural purposes, though the house was the main subject of the rent. And market and nursery gardens do not appear to come

[1] *Shepherd* v. *Hutton's Trs.*, 1855, 17 D. 516. Lord Cowan was of opinion that, in the special circumstances of the case, the agents would have been entitled to their expenses even without an assignation.

[2] For origin of this hypothec, see Hunter, *Landlord and Tenant*, 4th ed., ii. 355; Kames, *Elucidations*, p. 70.

[3] See generally, Bell, *Prin.* s. 1276; *Com.* ii. 28; Hunter, *Landlord and Tenant*, 4th ed., ii. 360; Rankine, *Leases*, 2nd ed., p. 337.

[4] 43 Vict. c. 12, s. 1. The 2nd and 3rd secs. of this Act are repealed by the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62, s. 27). These sections defined the landlord's remedies for rent in agricultural holdings.

under the definition of land "let for agriculture or pasture," and the landlord's hypothec in such subjects is probably unaffected. In these cases, and in the case of holdings of less than two acres, the hypothec of the landlord in agricultural subjects may still be of importance; but, with these exceptions, its importance is confined to leases of urban subjects, or of mines.[1]

Rent covered by hypothec.

In urban subjects, *i.e.* in subjects, whether situated in town or country, in which the rent paid is mainly or exclusively for buildings and not for land, the landlord has a hypothec over the *invecta et illata* in security of his rent.[2] This gives him a right in security for each year's rent as it falls due, provided that the goods have been actually on the premises during that year.[3] It gives no security for arrears;[4] and in order to make his right effectual, the landlord must enforce his hypothec by sequestration within three months after the term at which the rent is payable.[5] But within the three months he has a right which is preferable to the right of the landlord of any new premises to which the tenant has removed. Thus where a tenant removed at the end of his lease and entered into premises belonging to a new landlord, it was held that the former landlord was entitled to sequestrate the furniture which had been removed from the old premises to the new, and, on doing so, acquired a right which was preferable to the hypothec of the new landlord.[6] The hypothec does not cover the rent or hire of moveable subjects let with the premises,[7] and it is doubtful whether a claim of liquidated damages for breach of the conditions of the lease would be covered.[8] It has been held in the Sheriff Court that hypothec does not cover interest on money spent by the landlord in improvements at the beginning of the lease, and payable by the tenant under its conditions.[9]

Invecta et illata.

Under the phrase *invecta et illata* are comprised all moveable subjects belonging to the tenant, and brought on to the premises.[10] In the case of dwelling-houses, it includes furniture, pictures,

[1] As to hypothec in mining leases, see Rankine, *Leases*, 2nd ed., 349.

[2] Bell, *Prin.* s. 1275.

[3] See *Thomson* v. *Barclay*, 1883, 10 R. 694 (commencement of lease under Removal Terms Act, 1881).

[4] *Horn* v. *M'Lean*, 1830, 8 S. 454.

[5] Bell, *Prin.* ss. 1240, 1277.

[6] *Christie* v. *Macpherson*, 14 Dec. 1814, F. C.

[7] Ersk. ii. 6. 64, *Catterns* v. *Tennent*, 1834, 12 S. 686, revd. 1 S. & M'L. 695 (rubric wrong); *Sandeman & M'Lennan* v. *Thomson*, 1866, Guthrie, *Sheriff Court Cases*, 1st series, 75.

[8] *Robertson* v. *Clark*, 1842, 4 D. 1317; *Witham* v. *White & Young*, 1866, 38 Jur. 586.

[9] *Ross* v. *M'Laren's Tr.*, 1869, Guthrie, *Sheriff Court Cases*, 1st series, 309. This case is doubted by Rankine, *Leases*, 2nd ed., p. 339.

[10] Bell, *Prin.* s. 1276.

books, jewellery, and other moveable property, but not cash, bills, or notes, or probably wearing apparel, at all events that in ordinary use.[1] In the case of a manufactory, it includes the raw material as well as the finished product.[2] In the case of a shop, the goods there for sale are subject to hypothec, so far as unsold; but the sale of any article to a *bonâ fide* purchaser before the landlord has taken steps to enforce his hypothec will exclude it.[3] But in the case of a store, goods remain subject to hypothec until these are actually or constructively delivered to a purchaser. Thus where spirits, lying in the bonded warehouses of a distiller, were sold, and the sale was intimated to the excise officer, it was held that as this did not operate delivery, actual or constructive, the spirits were still subject to the hypothec of the landlord of the warehouse.[4] It is conceived that the Sale of Goods Act[5] would make no difference in a case of this kind, as, although the property in the goods sold might, under the provisions of that Act, pass to the purchaser without delivery, yet, if left in the possession of the tenant, they might still be subject to the hypothec of his landlord. It is laid down by Professor Bell, that the hypothec of the landlord of a shop will not cover the business books, so as to entitle him to collect the book debts.[6] But in an arbitration in Glasgow, it was held that the landlord of premises occupied as a livery stable was entitled to a hypothec over the accounts due for the keep of horses; and it was proved to be the custom in Glasgow to allow to the landlord of premises used as a grain store a hypothec over the charges made for actual storage, though not over those made for turning and conserving the grain.[7]

Hypothec over property of third parties.

The general rule of hypothec is that the property of third parties does not fall under the landlord's right.[8] But this is a rule subject to important exceptions. These may be considered under three heads: (*a*) property belonging to members of the tenant's family or his lodgers; (*b*) property lent or intrusted to the tenant, or allowed to remain in his possession; (*c*) property hired by the tenant as part of the furniture of his house or premises.

(*a*) Property of members of tenant's family.

In the case of property belonging to persons living in family

[1] *Countess of Callander* v. *Campbell*, 1703, M. 6244; Bell, *Prin.* s. 1276.

[2] Bell, *Prin.* s. 1276.

[3] Bell, *Com.* ii. 31; Rankine, *Leases*, 2nd ed., p. 348.

[4] *Wyld* v. *Richardson*, 1832, 10 S. 538.

[5] 56 & 57 Vict. c. 71.

[6] Bell, *Prin.* s. 1276.

[7] *Guild* v. *Sudden's Tr.*, 1863, Guthrie, *Sheriff Court Cases*, ii. 267.

[8] Per L. J. C. (Moncreiff) in *Pulsometer Co.* v. *Gracie*, 1887, 14 R. 316, at p. 318.

with the tenant, it would appear that the hypothec is not applicable, though the case where the main part of the furniture of the house belonged to a member of the family, and not to the tenant, might be doubtful. It has been held that a piano belonging to the daughter of the tenant is not liable to be attached under the hypothec, and the language used in this case seems wide enough to cover any isolated or personal property belonging to a child or servant of the tenant.[1] And the opinion has been expressed that the private property of a lodger is exempt.[2]

(*b*) Property lent to the tenant.

The case of furniture placed gratuitously in the possession of the tenant is more doubtful. The principle upon which the hypothec of the landlord over such articles might be supported is that the landlord is entitled to insist upon the house being furnished, and would therefore, if the articles in question had not been placed in the tenant's possession, have been able to secure the existence of furniture subject to the hypothec. In one case, shortly reported in Bell's *Commentaries*, it was held that the hypothec did not extend to furniture lent by a friend.[3] But in *Wilson* v. *Spankie*,[4] where the tenant of a house was bankrupt, and his creditors allowed him to keep his furniture gratuitously for several weeks, it was held that it was subject to the hypothec of his landlord. In a later case, a tenant had absconded, and his furniture was sold under Crown diligence. The purchaser allowed it to remain in the possession of his wife and children, and, nine weeks after the sale, it was sequestrated at the instance of the landlord. The Court, proceeding largely on the particular facts of the case, and especially on the fact that the furniture had been openly sold under a diligence preferable to that of the landlord, so that no false credit would arise to the tenant from its possession, held that it did not fall under the hypothec.[5] According to the opinion of Lord Deas, no general rule on the subject can be laid down. On the one hand, the fact that a friend of the bankrupt, or of his family, has purchased his furniture on his bankruptcy, and allowed him to retain the use of it for a short period, does not necessarily subject it to the diligence of the landlord; while, on the other hand, if the furniture is left in such circumstances, or

[1] *Bell* v. *Andrews*, 1885, 12 R. 961.

[2] Per Lord Shand in Bell, *supra*, at p. 964.

[3] *Cowan* v. *Perry*, 1804, Bell, *Com.* ii. 30.

[4] 17 Dec. 1813, F. C.; cf. *Yuille* v. *Laurie*, 1823, 2 S. 155, narrated *infra*, p. 436.

[5] *Adam* v. *Sutherland*, 1863, 2 Macp. 6; and see *Jaffray* v. *Carrick*, 1836, 15 S. 43 (furniture detained by lessee against the will of the owner not subject to hypothec).

for such a time, as to induce the landlord to regard it as belonging to the tenant, the true owner may not be entitled to vindicate it.[1]

Intrusted to him in course of business.

Where goods are placed in the premises of a tenant in the course of his business, there would seem no doubt that they are not thereby subjected to hypothec for his rent. Thus goods intrusted to a workman for repair, or placed in a manufactory to be worked up, are clearly not subject to the hypothec of the workman's or manufacturer's landlord. And the property of guests in an inn is not subject to hypothec for the rent of the inn.[2] In one case a yachting agent undertook to exhibit pulsometers in his office, receiving a store rent and a commission on sales made by his principals in consequence of his recommendations. There was nothing else in the office except a small quantity of furniture. The pulsometers were attached under the landlord's sequestration, and it was held that they did not fall under the hypothec, as they were neither the property of the tenant, nor his stock in trade, nor intended for the residential occupation of the premises.[3]

(*c*) Property on hire.

The right of the landlord has been held to be stronger in the case where the furniture of a house, or the fittings of an office or shop, are let to the tenant on hire. It would seem then to be held that the owner takes the risk of the articles hired being attached by the hypothec of the hirer's landlord, and that he may be supposed to charge for this risk in the hire. If the whole furniture of the tenant is obtained on hire, it may be regarded as settled that it will be subject to hypothec. This has been held with regard to ordinary household furniture,[4] and with regard to a billiard-table and fittings which were supplied on hire as the equipment of a billiard-saloon.[5] And it makes no difference if the articles are nominally let for a short period, as, for instance, by the week, if, as a matter of fact, they are allowed to remain permanently.[6] But it is probable that hypothec would not attach to furniture hired for a temporary purpose, such as chairs, forms, or china hired for a ball.[7] And the right of the landlord is at least doubtful in the case where a single article is let on hire; especially where, as in the case of sewing-machines or pianos,

[1] Lord Deas in *Adam* v. *Sutherland*, *supra*, at p. 8.

[2] Bell, *Com.* ii. 31.

[3] *Pulsometer Co.* v. *Gracie*, 1887, 14 R. 316.

[4] *Wauchope* v. *Gall & Ross*, 1805, Hume, 227; *Stewart* v. *Bell*, 31 May 1814, F. C., and App. to 18 F. C.

[5] *Nelmes & Co.* v. *Ewing*, 1883, 11 R. 193.

[6] *Ib.*

[7] See opinion of Lord Deas in *Adam* v. *Sutherland*, 1863, 2 Macp. 6.

there is a well-known custom, of which the landlord may be supposed to be aware, of letting such articles on contracts of hire-purchase. In one case, indeed, a hired piano has been held subject to hypothec,[1] but this case has been doubted,[2] though no actual decision in the same or similar circumstances has been pronounced. In *Macdonald* v. *Westren*,[3] the Court was able to avoid a decision on the question of articles in a shop on sale or return. In *Pulsometer Co.* v. *Gracie*,[4] the pulsometers, which were held not to be subject to the hypothec, were not part of the ordinary furniture of the office in which they were exhibited. The question as to hired articles has often been raised in the Sheriff Court, and conflicting decisions have been given. Some Sheriffs, founding on *Penson* v. *Robertson*, have sustained the hypothec,[5] while others have held that that case is no longer authoritative, and that single articles possessed by a tenant on a contract of hire are not subject to the landlord's diligence.[6] But the more recent decisions have upheld the hypothec.

Who may exercise hypothec.

The hypothec over *invecta et illata* may be exercised by anyone who is in the position of a landlord and entitled to demand the rent. Thus it may be exercised by a heritable creditor under an *ex facie* absolute disposition, or by a creditor in a bond and disposition in security, if he is infeft and has entered into possession;[7] by an adjudger, if he is infeft and has used diligence to obtain possession;[8] or by a tenant who has granted a sub-lease.[9] But where it was attempted to create a security over moveables by an *ex facie* absolute disposition of a building-yard belonging to the tenant, a back-bond declaring it to be merely a security, and a lease to the debtor, it was held that the creditor, though he was thus placed in the position of a landlord of the building-yard, had no right of hypothec over the *invecta et illata* therein. The claim to exercise such a right was regarded as an attempt to create a security over moveables without possession, which could not be

[1] *Penson* v. *Robertson*, 6 June 1820, F. C.

[2] Per Lord Shand in *Bell* v. *Andrews*, 1885, 12 R. 961, at p. 964.

[3] 1888, 15 R. 988.

[4] 1887, 14 R. 316.

[5] *Duncanson & Henderson* v. *Maver & Sons*, 1894, 2 S. L. T. No. 378 (Glasgow: Sheriff Guthrie); *Middleton* v. *Macbeth*, 1894, 2 S. L. T. No. 135 (Aberdeen: Sheriff Brown); *Dickson* v. *Singer Manufacturing Co.*, 1886, Guthrie, *Sheriff Court Cases*, 2nd series, 269 (Fife: Sheriff Mackay).

[6] See cases in *Journal of Jurisprudence*, cited in Bell's *Principles*, s. 1276.

[7] *Parkers* v. *Douglas, Heron, & Co.*, 1783, M. 2868; cf. *Railton* v. *Muirhead*, 1834, 12 S. 757; *Hood* v. *Martin's Crs.*, 1835, 13 S. 923.

[8] Ersk. ii. 6. 56.

[9] *Infra*, p. 423.

allowed by the law of Scotland.[1] As the hypothec is an accessory of the right to receive the rents, it belongs, in most cases of fee and liferent, to the liferenter and not to the fiar.[2] But where, under the terms of a will, a fiar received the rents of grass parks, under the obligation of making payment of £10 per annum to the liferenter until the latter obtained the natural possession of them, it was held that the fiar had the right to sequestrate the tenant's effects under his hypothec, though he had no title to bring an action of removing against the tenant without the concurrence of the liferenter.[3] Where a subject is owned by joint proprietors, all must concur in any proceeding under hypothec, though diligence at the instance of one only may be made effectual by the accession of the others.[4]

Assignation of hypothec.

The landlord's right of hypothec is assignable, as an accessory of an assignation of the rents. Where rent is paid by a cautioner for the tenant, he is entitled to an assignation of the landlord's right, and is entitled to sequestrate on the hypothec, and, on doing so, will obtain a right to the *invecta et illata*, which is preferable to the right obtainable by the landlord by sequestration for the rent of the ensuing term.[5] If the landlord has used sequestration and the rent is afterwards paid by the cautioner, the latter has a preference over the subjects which have been attached by the sequestration.[6] If the rent is paid by a third party who is not in the position of a cautioner for the tenant, he is entitled to an assignation of the hypothec, subject, however, to the important limitation that the landlord cannot be compelled to assign if he has an interest to refuse. As it is always the interest of a landlord to have the *invecta et illata* preserved intact, in order to provide a security for future instalments of the rent, a third party paying the rent can rarely be entitled to an assignation of the hypothec, except at the end of a lease.[7] And the *onus* lies on the

[1] *Herit. Securities Invest. Assoc.* v. *Wingate & Co.'s Tr.*, 1880, 7 R. 1094. Narrated *ante*, p. 233.

[2] *Zuill* v. *Buchanan*, 1833, 11 S. 682.

[3] *Zuill*, *supra*.

[4] *Stewart* v. *Ward*, 1842, 4 D. 622.

[5] Bell, *Com.* ii. 33; *Stewart* v. *Bell*, 31 May 1814, F. C.; *Christie* v. *Macpherson*, 14 Dec. 1814, F. C.; *Stevenson* v. *M'Culloch*, *infra*; *Stevenson* v. *Cooper*, 1822, 1 S. 312.

[6] *Stevenson* v. *M'Culloch*, 1821, 1 S. 30. Here the landlord sequestrated and sold the tenant's effects for the rent due at Whitsunday. The cautioner then paid the rent. The landlord claimed a right to retain the produce of the sale in security of the Martinmas rent, and it was held that the cautioner was preferable.

[7] *A.* v. *B.*, 1744, M. 6228; *Graham* v. *Gordon*, 1842, 4 D. 903; *Stewart* v. *Stables*, 1878, 5 R. 1024. In each case an assignation was refused. Cf. *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107; and *ante*.

party demanding the assignation to show that the landlord will not be prejudiced thereby.[1] Thus a landlord, in a sequestration for rent, attached cattle belonging to a grazier who had taken grass parks from the tenant on a sub-lease. The grazier had prepaid his rent to the tenant, but offered to consign his rent anew, and demanded an assignation of the hypothec. It was held that as he could not show that the landlord would not thereby be prejudiced, he was not entitled to an assignation.[2]

Hypothec where there is a sub-lease.

Where there is a sub-lease, the extent of the landlord's hypothec over the *invecta et illata* depends upon whether he has expressly or impliedly admitted the right of the principal tenant to grant the sub-lease. In the absence of any agreement to the contrary, an urban lease implies the right to sub-let.[3] The landlord has then a hypothec over the *invecta et illata* of the sub-tenant only to the extent of the rent due by him to the principal tenant, and under the condition of making a demand for it before it is paid to the principal tenant.[4] Where, however, sub-letting is forbidden in the lease, and the landlord has not in any way recognised the sub-tenant, it is probable, on the analogy of cases on agricultural hypothec, that the landlord has a hypothec over the *invecta et illata* of the sub-tenant, whether the latter has paid his rent to the principal tenant or not.[5] If the landlord is in use to accept the rent from the sub-tenant, he does not lose his recourse against the principal tenant by refraining from sequestrating the sub-tenant's effects: but if he does use sequestration, and then gives time to the sub-tenant, the principal tenant is freed from liability.[6]

A tenant who has granted a sub-lease has a right of hypothec over the *invecta et illata* of the sub-tenant for the rent due under the sub-lease.[7] And where, at the end of a lease, the landlord accepted as tenant a party who had held the subjects on a sub-lease, and had not paid his rent, it was held that sequestration used by the principal tenant for the rent due under the old sub-lease was preferable to sequestration used by the landlord for the

[1] *Stewart* v. *Stables*, *supra*; Guthrie, *supra*, per Lord President, at p. 111; Lord Mure, p. 112.

[2] *Stewart* v. *Stables*, 1878, 5 R. 1024.

[3] Bell, *Prin.* s. 1274.

[4] Bell, *Prin.* s. 1237; *Blane* v. *Morison*, 1785, M. 6232. Professor Rankine suggests that this is doubtful in cases where there is no express authority to sub-let—*Leases*, 2nd ed., p. 366.

[5] Bell, *Prin.* s. 1237; Rankine, *Leases*, 2nd ed., 365; *Countess of Traquair* v. *Cranston*, 1667, M. 6221; *Lord Salton* v. *Club*, 1700, M. 1821 and 6224.

[6] *Williamson* v. *Forbes*, 1830, 8 S. 405.

[7] Bell, *Com.* ii. 32; *Christie* v. *Macpherson*, 14 Dec. 1814, F. C.

first term's rent under the new lease.[1] But the principal tenant is not entitled to sequestrate the effects of the sub-tenant, in a question with the landlord, unless he pays or finds security for his own rent. Thus where a principal tenant, who had not paid his own rent, sequestrated the effects of the sub-tenant, and applied for a warrant for sale, an application by the landlord for an interdict against the sale was only refused on condition that the principal tenant found security for the payment of the whole rent due by him to the landlord.[2]

Hypothec in competition.

Ordinary creditors of tenant.

A landlord, in virtue of his hypothec, has a real right over the *invecta et illata*, and is thereby preferable to the diligence of ordinary creditors, even without the use of sequestration. Thus he is entitled to stop a poinding, unless sufficient goods are left to satisfy his claim, or caution is found for the rent.[3] And it is expressly provided in the Bankruptcy Act, 1856, that nothing in the Act shall affect the landlord's right of hypothec;[4] and therefore the sequestration of the tenant leaves the right of the landlord unaffected, and he may make good his right by sequestration under his hypothec in a question with the trustee.[5] But as a landlord has no hypothec for arrears of rent, he is, in regard to such arrears, on an equality with other creditors. Thus a landlord sequestrated the effects of a tenant whose rent was three years in arrear. By arrangement with the tenant the goods attached were sold by public roup, and produced more than enough to meet the rent of the current year. A creditor of the tenant arrested the price of the goods in the hands of the purchasers at the sale; and it was held that while the landlord was preferable for the current rent, he had no preference for the arrears, and that the arrestment was good against that part of his claim.[6] In the same way, a poinding on a personal debt was held to be preferable to the claim of the landlord for arrears of rent.[7]

Privileged debts.

Though the hypothec of a landlord gives him a preference over ordinary creditors using diligence, yet his right is postponed to certain privileged debts. Thus it is postponed to diligence at the instance of the Crown, if issued before the effects of the tenant are sold under a sequestration;[8] to the superior's hypothec

[1] *Christie* v. *Macpherson*, *supra*.

[2] *Stevenson* v. *Cooper*, 1822, 1 S. 312.

[3] *Philips* v. *Easson*, 1807, Hume, 228.

[4] 19 & 20 Vic. c. 79, s. 119.

[5] *Earl of Wemyss* v. *Hewat*, 1818, Hume, 233.

[6] *Young* v. *Welsh*, 1833, 12 S. 233.

[7] *Tulloch* v. *Willoughby D'Eresby*, 1834, 12 S. 754; 1835, 14 S. 198.

[8] Bell, *Prin.* s. 1277; *Ogilvie* v. *Wingate*, 1791, M. 6884, revd. 3 Pat. 273; *Robertson* v. *Jardine*, 1802, M. 7891.

for feu-duty;[1] and to the deathbed and funeral expenses of the tenant.[2] By the Preferential Payments in Bankruptcy Act, 1888,[3] it is declared that in a bankruptcy, or in the liquidation of a company, certain debts shall be paid in priority to all other debts. These debts include parochial and local rates for the last twelve months before the bankruptcy, assessed taxes, land-tax, property or income tax assessed on the bankrupt up to the fifth day of April preceding the bankruptcy, and not exceeding one year's assessment;[4] the wages of any clerk or servant in respect of services rendered to the bankrupt during four months before the bankruptcy, and not exceeding fifty pounds;[5] and the wages of any workman or labourer, not exceeding twenty-five pounds, whether payable for time or piece work, in respect of services rendered within two months of the bankruptcy.[6] By subsec. 4 of the same section (2) it is provided: "In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a company being wound up within three months next before the date of the receiving order or the winding-up order respectively, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. Provided, that in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom such payment is made." It has only recently been decided that this Act applies to Scotland.[7] Apart from this Statute, it has been held in the Sheriff Court that the landlord's hypothec, in the case of the bankruptcy of the tenant, is postponed to the claim of domestic servants, clerks, or shopmen for four months' wages, and not exceeding fifty pounds, and to the claims of workmen and labourers for two months' wages.[8] The question of the preference

[1] *Infra.*

[2] *Rowan* v. *Bar*, 1742, M. 11852 (undertaker); *Drysdale* v. *Kennedy*, 1835, 14 S. 159 (doctor).

[3] 51 & 52 Vic. c. 62, s. 2.

[4] *Ib.* subs. 1 (a).

[5] *Ib.* subs. 1 (b). [6] *Ib.* subs. 1 (c).

[7] *Liquidator of Scottish Poultry Journal Co.*, 1896, 4 S. L. T., No. 253 (Outer House, Lord Stormonth Darling). The terms used throughout the Act are English, and it is declared that the operative section (2) shall have effect as part of sec. 40 of the Bankruptcy Act, 1883 (which does not apply to Scotland). It is understood that conflicting decisions have been given in the Sheriff Courts.

[8] *Boag* v. *M'Laine's Tr.*, 1880, 24 J. of Juris. 163 (Sheriff Fraser); *Dobbie* v. *Thomson*, 1880, 7 R. 983, where the question was not considered in the Court of Session. This preference is statutory (38 & 39 Vict. c. 26, s. 3), but it is doubtful whether the landlord's hypothec is affected by the Statute; cf. Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 119, *ante*, p. 424.

of rates and taxes, apart from the Preferential Payments in Bankruptcy Act, seems more doubtful. In the Taxes Management Act, 1880, "the suit of the landlord for rent" is excepted from the provision declaring the general preference of the land and other assessed taxes to all private diligence or action;[1] and the Poor Law Act, 1845, declares that all remedies and provision enacted for collecting, levying, and recovering the land-tax and assessed taxes shall be applicable to the recovery of poor-rates.[2] But it is also declared by the Poor Law Act, that all assessments for the relief of the poor shall, in case of bankruptcy or insolvency, be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed; and similar provisions are contained in other rating Statutes. And in a case in which the question of preference between rates and private creditors was raised, the preference of the collector of rates was upheld in very general terms.[3] "We are not in the category of competing creditors at all. The property must pay the rates, no matter into whose hands it may happen to fall. The distinctions arising with reference to the preference of ordinary creditors have no bearing upon this case."[4]

Modes of enforcing hypothec.

The hypothec of the landlord confers upon him, as has been seen, a general preferential right over the *invecta et illata* of the tenant. In order to render this general right effectual, the landlord is entitled (*a*) to insist upon the subjects being retained on the premises, (*b*) to render his general security specific by the use of sequestration.

(1) Retention under hypothec.

The right to insist upon the *invecta et illata* being left on the premises is a necessary consequence of the right of hypothec, which otherwise might be rendered nugatory at the pleasure of the tenant.[5] It has been held to involve the right to prevent the removal of the subjects, by the use of interdict, and the right to bring them back, when actually removed. The extent to which these rights can be exercised depend upon whether the rent which it is sought to secure is merely current, or actually due and payable.

Where rent not due.

Where the rent is not yet payable, the landlord is entitled to

[1] 43 & 44 Vict. c. 19, s. 88.

[2] 8 & 9 Vict. c. 83, s. 88.

[3] *North British Prop. Invest. Co.* v. *Paterson*, 1888, 15 R. 885 (a question with a heritable creditor poinding the ground).

[4] L. J. C. Moncreiff in *North British Prop. Invest. Co.*, *supra*, at p. 589.

[5] See opinion of Lord Mackenzie in *Preston* v. *Gregor*, 1845, 7 D. 942, at p. 946.

have the whole *invecta et illata* retained on the premises, and it is no answer to his claim that enough has been left to satisfy the rent when it becomes due.[1] The reason for this rule, which seems more applicable to agricultural than to urban hypothec, is that as the landlord cannot make his security instantly available by hypothec, and as the amount left might deteriorate in value, he is not bound to submit to any deduction from his security.[2] But an offer of caution for the rent, interest, and penalties is a good answer to any proceeding by which the landlord proposes to exercise his right of hypothec.[3] It has been held that the right of the landlord to have the subjects of his hypothec retained on the premises is not affected by the fact that the tenant is perfectly solvent, and not in arrears with rent; and an application for interdict of a sale of the tenant's crop was granted when there was no allegation that the tenant was insolvent, or in debt to the landlord.[4]

Where rent due.

Where the rent is actually due, the landlord, as he may make his claim immediately effectual by sequestration, is only entitled to insist that sufficient shall be left on the premises to satisfy the claim for rent for the year. Thus in an action which sought to make a creditor, who had poinded and removed certain of the tenant's effects, liable for the rent as an intromitter, it was held to be a sufficient answer that the rent was due, and that enough had been left to satisfy it.[5] But where the rent is due, an offer of caution does not justify the removal of the whole *invecta et illata*, and the goods must either be left, or the rent paid.[6] It has already been stated that a third party who pays the rent is not, unless he is a cautioner, entitled to an assignation of the hypothec.[7]

Retention in question with tenant. Plenishing order.

The right of retention under hypothec may be considered in a question with the tenant, and in a question with third parties who have obtained an interest, by diligence or voluntary conveyance, in the effects subject to the hypothec. In a question with the tenant, the landlord has a right to have the subjects let furnished with suitable plenishing, varying according to the object for which the lease was granted. Thus in the case of a dwelling-house, the landlord may insist on the provision of suitable furniture; in the case of a shop, on the presence of some

[1] *Donald* v. *Leitch*, 1886, 13 R. 790.
[2] Ersk. ii. 6. 59.
[3] Hunter, *Landlord and Tenant*, 4th ed., ii. 391.
[4] *Preston* v. *Gregor*, 1845, 7 D. 942.
[5] *Rutherford* v. *Scott*, 1736, M. 6226.
[6] *Crawford* v. *Stewart*, 1737, M. 10531.
[7] *Ante*, p. 422.

stock in trade.[1] The obligation of the tenant to keep the premises plenished remains, even although the existing plenishing has been removed by the landlord under a sequestration for rent; and an order for plenishing may follow such a sequestration.[2] The obligation to keep the subjects plenished may be enforced by a plenishing order, which may be obtained in the Sheriff Court.[3] Such an order ordains the tenant to plenish the subjects, so as to afford security sufficient in value for the rent, at the sight of some party named, or, failing such plenishing, to find caution for the rent; and concludes for a warrant, on failure of the tenant to plenish or find caution, for his summary ejection, and for the removal of his furniture and effects to a place of safe custody, and for authority to the landlord to re-let the premises. It should be granted only for the rent covered by the hypothec, not for arrears of rent, or for a sum due under the lease as the hire of moveables.[4] The effect of such an order is not to put an end to the lease; and an opinion has been indicated that the tenant would be entitled to come forward at any time during the currency of the lease, and demand possession, on paying arrears and plenishing the house.[5]

Retention in questions with third parties.

In questions with third parties, the landlord may obtain interdict against the sale of the tenant's effects, or against their removal by a purchaser under a sale, or their sale by a creditor under a poinding. It is a sufficient answer, if the rent is not due, that caution is found for it; or if the rent is due, that enough has been left to meet it. Otherwise a purchaser or creditor removing the subjects renders himself liable for the rent as an intromitter, at least to the value of the effects removed.[6] This rule has been enforced against a contractor, who was employed by the tenant to remove furniture to an auction room, and was found liable for

[1] *Whitelaw* v. *Fulton*, 1871, 10 Macp. 27. The tenant was ordered to plenish the shop (a pawnbroker's), and to keep it aired and dry; but an order on him to open it and carry on business was refused.

[2] *Adam* v. *MacDougall*, 1828, 6 S. 978; *Macdonald* v. *Mackessack*, 1888, 16 R. 168.

[3] The case (if the rent is not above £50 per annum, 40 & 41 Vict. c. 50, s. 8) is within the jurisdiction of the Sheriff Court, even if the defences involve the consideration of the validity of the lease—*Robertson* v *Cockburn*, 1875, 3 R. 21; *Cunningham* v. *Black*, 1883, 10 R. 441. As to the competency of an appeal, where the rent sued for is under £25, see the latter case.

[4] *Wright* v. *Wightman*, 1875, 3 R. 68.

[5] *Wright* v. *Wightman*, *supra*, per Lord Justice Clerk (Moncreiff), at p. 70. But not, it is presumed, if the landlord had re-let the subjects.

[6] See *Miller* v. *Rankin*, 1881, Guthrie, *Sheriff Court Cases*, 2nd series, 276 (liability limited to value of subject); *Small* v. *Boyd*, 1877, Guthrie, *Sheriff Court Cases*, 1. 307.

its value.[1] And where the father in law of a widow, who was tenant of a farm, assisted her in removing and selling the whole stocking of the farm, and failed to answer a letter from the factor, asking if he was to be held responsible for the rent, it was held, in the circumstances, that he had rendered himself liable for the whole rent, although that was more than the amount produced by the sale.[2] And a purchaser of goods forming part of the *invecta et illata* from the tenant is liable, in a question with the landlord, to restore them or pay their value, unless they have been bought in bulk in open market, an exception which might be extended, in modern practice, to a sale by auction.[3] It is no defence that the purchaser acted in *bona fides*, and in ignorance of the landlord's claim, as the existence of the landlord's hypothec is part of the law of the land, with which everyone is presumed to be acquainted, and the purchaser, in dealing with a tenant, is bound to inquire whether the rent is paid or not. But the law does not go the length of attaching a *vitium reale* to goods subjected to the hypothec, and therefore the landlord has no claim against *bonâ fide* sub-purchasers of goods removed from the premises.[4]

Right of landlord to have *invecta et illata* brought back.

It is a corollary of the right of the landlord to retain the *invecta et illata* on the premises, that he is entitled, in extreme cases, to have them brought back when removed. In the case where the tenant has himself removed them, they may be brought back on a summary warrant from the Sheriff; but if they have been actually taken away by a creditor under a poinding, or by a purchaser, the landlord must proceed by an ordinary action for the restoration of the goods, or the payment of their value.[5] Where the effects are brought back on a warrant from the Sheriff, the application is usually combined with an application for sequestration; and the warrant grants authority to search for and carry back the goods to the house from which they were removed, there to be sequestrated, inventoried, and secured. This warrant is obtained on *ex parte* statement, and was usually granted as a matter of course. But it has been observed in recent cases that

[1] *Pullar* v. *Thomson*, 1880, Guthrie, *Sheriff Court Cases*, 2nd series, 279.

[2] *Stewart* v. *Peddie*, 1874, 2 R. 94.

[3] *Cooper* v. *Bone*, 1823, 2 S. 598; in *Barns* v. *Allan*, 1864, 2 Macp. 1119, it was held that oats remained subject to hypothec when converted into meal, and that a miller, buying meal in his own shop, in disregard of hypothec, must pay the price over again to the landlord. *Bonâ fide* purchasers of agricultural produce were protected by 30 & 31 Vict. c. 42, but its provisions do not apply to *invecta et illata*.

[4] Hunter, *Landlord and Tenant*, 4th ed., ii. 398.

[5] Hunter, *Landlord and Tenant*, 4th ed., ii. 414; *Currie* v. *Crawford*, 1745, M. 6206.

this is an extreme remedy on the part of a landlord, and that the Sheriff should not grant a warrant on a bare statement that the effects have been removed, without any facts stated to show that the removal has taken place clandestinely, or with the intention of disappointing the landlord's claim for rent.[1] But it is not necessary, and in practice is not usual, to give notice of the application to the tenant, as in many cases such notice would simply be a warning to him to remove the goods out of the landlord's reach.[2] The warrant to carry back goods is granted *periculo petentis*, and the landlord is liable in damages if the application is unnecessary, or the mode of carrying out the warrant oppressive. This will be considered in dealing with the liability of the landlord for wrongous use of sequestration.

Criminal liability of tenant concealing goods.

A tenant who removes and conceals his effects from the diligence of the landlord and his other creditors may in certain cases be guilty of a criminal offence. By the Debtors (Scotland) Act, 1880, it is provided that the debtor in a process of sequestration or cessio shall in certain cases be guilty of a criminal offence, unless he satisfies the Court that he had no intention to defraud. One of these cases is "if after the presentation for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property."[3] This provision, of course, refers to sequestration in bankruptcy, and not the sequestration by a landlord under his hypothec; but where it is necessary for a landlord to recover furniture or other effects removed from a house, the tenant is usually within four months of bankruptcy. The Act does not apply to a person aiding the debtor to conceal his effects;[4] but such party, as well as the tenant, is criminally responsible at common law for concealing the effects in order to disappoint the hypothec of the landlord.[5]

Landlord's sequestration.

The general security afforded by hypothec is converted into an attachment of specific subjects by the use of sequestration. This diligence is exclusively the right of a party who is invested with the hypothec of a landlord, and is not competent for debts which the hypothec does not cover. It may be used (*a*) for rent while only current, and not yet payable, and (*b*) for rent actually due,

[1] *Johnston* v. *Young*, 1890, 18 R. (J. C.) 6; *Gray* v. *Weir*, 1891, 19 R. 25.

[2] *M'Laughlan* v. *Reilly*, 1892, 20 R. 41.

[3] 43 & 44 Vict. c. 34, s. 13; *Robertsons* v. *Caird*, *infra*; Macdonald, *Criminal Law*, 3rd ed., p. 98.

[4] *Robertsons* v. *Caird*, 1885, 13 R. (J. C.) 1.

[5] *M'Alister* v. *Orr*, 1822, 1 S. 339; *M'Donell* v. *Cameron*, 1824, 3 S. 131; Macdonald, *Criminal Law*, 3rd. ed., 3.

within three months of its becoming payable.[1] These processes are commonly conjoined, and sequestration is applied for to meet the rent actually due, and in security of the rent about to become due. But each may be used separately.

Sequestration *currente termino*.

A sequestration for rent *currente termino*, that is, when it is not actually due, is not granted as a matter of course, but requires cause shown.[2] The ordinary reason for its adoption is that the tenant is displenishing, or has deserted, the subjects.[3] Its adoption is regarded as a very severe measure on the part of the landlord; and it has been held that if the rent is punctually paid on its becoming due, the landlord must pay the expense of the sequestration.[4] And in the case of sequestration of the *invecta et illata* in urban subjects, the articles sequestrated cannot be sold until the term of payment has arrived.[5]

When rent due.

Where the rent is actually due, an application for sequestration is granted as a matter of course in the Sheriff Court. If the term's rent claimed is under £12, it may be obtained in the Small Debt Court,[6] without regard to the annual value or rental of the subjects.[7] But the right to sequestrate expires, with regard to each year's rent, three months after the last term of payment; though if sequestration is used within three months, it may be carried out by a sale of the effects after that period, and the only limit is then the expiry of such a period as may be held to infer abandonment.[8] It is not proposed here to enter into the procedure in actions of sequestration for rent, and for this the reader is referred to the works noted below.[9]

Recall of sequestration.

Sequestration for rent actually due will be recalled on caution being found for the rent, or if any adequate defence is stated by the tenant. Such a defence very frequently is that he has a right to retain his rent in security of a claim of damages against the landlord for breach of a condition of the lease, or that rent is not due because he has never obtained possession of the subjects let. The cases in which such defences are competent will be found in the chapter on Retention.[10] Sequestration may also be recalled

[1] Bell, *Com.* ii. 33.

[2] *Duffy* v. *Gray*, 1858, 20 D. 580, per Lord President at p. 588, Lord Curriehill, p. 591.

[3] The circumstances which justify it may be seen in *M'Laughlan* v. *Reilly*, 1892, 20 R. 41.

[4] *Gordon* v. *Suttie*, 1836, 14 S. 954.

[5] *Wells* v. *Proudfoot*, 1800, Hume, 225; *Duffy* v. *Gray*, 1858, 20 D. 580.

[6] 1 Vict. c. 41, s. 5, and 16 & 17 Vict. c. 80, s. 26.

[7] Lees, *Small Debt Act*, p. 37.

[8] *Ante*, p. 417.

[9] Dove Wilson, *Sheriff Court Practice*, 4th ed., 486; Rankine, *Leases*, 2nd ed., 369; Lees, *Sheriff Court Styles*, 3rd ed., 378.

[10] *Ante*, pp. 308–312.

at the instance of a third party, if he proves that goods belonging to him, and not subject to the hypothec, have been sequestrated. The proper course for such a third party is to appear in the sequestration, and not to apply for interdict against the landlord selling the goods under the sequestration.[1]

Interdict against sequestration.

Where, however, sequestration is threatened, and the tenant thinks he has a good ground of defence, he is not bound to wait until the sequestration is actually awarded, and his credit thereby injured. He is entitled to protect himself by an application for interdict against the landlord using sequestration.[2] The application may be presented in the Sheriff Court, or in the Court of Session.[3] Interdict may be granted on caution being found for the rent and expenses, or on consignation.[4] Or the tenant may lodge a caveat with the Clerk of Court, requiring that sequestration be not awarded until he has had an opportunity of being heard, in which case he will be allowed to show cause why it should not be awarded, or to find caution for the rent.

On sequestration, the goods are *in manibus curiæ*.

When sequestration is carried out without recall, the effects are inventoried by an officer of Court, in presence of a witness, and this inventory is the only competent evidence of what is included in the sequestration.[5] The articles included in the inventory are held to be *in manibus curiæ*, and any unwarrantable intromission with them is a contempt of Court.[6] The tenant has no right to use the effects which have been sequestrated without judicial authority; but this rule is not inflexible, and may yield to circumstances which make it reasonable for him to do so. Thus where horses and oats were sequestrated, it was held that the tenant had not committed a breach of sequestration by using the oats to feed the horses.[7] Breach of sequestration committed by the tenant—as, for instance, where he removes or sells the goods sequestrated—subjects him to summary imprisonment by the Sheriff until he restores the goods or finds caution for the rent.[8] Where breach of sequestration is committed by a third party, in full knowledge of the fact that it has been granted, he would

[1] *Lindsay* (*Christie's Tr.*) v. *Earl of Wemyss*, 1872, 10 Macp. 708; *M'Kechnie* v. *Duke of Montrose*, 1853, 15 D. 623.

[2] Hunter, *Landlord and Tenant*, 4th ed., ii. 428.

[3] *Gray* v. *Renton*, 1840, 3 D. 203.

[4] *Gray* v. *Renton*, *supra*; *Clark* v. *Duncan*, 1833, 12 S. 158.

[5] *Horsburgh* v. *Morton*, 1825, 3 S. 596; cf. *Lamb* v. *Grant*, 1874, 11 S. L. R. 672.

[6] Bell, *Prin.* s. 1244.

[7] *Millar* v. *Paterson*, 1831, 9 S. 792; *Gordon* v. *Suttie*, 1836, 14 S. 954; and see *Kippen* v. *Oppenheim*, 1846, 8 D. 957.

[8] *Love* v. *Foster*, 1832, 11 S. 280; *Goldie* v. *Oswald*, 1839, 1 D. 426.

seem liable to similar imprisonment. In ordinary cases the penalty exacted is the restoration of the goods, or payment of their value, with expenses and damages for any loss sustained by the landlord. But he would seem also to be liable to pay the whole rent. Thus where a creditor poinded goods without being aware of the sequestration, and sold them after he had received intimation of it, it was held that he was liable to the landlord in the appraised value of the goods, which was more than they produced when sold; and an opinion was expressed by Lord Deas that he was probably liable for the whole rent.[1] But where a landlord used sequestration, and then, instead of obtaining a warrant for sale, made an arrangement whereby the tenant was to sell the goods and account to him for the proceeds, it was held that goods sold under this arrangement were sold with the landlord's authority, and that he was not entitled, on the failure of the tenant to account for the price, to revert to the sequestration, and refuse to deliver the subjects sold to the purchaser.[2] And the landlord is not entitled, after sequestrating the tenant's effects, to use them in carrying on the business in which they were employed by the tenant.[3]

Forum in case of breach of sequestration.

The Sheriff Court in which the sequestration was granted is the proper tribunal to which application should be made in the case of breach of sequestration;[4] and such an application in the Court of Session has been held incompetent.[5] But on an application for liberation from prison by a bankrupt, the Court of Session incidentally took notice of breach of sequestration, and in consequence refused the application.[6]

Sale.

A sequestration may be followed by a sale of the sequestrated effects, which takes place on a warrant from the Sheriff, and is carried out at the sight of the Clerk of Court, or other officer appointed by the Sheriff. By Act of Sederunt an account must be lodged within fourteen days of the sale, showing the amount received, the expenses incurred, the debt due by the defender, and the difference between that debt and the proceeds of the sale.[7] Out of the proceeds of the sale the landlord is entitled to his rent and expenses, and the balance, if any, is paid to the tenant. But the balance may be attached by the diligence of the landlord, for

[1] *Jack* v. *M'Caig*, 1880, 7 R. 465.

[2] *Mackenzie* v. *Lord Lovat*, 1883, 20 S. L. R. 694.

[3] *Lindsay* (*Christie's Tr.*) v. *Earl of Wemyss*, 1872, 10 Macp. 708.

[4] *M'Kechnie* v. *Duke of Montrose*, 1853, 15 D. 623.

[5] *Monro* v. *Robertson's Trs.*, 1834, 12 S. 788.

[6] *Muir* v. *Downie*, 1839, 2 D. 166.

[7] A. S., 11 July 1839, s. 150.

debts not covered by the hypothec, or by the diligence of the other creditors of the tenant.[1]

Register of sequestrations.

By the Hypothec Amendment (Scotland) Act, 1867, it is provided that a register of sequestrations for rent shall be kept, and that an entry of every sequestration shall be made in it, showing the name of the tenant and the subjects, a description of the subjects as urban or rural, the date of the sequestration, and the date at which the rent becomes due, the rent for which sequestration is granted, and the name of the landlord or other person taking it out. The register is open to the inspection of any person on payment of a fee of one shilling.[2]

Liability of landlord for improper use of sequestration.

In the exercise of his right to have goods which have been removed restored, and of his right to sequestrate, the landlord incurs liability in damages if he acts without a proper title, or without due necessity, or if he carries out his sequestration in an irregular or oppressive manner. A warrant to carry goods back, and a warrant to sequestrate, are not granted as a matter of course, on mere application, but on an *ex parte* statement of the facts which render them necessary. And a party who makes use of diligence or other process which is obtained in this manner is answerable for the truth of the statements which he makes, and on which he obtains his warrant, and, if the statement was untrue in fact, is liable for the consequences, although he made it in perfect good faith.[3] And even though the statements made are true, the landlord is liable in damages, if the sequestration, especially in cases where it was used in security, was unwarrantable.[4] Thus where the tenant removed his furniture to a new house which he had taken, and this removal was carried out openly and with the previous knowledge of the landlord, and he nevertheless brought the furniture back under a warrant to sequestrate before the rent was payable, it was held that the tenant was entitled to damages, though the statement upon which the warrant was obtained, being merely that the tenant had removed his furniture without finding security for the rent, was true in fact.[5] Where, however, the removal was carried out secretly at night, and without the knowledge of the landlord, it was held

[1] *Earl of Morton* v. *Somerville*, 1765, M. 6197; *M'Farlane* v. *Forrester*, 1823, 2 S. 505; cf. *Young* v. *Welsh*, 1833, 12 S. 233.

[2] 30 & 31 Vict. c. 42, s. 7, and Schedule.

[3] See opinion of Lord Justice Clerk Inglis in *Wolthekker* v. *Northern Agricultural Co.*, 1862, 1 Macp. 211, at p. 213.

[4] *Oswald* v. *Graeme*, 1851, 13 D. 1229; *Watson* v. *M'Culloch*, 1878, 5 R. 843; *Johnston* v. *Young*, 1890, 18 R. (J. C.) 6; *Gray* v. *Weir*, 1891, 19 R. 25.

[5] *Gray* v. *Weir*, 1891, 19 R. 25.

that a warrant to bring the furniture back was justified, even although the rent was not due.[1] Each case must rest on its own circumstances; and it is for the jury, or for the Court acting as a jury, to decide whether the proceedings of the landlord were justified. Where, however, sequestration is granted in the Small Debt Court, it is incompetent to bring an action of damages for irregularities before decree, because decrees in that Court are not open to review; and to allow an action of damages would merely open a review in another form.[2] But any irregularity or oppressive conduct in the execution of the decree may be the subject of an action, as the finality which attaches to Small Debt decrees does not extend to the execution which follows upon them.[3]

Liability for nimious procedure.

Even where the sequestration was in itself justifiable, the landlord will be liable in damages for any irregularities in the method of carrying it out.[4] It has been questioned, but not decided, whether he is liable for oppressive or illegal conduct on the part of the auctioneer, or other party appointed by the Court to carry out the sale of the sequestrated effects.[5] The mere fact that more has been sold than was necessary will not entitle the tenant to damages, but gross over-sequestration, or a sale in such circumstances as to prevent the goods fetching a fair price, would infer liability.[6] It is not necessary to reduce the diligence in order to entitle the tenant to insist for damages, as a sequestration may be perfectly legal, and yet may be carried out in a manner so oppressive as to subject the landlord to liability for damages.[7]

Form of action of damages.

An action of damages for wrongous sequestration usually concludes for the amount of loss the tenant has suffered thereby, and for a further sum as solatium for the injury to the tenant's feelings and reputation. It is not necessary to aver that the landlord acted maliciously or without probable cause, as a landlord who uses sequestration for his rent is bound to show that his diligence was justified, and it is sufficient if the tenant aver that the sequestration, or the manner of carrying it out, was wrongful.[8] In a case where it was averred that the landlord sold a much greater amount than was necessary, and also sold under circum-

[1] *M'Laughlan* v. *Reilly*, 1892, 20 R. 41.

[2] *Crombie* v. *M'Ewan*, 1861, 23 D. 333; *Gray* v. *Smart*, 1892, 19 R. 692.

[3] *Gray* v. *Smart*, *supra*.

[4] *Wells* v. *Proudfoot*, 1800, Hume, 225; *Cargill* v. *Baxter*, 1829, 7 S. 662.

[5] *Robertson* v. *Galbraith*, *infra*.

[6] *Robertson* v. *Galbraith*, 1857, 19 D. 1016.

[7] *M'Leod* v. *M'Leod*, 1829, 7 S. 396.

[8] *Watson* v. *M'Culloch*, 1878, 5 R. 843.

stances which precluded a fair price being obtained, a general issue was granted: "Whether the defender, in selling part of the sequestrated effects under the said warrant, did illegally and oppressively sell the same, in disregard of the interests of the pursuer, and in a manner to produce loss, injury, and damage to the pursuer?"[1]

SEC. IV. HYHOTHEC OF SUPERIOR

Hypothec of superior.

A superior has a hypothec for his feu-duties, extending over the crop and stocking in agricultural, and the *invecta et illata* in urban subjects. This hypothec, well-established on the authority of the institutional writers,[2] is rarely if ever put in force, and is very sparsely illustrated by decisions. It confers on the superior a right similar, but preferable to, the hypothec of a landlord, and may be put in force by the sequestration of the crop and stocking, or the *invecta et illata*, according as the subject is agricultural or urban.[3] The Hypothec Abolition Act, 1880,[4] dealing only with the hypothec of a landlord, does not restrict the hypothec of a superior over agricultural subjects. But it would appear that there is only one case in which its exercise came before the Court.[5] There urban subjects were feued for a *cumulo* sum, partly feu-duty, partly interest on a loan by the superior to the vassal. The vassal was sequestrated, while there was on the premises a large quantity of material and tools for repairing certain houses, which he was under contract to finish. Yuille, the owner of these houses, purchased the material from the trustee, proceeded with the work, and ultimately removed most of the tools and material. The superior applied to the Sheriff for a warrant to bring them back, as subject to his hypothec. Some doubts were entertained on the Bench as to the application of the hypothec to that part of the feu-duty which was really the interest on a loan, but the Court was unanimous in holding that the superior had a hypothec over the *invecta et illata*, and that the sale by the trustee to Yuille was not sufficient to prevent the tools and material from falling under it.[6] The fact that the hypothec of a superior is rarely resorted to is probably due to the right of the

[1] *Robertson* v. *Galbraith*, 1857, 19 D. 1016.

[2] Stair, ii. 4. 7; Mackenzie, ii. 6. 12; Ersk. ii. 6. 63; Bell, *Prin.* s. 698; *Com.* ii. 26. It is questioned in Ross's *Lectures*, ii. 392 *et seq.*

[3] Erskine and Bell, *supra.*

[4] 43 Vict. c. 12, *ante*, p. 416.

[5] *Yuille* v. *Laurie*, 1823, 2 S. 155.

[6] *Yuille* v. *Laurie*, *supra.*

superior, as a holder of a *debitum fundi*, to poind the ground, and thus secure a preference over the moveables, without resorting to sequestration under his hypothec.[1]

Rights of superior over rents.

A superior is not entitled to enter into possession of the feu, and is not therefore entitled to bring an action of maills and duties against the tenants of the vassal, who have no direct relation or liability to him.[2] Where, however, the rents due by the tenants are unpaid, the superior, by attaching the tenants' effects under a poinding of the ground, may compel them to apply the rents to pay the feu-duty as a condition of loosing the poinding.[3] And the tenants, as intromitters with the fruits of the subjects, are liable to pay the feu-duties which have become due during the period of their intromission or occupancy, but are not liable for those which accrued before their intromissions with the subjects commenced.[4] It is assumed that *bonâ fide* payment of rent to the landlord would be a good answer to any claim by the superior, and it has been questioned, but not decided, whether, in a question with the superior, the tenant could plead compensation on a debt due to him by the landlord.[5]

SEC. V. MARITIME HYPOTHECS

Nature of maritime hypothecs or liens.

There are certain recognised maritime hypothecs which afford to particular creditors a real right over a ship without possession, resulting in a preference on the price of the ship when sold under diligence or in bankruptcy. Hypothecs of this class are usually known in English law as maritime liens. They extend only over ships belonging to private individuals or firms; not over ships of war, or unarmed ships belonging to, and in the service of, a foreign Government.[6]

Hypothec for collision.

In a recent case, the maritime lien or hypothec for collision came under the consideration of the Court of Session, and opinions were expressed, though it was unnecessary to decide the point, that this hypothec was not recognised by the law of Scotland.[7] But, on this case being appealed to the House of Lords, although the judgment below was affirmed on the particular

[1] Bell, *Prin.* s. 699, *ante*, p. 102.

[2] *Prudential Insur. Co.* v. *Cheyne*, 1884, 11 R. 871.

[3] See opinion of Lord Young in *Prudential Insur. Co.*, at p. 877.

[4] *Rollo* v. *Murray*, 1629, M. 4185; *Cockburn* v. *Trotter*, 1639, M. 4187; *Hamilton* v. *Burleigh*, 1712, M. 4189. Opinion of Lord Rutherfurd Clark in *Prudential Insur. Co.*, *supra*, at p. 879.

[5] *Biggar* v. *Scott*, 1738, M. 4191.

[6] *The Parlement Belge*, 1880, 5 P. D. 197.

[7] *M'Knight* v. *Currie*, 1895, 22 R. 607; affd. 1896, 34 S. L. K. 93.

facts, it was laid down that a maritime lien for collision was a part of the law of Scotland, and that the English decisions in cases of maritime lien were authoritative in Scotland. In view, however, of the fact that the decisions on maritime lien or hypothec for collision are all English, and that the subject is exhaustively treated in the treatises noted below,[1] it has been thought unnecessary to deal with it here.

Hypothec of seamen and master.

In England seamen have a hypothec over the ship to the last plank for their wages.[2] In Scotland the cases (of very early date) recognise a hypothec over the freight,[3] and a *jus retinendi et insistendi*, or right of retention dependent on possession, over the ship, but expressly negative any hypothec over the ship itself.[4] But in Bell's *Commentaries* the opinion is expressed that a hypothec over the ship exists, and would be recognised in a modern case.[5] The master has, in England, a hypothec or maritime lien for his wages, even although he is a part owner.[6] It was held that at common law he had no hypothec for his disbursements;[7] but this was remedied by Statute.[8] And, by the Merchant Shipping Act, 1894, a master has the same rights, liens, and remedies for his wages and disbursements as a seaman.[9]

Hypothec for salvage.

A maritime lien is allowed in England for salvage,[10] which is also secured by a possessory lien and by statutory provisions.[11] There would appear to be no authority in Scotland as to a hypothec for salvage, except a statement by the editor of Bell's *Principles*.[12] There is no maritime lien for towage.[13]

Hypothec for repairs.

A hypothec for repairs and for necessaries in a foreign port is recognised.[14] After conflicting decisions, it was finally held that there was no similar hypothec for repairs or necessaries in a home

[1] Abbott on *Shipping*, 13th ed., p. 868 *et seq.*; Maclachlan on *Shipping*, 4th ed., p. 334; Maude & Pollock, *Merchant Shipping*, 4th ed., i. 619; Marsden, *Collisions at Sea*, 3rd ed., pp. 78–88.

[2] Abbott on *Shipping*, 13th ed., p. 821; Maclachlan on *Shipping*, 4th ed., p. 254.

[3] Ersk. iii. 1. 34.

[4] *Seamen of "Golden Star"* v. *Miln*, 1682, M. 6259; *Sands* v. *Scott*, 1708, M. 6261.

[5] Bell, *Com.* i. 562.

[6] *The Feronia*, 1868, L. R. 2 Ad. 65.

[7] *The Sara*, 1889, 14 App. Cas. 209.

[8] 52 & 53 Vict. c. 46, s. 1.

[9] 57 & 58 Vict. c. 60, s. 167.

[10] Maclachlan on *Shipping*, 4th ed., p. 668.

[11] Abbott on *Shipping*, 13th ed., p. 717; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 547 *et seq.*).

[12] Sec. 1397. As to lien, see *ante*, p. 351.

[13] *Westrup* v. *Great Yarmouth Co.*, 1889, 43 Ch. Div. 241.

[14] Bell, *Prin.* s. 1398.

port.[1] The law of England is to the same effect.[2] And there is no hypothec or maritime lien for necessaries supplied to a foreign ship at a home port.[3]

Other hypothecs.

A hypothec over the ship in favour of freighters, for damage done to the cargo, and a hypothec for general average, are mentioned in Bell's *Commentaries*, but there is no instance of their exercise.[4]

Maritime hypothecs in competition.

A maritime hypothec is a real right over the ship, and therefore, if put in force within reasonable time, is a burden on the ship in the hands of a purchaser, and is preferable to a mortgage.[5] In a competition between maritime hypothecs, the hypothec of seamen for their wages gives a universal preference, except against a claim on the ground of damages caused by a collision.[6] In a question with a ship carpenter, claiming a lien over the ship for repairs, and founding upon possession,[7] the English rule is that he is postponed to any hypothec which existed over the ship at the time when she was put into his hands for repairs.[8]

[1] *Hamilton* v. *Wood*, 1788, M. 6269; affd. 1789, 3 Pat. 148. Ports in Great Britain, Ireland, the Isle of Man, and the Channel Islands are home ports—19 & 20 Vict. c. 60, s. 18.

[2] Abbott on *Shipping*, 13th ed., 142.

[3] *The Henrich Bjorn*, 1886, 11 App. Cas. 270.

[4] Bell, *Com.* ii. 38. 9.

[5] *Harmer* v. *Bell* (*The Bold Buccleugh*), 1851, 7 Moo. P. C. C. 267.

[6] Abbott on *Shipping*, 13th ed., pp. 872, 874.

[7] As to lien, see *ante*, pp. 342, 357.

[8] *The Gustaf*, 1862, Lush. 506; *The Immacolata Concezione*, 1883, 9 P. D. 37; Abbott, p. 886; Maclachlan, p. 741.

CHAPTER XIII

RIGHTS IN SECURITY OVER INCORPOREAL MOVEABLES

Assignable rights.
Non-assignable rights.
(1) Alimentary.
(2) Involving *delectus personæ*.
Assignation of rights in partnership.
Assignation of contracts.
Assignation of goodwill.

RIGHTS, ASSIGNABLE AND NON-ASSIGNABLE

Incorporeal moveables as security for debt.

PASSING from the subject of corporeal moveables, we come to the consideration of incorporeal moveable property as a subject of security for debt. In the list of incorporeal moveables are comprised all those things capable of being held in property which are, from their nature, not tangible, and which fall outside the category of heritage. "Incorporeal rights," says Professor Bell,[1] "comprehend all *jura ad res*, the *jus exigendi* in all obligations; and, although incapable in one sense of possession, they are vested by the completion of the *jus exigendi*, and form, when so vested, a part of the moveable or personal estate." The owner of a *jus crediti*, no less than the owner of a tangible or corporeal moveable, may use his property as a security for debt. Incorporeal moveables, having no concrete existence, are incapable of being delivered *in corpore* to a creditor in security; but in place of a change of physical possession, the owner of an incorporeal moveable may by contract assign or transfer his right to another, who thus becomes entitled to stand in the place, and exercise the rights, of the original owner.

The kinds of incorporeal rights commonly made use of as securities comprise the following: Debts or the rights of creditors in obligations, whether such rights have vested or are only future and contingent; rights under decrees; shares or interests in the profits of private firms, and shares or stock of public companies; funds in the public debt of this or other countries; the goodwill of a business; trade marks, patents, and copyrights; policies of life assurance; rights under leases; liferent

[1] *Prin.* s. 1338.

and reversionary interests, present or future, in trust or other estates, with or without a policy of assurance on the life of the borrower; rights arising under onerous contracts; rights to recover pecuniary damage for non-performance of contractual obligations; and the stipends or salaries attached to offices, in so far as they are in excess of what is necessary for the holder's support and the due performance of his duties. This is by no means an exhaustive enumeration of the different forms of incorporeal moveable property which may be used in the way of security; but it will serve to indicate at the outset the kind of subjects which fall within the scope of the discussion in the following chapters.

Assignation of rights not yet acquired by the cedent.

While a debt which has been extinguished, before the date of assignation cannot be effectually assigned,[1] it is quite settled, both in Scotland and England, that a future right, which is neither vested nor exigible at the date of assignation, is none the less capable of being legally alienated, to the effect of giving a good title to the assignee when the right comes to be vested. An expectant, who grants a conveyance of a right which he hopes to acquire, actually conveys at the time no more than a mere chance—his chance of becoming proprietor of the subject in question. "The conveyance becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest."[2] At the same time, express assignations of expectancies, or rights which at the date of assignation were still *in spe*, are recognised as effectual, when duly intimated, to put the assignee in the place of the cedent, and give him a claim to payment when the period of payment arrives.[3] So in England all that is necessary to make an assignment of a future *chose in action* effectual is that the

[1] *Jackson* v. *Nicoll*, 1870, 8 Macp. 408.

[2] Per Lord Rutherfurd Clark in *Reid* v. *Morrison*, 1893, 20 R. 510, at 514.

[3] *Carter* v. *M'Intosh*, 1862, 24 D. 925; *Kirkland* v. *Kirkland's Tr.*, 1886, 13 R. 798. It is to be observed that the right of expectancy or *spes successionis*, though it can be validly assigned, is not attachable by the diligence of the creditors of the person in expectancy, and is not carried to the trustee in his sequestration, if the bankrupt is discharged before the right in question is vested in him—*Trappes* v. *Meredith*, 1871, 10 M. 38. Further, it is now settled that a *spes successionis* which a bankrupt may have under the settlement of a deceased testator is not an "eventual right" which he can be called upon, under sec. 81 of the Bankruptcy Act, 1856, to assign to his trustee; though it is still an open question whether the assignation of such a *spes* may be made a condition of granting the bankrupt's discharge—*Reid* v. *Morrison*, 1893, 20 R. 510.

chose in action, on its coming into existence, shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or one of the very things, assigned.[1] For example, in *Tailby* v. *Official Receiver*,[2] in which case all the earlier English authorities were fully reviewed, the question was whether an assignment of "all the book debts due and owing, or which might, during the continuance of the security, become due or owing to" A., was effectual to give the assignee a good title to book debts, not existing at the date of the assignment, when they became due to A. In spite of the wide and general terms of the assignment, and although the actual subjects conveyed were clearly incapable of being identified at the time of the assignment, it was held that the assignment was valid, and carried the subject-matter of the contract to the assignee, from the time of its coming into existence. Similarly, an assignment of "all moneys then or thereafter standing at the credit of" the assignor at a bank, was found effectual to carry his balance with the bank at the date of his death, which amounted to £217, and not merely the balance existing at the date of the assignment, which amounted only to £48.[3] In short, the result of the English authorities is that future property, possibilities, and expectancies, however speculative and visionary, may be the subject of a present and immediate assignment,—the one condition being that they be so described in the instrument of assignment as to be capable of identification on coming into existence.

Not only may an expectancy be expressly assigned, but it may be included in and carried by a general conveyance of the cedent's whole estate, if the words of the conveyance show that such was the intention of the party. A common instance of a general conveyance of estate, including property not yet acquired by the granter, is found in provisions in marriage settlements, whereby future acquired property of the parties is settled.[4] It has never been doubted that a conveyance, for example, of *acquisita et acquirenda* to marriage-contract trustees carries, as between the granters and the grantees of the deed, not only everything which the granter possesses at the date of the contract, but also everything which he may acquire during the period of the marriage, as soon as such property comes into

[1] Per Lord Watson in *Tailby* v. *Official Receiver*, 1888, 13 App. Cas. 523. As to what is included in "book debts," see *Alexander* v. *Alexander*, 1896, 23 R. 724.

[2] 1888, 13 App. Cas. 533.

[3] *Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 511.

[4] The conveyance of *acquirenda* to trustees is in practice confined to the wife's estate.

existence.[1] A *spes successionis* belonging to a husband at the date of his marriage contract has even been held to be carried by a conveyance to the marriage-contract trustees "of property now belonging to him," as it appeared from other parts of the deed that he intended to include it.[2]

Difficulty in making an assignation of a right not yet acquired effectual by intimation.

In assignations of rights which have no present existence, considerable difficulty inevitably arises in the proper completion of the assignee's right by intimation to the debtor; for, till the actual emergence of the right, no one can properly be said to hold the place of debtor to the cedent. Even in an assignation of expectancies contained in a marriage contract, it is frequently found a matter of difficulty to give such intimation as is necessary to effectually protect property to which the cedent becomes entitled *stante matrimonio*.[3] This practical difficulty in making an assignation of an expectancy effectual to give the assignee a real right in, and preference over, the future subject assigned, probably explains the statement made by Bell in his *Commentaries*, that "a legacy is not capable of assignation during the testator's life."[4] The authority relied on by Bell for this doctrine is *Bedwells and Yates* v. *Tod*.[5] In this case the subject of assignation was a legacy, bequeathed in the will of a person still alive at the date of the assignation; and all that was held by the Court was that, although intimation was made to the person named executor in the will, during the life of the testator, the assignee could not compete with a creditor of the legatee who had used arrestments in the executor's hands, after the death of the testator. In other words, the point at issue in the case simply was as to which right was first made effectual by intimation, and not as to the validity or nullity of the assignation itself.

Non-assignable rights are of two classes: (1) alimentary; (2) containing an element of *delectus personæ*.

Rights which are incapable of being the subject of a valid assignation may be divided into two classes. The first class comprises those rights which are alimentary, either from their nature or from the fact that an alimentary character has been effectually impressed upon them by particular destination; the second class comprises those rights which are so strictly personal that they cannot be validly transferred by one person to another,

[1] Per Lord Kinnear in *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121; *Simson's Trs.* v. *Brown*, 1890, 17 R. 581; *Douglas' Trs.* v. *Kay's Trs.*, 1879, 7 R. 295.

[2] *Wyllie's Trs.* v. *Boyd*, 1894, 18 R. 1121.

[3] See, for example, *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078; cf. *Rutter* v. *Everett* [1895], 2 Ch. 872.

[4] Bell, *Com.* (M'L. ed.) ii. p. 16.

[5] 2 Dec. 1819, F. C.

or, in other words, into which the element of *delectus personæ* enters.

Alimentary rights.

Rights of an alimentary character, being specially protected by law, are not assignable in advance; and a deed assigning funds of this description is void. Thus in *Rennie* v. *Ritchie*,[1] a deed, whereby a married woman assigned, as security for the repayment of money paid at her request to her husband, a fund which was vested in trustees for her alimentary use, and which was declared not to be attachable or assignable, was found to be void. Further, compensation cannot be pleaded against a demand for the payment of alimentary funds; and such funds are not attachable by creditors either by arrestment or in sequestration. In determining what funds are, and what funds are not, assignable in virtue of their alimentary character, decisions on questions as to the competency of compensation and arrestment are almost equally useful with those in which the question of assignability was directly in issue; for in all these classes of cases the line of demarcation between alimentary and non-alimentary rights is practically identical.

Funds alimentary from their nature.

A fund may be alimentary from its nature or on the ground of public policy. Thus, at common law, the wages of labourers are not arrestable or capable of being effectually assigned in advance, except in so far as they exceed what is necessary for aliment. By the Wages Arrestment Limitation Act, 1870,[2] the limit, below which the wages of labourers and workmen are regarded as being necessary for subsistence, is fixed at twenty shillings per week.[3] Any excess over this sum may be attached by arrestment;[4] and probably it could be effectually assigned in security for debt. The same principle is applied to salaries and allowances from offices,—as, for example, to the salary of a professor or the stipend of a minister. The salary is protected by law to the extent to which it is necessary for subsistence and the due performance of the duties of the office, while the surplus may be attached by creditors, or assigned.[5] An exception was made in favour of pensions, fees, and salaries paid by the Crown, which were wholly protected from creditors.[6] To this class

[1] 1845, H. L. 4 Bell's App. 221.

[2] 33 & 34 Vict. c. 63.

[3] The protection under this Act does not apply to alimentary debts, or to rates and taxes.

[4] See *Dick* v. *Russel*, 1887, 15 R. 261, and *M'Murchy* v. *Emslie*, 1888, 15 R. 375.

[5] *Learmonth* v. *Paterson*, 1858, 20 D. 418; see *in re Mirams* [1891], 1 Q. B. 594.

[6] Bell, *Prin.* s. 2276; Stair, iii. 1. 37.

belonged the salaries of judges, sheriffs, and other public officers.[1] By the Bankruptcy Act, 1856, s. 149, it is provided that the pay, half-pay, salary, emolument, and pension, paid by Government departments, can be made available in bankruptcy, through the medium of a petition by the trustee to the Lord Ordinary on the Bills, or the Sheriff, for an order recommending the head of the department in question to pay a portion of the salary or pension, etc., to the trustee.[2] It has been held that a salary or pension paid by the Commissioners of the Treasury is not included in this enactment.[3] The Court will refuse a petition of a bankrupt's trustee under this section, if it appear that the pay or pension of the bankrupt is no more than is necessary for the maintenance of himself and his family.[4] In confirmation of the common law, a special Statute [5] has been passed declaring null and void all assignments of their pay or half-pay by soldiers or sailors. Also in the various Statutes by which Widows' Funds have been established in different professions, the annuities granted are declared alimentary to the grantee, and not assignable or subject to the diligence of creditors. Arrears, whether of pay or salary, are of course attachable and assignable.

Funds made alimentary by destination.

Again, a fund may be alimentary from the fact that, in the deed by which it is constituted, it is, by particular destination, effectually set apart for the alimentary use of the beneficiary. The exact limits of the power of the granter of a provision to render it inalienable by the grantee and protect it from his creditors, and the methods by which this power can be effectually put into execution, present questions not altogether free from difficulty.

A person cannot render funds belonging to himself, and of which he retains the beneficial use alimentary so as to be non-assignable.

It is a universal rule, that by no method can a person "so vest his own funds in himself, or for his own use, as to exclude his creditors."[6] Attempts on the part of a person to protect the beneficial use of property belonging to himself from future creditors, though at the date he has no actual creditors, are held to be tainted with fraud, and are useless in competition with an onerous assignee, or a creditor doing diligence.[7] "It is against the whole principles and policy of the law to enable any party so to settle the property belonging to himself that he shall have the full

[1] A. of S., 11 June 1613.

[2] 19 & 20 Vict. c. 79, s. 149.

[3] *Latta* v. *Bremner*, 1857, 19 D. 1107.

[4] *Scott's Tr.* v. *Scott*, 1885, 12 R. 540.

[5] 47 Geo. III. c. 25, s. 4.

[6] Bell, *Com.* (M'L. ed.) i. 124; *Wright* v. *Harley*, 1847, 9 D. 1151; *Campbell* v. *Stewart*, 1848, 10 D. 1280; *Darling* v. *Mein*, 1851, 14 D. 296.

[7] *Wink* v. *Speirs*, 1867, 6 Macp. 77.

beneficial enjoyment, and yet put it *extra commercium*, and exempt from the diligence of creditors."[1] Even where the attempt to do this takes the form of a conveyance of the property to trustees,—usually the most effectual method of securing an alimentary right,—no restrictions, which the truster may impose on his trustees by way of instructions that the income is to be applied solely for his alimentary use, will suffice to render that income alimentary, so as to protect it against his own onerous obligations and the claims of his lawful creditors. Thus in *Ker's Trs.* v. *Justice*,[2] a husband, in an antenuptial marriage contract, conveyed his whole interest in an estate, of which he was supposed to have the fee, to trustees, with instructions to pay the income to himself yearly during his life, and, after his death, to his widow as a jointure, declaring at the same time, in stringent terms, the strictly alimentary nature of both the income and the jointure. The truster having, subsequently to his marriage, assigned his whole interest in the estate to a creditor, it was held that the provision that the liferent should be alimentary was invalid, and that the assignee was entitled to uplift the profits of the estate directly, as it would serve no good purpose for the trustee to uplift them in order to hand them over to him. "No one," observed Lord Deas in this case, "is entitled to protect his own income against his own onerous obligations and the claims of his creditors."[3] Where a truster conveys property to trustees, reserving a liferent or annuity to himself, and instructing the trustees to pay the balance of the income to his wife for his children, the fee of the estate cannot indeed be touched by creditors, unless there be fraud or collusion in the transaction; for any man, while solvent, is entitled to convey his estate to whom he pleases: but both the present and future liferent may be attached either by an assignee or a creditor.[4] In the same way, if a person, being in right of, or purchasing, an annuity, takes a personal bond for it, and puts into the bond a provision that the annuity shall be purely alimentary, shall not be liable for his debts or deeds, and shall not be liable to be assigned or renounced by him, the result is simply that he remains absolute master of the annuity, and the qualification of his rights, inserted by him in security of

[1] Per Lord Pres. Inglis in *White's Trs.* v. *Whyte*, 1877, 4 R. 786, at p. 789.

[2] 1866, 5 Macp. 4.

[3] In *Ker* v. *Justice*, 1866, 5 Macp. 4, it was found, after litigation, that instead of having the fee of the estate, as had been supposed, the truster had only a liferent interest, and thus the provision in favour of the wife necessarily lapsed.

[4] *Earl of Rosebery* v. *Cowie*, 1823, 2 S. 443, (N. E.) 394; *Learmonth* v. *Miller*, 1875, 2 R. (H. L.) 62.

the annuity, is of no avail whatever.[1] "I know of no authority or precedent, either here or in England, for holding that a man of full age and *sui juris* can put his property out of his power and beyond the reach of his creditors, without constituting at the same time some right, direct or contingent, in regard to that property in another."[2] Even a woman, who conveys property belonging to herself to trustees under an antenuptial marriage contract, is not divested of her rights as proprietor, unless the trustees are directed to hold and apply the property to secure proper matrimonial provisions.[3]

Alimentary character may be attached to periodical payments, as life interests or annuities, in course of voluntary transfer by one person to another.

It being impossible for a person to protect, as alimentary, the income of property which belongs to himself, it is clear that the only occasion, which allows of property being impressed with an alimentary character, is when the property in question, or rather its beneficial use, is in course of being conveyed from one person to another, and is declared alimentary in the person of that other.[4] The most usual occasion is that of a gratuitous conveyance from one person to another, either *inter vivos* or *mortis causa*. In the case of such a gratuitous conveyance the granter has the power to restrict the grantee's right to an alimentary use, and to exempt the property in question from the diligence of creditors of the grantee. A valid alimentary interest can only be created in a series of periodical payments, as a life interest or annuity. It does not appear to be fatal to the alimentary character of an annuity that it is in reality a series of periodical payments out of the capital stock.[5] The time during which the alimentary quality is attached to a series of payments may be limited by the granter,—as, for example, where it is attached only during the minorities of the beneficiaries.[6] Also an interest may be alimentary to the effect of being inalienable and non-assignable during the beneficiary's lifetime, and yet be capable of being assigned by a deed which takes effect after his death.[7] It is not necessary, in order to make valid an alimentary provision in a conveyance, that the conveyance should be gratuitous. If, however, the

[1] Per Lord Pres. Inglis in *White's Trs.* v. *Whyte*, 1877, 4 R. 786, at p. 789.

[2] Per L. J. C. Moncreiff in *Hamilton's Trs.* v. *Hamilton*, 1879, 6 R. 1216, at 1221.

[3] *Ramsay* v. *Ramsay's Trs.*, 1871, 10 Macp. 120; *Laidlaw* v. *Newlands*, 1884, 11 R. 481; *Reliance Mutual Life Assur. Soc.* v. *Halkett's Trs.*, 1891, 18 R. 615.

[4] The importance of seeing that the property is not allowed to vest in the beneficiary before the constitution of the alimentary interest, is illustrated by the observations of Lord Ormidale in *Gray* v. *Gray's Trs.*, 1877, 4 R. 378.

[5] *Gray* v. *Gray's Trs.*, 1877, 4 R. 378.

[6] *Auld* v. *Anderson*, 1876, 4 R. 211.

[7] *Elliot* v. *Bowhill*, 1873, 11 M. 735.

grant is not gratuitous, it is an essential condition that the granter shall be under no previous legal obligation to grant the particular deed. It is only when the provision is at least voluntary on the part of the granter that he is entitled to add conditions restraining the grantee in his use of it. Thus in *Lewis* v. *Anstruther*,[1] where the granter of the alimentary provision, a bond of annuity, was the heir of entail in possession of a large estate, and the grantee was his son, it was held that the bond was alimentary to its full extent, and was not adjudgeable by the son's creditors, although the bond was not gratuitous, but was given for a valuable consideration, namely, the consent of the son to a disentailing of a portion of the estate, and permission given by him to his father to borrow on the security of the estate. Though an onerous consideration was given in this case, the Court were careful to distinguish the case from that of a party buying for himself an alimentary annuity, upon the ground that the grant was voluntary, inasmuch as the granter, the father, was clearly not under any obligation to grant a deed in that particular form.

The effectual method of protecting an alimentary interest is by the constitution of a continuing trust.

The most effectual way—perhaps the only thoroughly effectual way—to provide an alimentary payment to a person, and, at the same time, deprive him of the power of discharging or assigning it, is through the operation of a trust deed, that is, by conveying property to trustees with the necessary directions. When this is done, so long as the trust subsists, the trustees are bound to fulfil the truster's directions; so that, provided these directions are sufficiently explicit, the fund is entirely protected both from the gratuitous and onerous deeds of the grantee, and from the diligence of his creditors.[2] The grantee or beneficiary is deprived of the power to assign his interest, so far as unrealised; and should the trustees, in breach of their trust, convey the property to anyone,—as, for example, to an assignee of the beneficiary,—the conveyance is reducible as *ultra vires*.[3] Nor will the trustees be allowed to denude, though with the full consent of the liferenter, in favour of the fiar, even when all the other purposes of the trust have been performed, for the reason that by no other means can the alimentary provision be so effectually secured, especially against the voluntary deeds of the liferenter.[4] "A trust duly constituted for payment of an alimen-

[1] 1852, 14 D. 857; 1852, 15 D. 260. *Vide infra*, p. 450.

[2] See opinions of Lord Pres. Inglis and Lord Shand in *White's Trs.* v. *Whyte*, 1877, 4 R. 786.

[3] *Rennie* v. *Ritchie*, 1845, 4 Bell's App. 221.

[4] *White's Trs.* v. *Whyte*, 1877, 4 R. 786.

tary annuity cannot be brought to an end by the joint action of the annuitant and the parties having beneficial right to the fee. A rule to the contrary has long been settled, and was recently enforced in *White's Trs.* v. *Whyte*, and *Duthie's Trs.* v. *Kinloch*.[1] In both instances the parties entitled to the fee had a vested interest, which is not the case here; and in *Duthie's Trs.* v. *Kinloch*, the alimentary liferenter and the beneficial fiar were one and the same person. Yet it was held that the combined action of all parties interested could not defeat the settler's intention to make the annuitant's rights alimentary, a result which could not be attained except by continuing the trust."[2] When the alimentary beneficiary becomes vested with the fee on which his alimentary interest is a burden, he can appoint the fee; and he may make this appointment for a present consideration, and by this means improve his financial position during his lifetime.[3] A fee burdened with an alimentary interest may be released from the trust administration, on the alimentary interest being made a real burden on the fee, and the real burden so created being held in trust for the alimentary beneficiary.[4] The determining question in all cases of this sort is simply whether the alimentary interest can be provided for just as effectually in some other way.[5] It has not been determined whether an alimentary interest can be discharged by the beneficiary, with the consent of the truster; but the fact that a truster has bequeathed his whole estate in absolute property to the beneficiary will not be construed as signifying a consent by him to the determination of the beneficiary's alimentary liferent.[6]

Effect of a direct conveyance of a liferent interest with a declaration that it shall be alimentary.

Without resorting to the machinery of a trust, a liferent interest, or annuity, may be conveyed directly to a grantee, and yet protected from alienation or the diligence of creditors by the insertion in the bond or deed, by which it is constituted, of a declaration on the part of the granter that the interest of the grantee shall be purely alimentary. The law to

[1] 1878, 5 R. 858.

[2] Per Lord Watson in *Hughes* v. *Edwards*, 1892, 19 R. (H. L.) 33, at p. 35; see also *Barron* v. *Barron's Trs.*, 1887, 24 S. L. R. 735.

[3] Per Lord Justice Clerk in *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 975, at p. 979.

[4] *Munro* v. *Macarthur*, 1878, 16 S. L. R. 126.

[5] See per Lord President in *White's Trs.* v. *Whyte*, 1877, 4 R. 786. The objections to trustees purchasing, with consent of the beneficiary, with the trust funds, an annuity in their own names, payable to the beneficiary, and equal in amount to the annuity provided in the original trust, are discussed in *Ker's Trs.* v. *Ker*, 1895, 23 R. 317.

[6] See opinions in *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 975.

this effect is clearly stated by the institutional writers.[1] The principle under which the mere declaration in a conveyance of a liferent that its purpose is alimentary, without the interposition of a trust, suffices to exempt the property from the beneficiary's creditors and render it non-assignable, is somewhat obscure; and certainly this method of protecting a beneficiary against his creditors, and against himself, is not so effectual as by the creation of a continuing trust. The observations of the judges in *White's Trs.* v. *Whyte*[2] and *Smith & Campbell*[3] are instructive in showing the difficulty of effectually securing an alimentary provision by any other means than through a trust. In the former case, it was proposed to substitute in place of a trust a bond of annuity over heritable property in favour of the annuitant; in the latter case, a personal bond of annuity. The proposed bond in each case contained a declaration as to the alimentary nature of the payments. In both cases the Court refused to bring the trust to an end, on the ground that the purpose of the truster could not be effectually carried out otherwise than by a continuation of the trust. Still, a mere declaration in the conveyance, to the effect that the interest or annuity is alimentary is not without effect.[4] Thus in *Lewis* v. *Anstruther*,[5] a bond of annuity, which was declared alimentary, was held protected from the diligence of the creditors of the annuitant, and non-assignable by him. The case, however, was special, in respect that in the Entail Acts, under which the disentail, which formed part at least of the valuable consideration given for the bond, was carried through, provision was made for creditors to appear and object to the form in which compensation was given to the heir; and no such objection had been lodged by the creditors. So it appears that an annuity or liferent, settled on a wife in an antenuptial marriage contract, and declared to be for her alimentary use, will—at least if the provision in question were not granted out of her own funds—be protected as alimentary, though

[1] Stair, iii. 1. 37; Ersk. *Inst.* iii. 6. 7; Bell, *Com.* i. 125. The law of trust was, however, quite undeveloped, even in the time of Bell; and this mode of protecting an alimentary interest would not now be adopted by a careful conveyancer. As to the effect of conditions limiting the grantee's power of disposing of a bequest or subject of gift, see per Lord M'Laren in *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927, at 936.

[2] 1877, 4 R. 786.

[3] 1873, 11 Macp. 639.

[4] *Paterson* v. *Paterson*, 1849, 21 Sc. Jur. 125. Compare the practice of the Court, in certain cases, to order the insertion, in a conveyance to, or receipt given by, a beneficiary, of a declaration that the payments are alimentary—*Allan's Trs.* v. *Allan*, 1872, 11 M. 216; *M'Nish* v. *Donald's Tr.*, 1879, 7 R. 96.

[5] 1852, 14 D. 857; 1852, 15 D. 260; see *supra*, p. 448.

no trust is interposed. In *Muirhead* v. *Miller*,[1] where the question related to the arrears of such an annuity, constituted in a marriage contract without the interposition of a trust, opinions were expressed by several judges, and it does not seem to have been disputed, that the annuity had been validly constituted an alimentary fund, at least in a question with the husband's creditors. Again, where a bond of annuity, granted by an insurance office, contains a declaration that the annuity shall be alimentary in the person of the annuitant and non-assignable by him, the declaration appears to be effectual, provided that the annuity has not been purchased by the annuitant's own funds.

The general result of the law on the subject seems to be that, while it is practicable, without the interposition of a trust, to protect a liferent interest in an estate from the creditors of the beneficiary by declaring it alimentary, it is not practicable, by similar means, to effectually protect the beneficiary from his own express voluntary deeds, for the simple reason that in this latter case there may be no one to come forward and prevent or challenge the illegal transaction.[2] "It has long been settled that the Court will not supply the means for protecting property against creditors, or restricting the rights of legatees. If there is a trust constituted for the special purpose, and the trust fails, the Court will supply the deficiency by the appointment of new trustees or a judicial factor, but the Court will not set up a trust to protect a legatee against himself, unless it is clear that the settler has directed the constitution of such a trust."[3]

Where a fee or full beneficial interest in property is given, a declaration that the beneficiary's interest is alimentary is invalid.

If, on the other hand, the result of the destination in a conveyance is that the fee of the subject is vested in the beneficiary, no declaration in the deed that the interest of the beneficiary shall be purely alimentary, and not subject to the diligence of creditors, can have effect.[4] Though the intention of a testator to restrict the rights of a beneficiary is clear, yet unless he provides the machinery requisite for carrying out that intention, as by directing trustees to hold the fee, his intention is inoperative. If, for

[1] 1877, 4 R. 1139. Contrast this case with *Standard Prop. Invest. Co.* v. *Cowe*, 1877, 4 R. 695, in which it was held competent for a wife infeft in a liferent of her husband's heritage, conferred in her marriage contract, to consent to an alienation by the husband. In this case the wife's provision was not declared alimentary.

[2] See the observations of Lord Deas, commenting on *White's Trs.* (*supra*), in *Gibson's Trs.* v. *Ross*, 1877, 4 R. 1038.

[3] Per Lord M'Laren in *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927, at p. 941.

[4] *Allan's Trs.* v. *Allan*, 1872, 11 M. 216; *M'Nish* v. *Donald's Trs.*, 1879, 7 R. 96; *Jamieson* v. *Lesslie*, 1889, 16 R. 807; *Clouston's Trs.*, 1889, 16 R.

example, he directs his trustees to pay over, and at the same time endeavours to limit the full right of property in the payees, without a continuing trust, by calling their right alimentary, or by forbidding assignation, he attempts to do two inconsistent things. The effect is that the beneficiaries become absolute proprietors of the estate.[1] "There is," in the words of Lord Pres. Inglis, "an absolute inconsistency in declaring the liferent interest to be alimentary and at the same time so framing the deed that the fee of the provision shall vest in the beneficiary."[2] On this principle, property left by a testator in fee to a married woman, who has bound herself to convey to marriage-contract trustees estate acquired during the subsistence of the marriage, is carried to the marriage trustees, notwithstanding the most stringent provisions by the testator to the contrary effect.[3] In short, it is impossible to give anyone a provision in fee without thereby enabling him to dispose of it for onerous causes, and his creditors to attach it for his debts.[4]

Liferent may be conveyed subject to a condition that the liferenter's title shall determine on his selling or mortgaging it.

On the other hand, where the liferent of an estate is granted, the granter can prevent the liferenter from doing what he likes with it, without the interposition of a trust or even a declaration that it is alimentary, by making the conveyance subject to certain prohibitions and conditions under which the right of the beneficiary shall be defeated by his doing the acts prohibited. Thus where, in a disposition and settlement of landed estate, there was a destination of the subjects to one person in liferent and his issue in fee, whom failing to certain other persons in liferent and fee respectively, the disposition declaring that all who took a beneficial right under it were "prohibited from selling, mortgaging, or otherwise disposing of such interest," that such sales or mortgages were void, and that the persons signing them should lose their rights under the settlement, and give place to the next in succession, it was held that the clauses of prohibition and forfeiture were valid and effectual to prevent a sale by the liferenter of his liferent.[5] It was conceded that the limitations effected by the prohibitions would have been unavailing to prevent a fiar from doing as he liked,

937; *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927.

[1] In *Allan's Trs.* v. *Allan* (*supra*), the Court, in order to give effect as far as possible to the testator's intentions, directed that the receipts given by the beneficiaries for their shares should contain a declaration that they were alimentary and non-assignable. It is difficult to see, however, that this could have much practical effect in the circumstances.

[2] Per L. P. Inglis in *Dawson's Trs.* v. *Dawson*, 1877, 4 R. 597.

[3] *Simson's Trs.* v. *Brown*, 1890, 17 R. 581; *Douglas' Trs.* v. *Kay's Trs.*, 1879, 7 R. 295.

[4] *Gibson's Trs.* v. *Ross*, 1877, 4 R. 1038; per Lord Shand, at p. 1067.

[5] *Chaplin's Tr.* v. *Hoile*, 1890, 18 R. 27.

being repugnant to the nature of a fee: but the Court had no doubt that the granter of a liferent was entitled to fix the conditions on which it should continue to subsist. Subsequently, the liferenter in possession under the above disposition granted a trust disposition for behoof of his creditors, conveying the liferent to a trustee, with a power of sale; and, later, his estates were sequestrated. The Court, on the question of the creditors' rights coming before them, held that the trust deed for creditors, being neither a sale nor a mortgage, was not struck at by the clause of forfeiture; and, further, that, as the diligence of creditors was not excluded, the liferent was vested in the trustee by the sequestration, who could sell without incurring the forfeiture.[1] In *Boswall* v. *Arnot*[2]—a case which Professor Montgomerie Bell quotes as authority for the statement that the right of gratuitous assignation, ordinarily competent to the creditor in a bond, may in certain cases be excluded by a simple clause excluding assignees[3]—a personal bond of provision in favour of two sisters, which bore a clause excluding assignees, was held not capable of gratuitous assignation by one sister to the prejudice of the surviving sister; and the surviving sister, as next-of-kin to the predeceaser, was preferred to the gratuitous assignee of the predeceaser.

A trustor may give a beneficiary a vested interest in a fund, subject to a condition that his trustees shall have power to subsequently restrict the beneficiary's interest to an alimentary liferent.

A testator may confer on trustees a discretionary power to protect the interests of beneficiaries, leaving it to the trustees to determine the time and manner and expediency of exercising this power; and the trustees, in exercise of the power so conferred on them, may, even though the beneficiary has previously acquired a vested right, restrict his right to a liferent and render it alimentary. Thus in *Chambers' Trs.* v. *Smith*,[4] a testator, after making the shares of the residue payable six months after his decease, and declaring that such shares should vest at his death, gave power to his trustees to postpone payment of the shares of any of the beneficiaries as long as they might think expedient, and to apply the interest of such shares, during the period of postponement, for the behoof of the beneficiaries. The exact manner of restricting the beneficiaries' rights was left to the discretion of the trustees. The balance of the share of a beneficiary was arrested in the hands of the trustees by creditors, who subsequently brought a furthcoming. In their answers to the furthcoming, the trustees for the first time announced their resolution to postpone the payment of the beneficiary's share, and to apply the annual proceeds thereof for his aliment; and thereafter they executed a

[1] *Chaplin's Tr.* v. *Hoile*, 1891, 19 R. 237.
[2] 7 Feb. 1759, M. 12578.
[3] Bell, *Lect. on Convey.* vol. i. 330.
[4] 1878, 5 R. (H. L.) 151.

trust deed restricting his right to an alimentary liferent. It was held that the trustees had validly exercised their power, and that the income of the share of residue, which had not been actually paid to the beneficiary, was alimentary. "I think," observed Lord Blackburn, "that the truster, having a perfect right to give the beneficiary nothing, had also a perfect right to give him a vested interest in a fund, subject to a condition that the trustees might, in their discretion, divest that fund."[1] Further, where a truster gives discretionary powers, to be exercised by his trustees in order to protect the interests of others, the trustees are bound to exercise their discretion, and cannot, in general, deprive themselves by anticipation of their power to do so.[2] A discretionary power to render provisions left in a will alimentary and inalienable must, however, be exercised by the trustees timeously; and it has been held that a declaration by trustees, who possessed such discretionary power, that an interest was alimentary, was ineffectual against an assignee, to whom one of the beneficiaries, prior to the date of vesting, had assigned his *spes successionis* in the trust funds, on the ground that the declaration of the trustees in exercise of their powers was not timeous, it not having been made till six years after the date of vesting.[3] If trustees have power to withhold payment of capital, and to pay the income to the beneficiary as an alimentary provision, it is presumed, if they do withhold payment of the capital, that there has been a valid exercise of the power.[4]

What is required in order to impress periodic payments with an alimentary character.

Whether the granter of an alimentary interest constitutes and protects it by a continuing trust, or whether he constitutes it simply by a declaration in the conveyance of a liferent or annuity directly to the beneficiary, no special form of words is necessary to impress the periodical payments with an alimentary character: all that is essential is that the deed, by which the interest is constituted, or the Statute, by which the annuity is regulated and secured, in case, for example, of allowances from Widows' Funds,[5] should show a clear intention that the payments shall be alimentary. The use of the word "alimentary" itself, in constituting the provision, "has, according to high authority, a very comprehensive effect."[6] The particular word "alimentary" need

[1] Per Lord Blackburn in *Chambers' Trs.* v. *Smith*, 1878, 5 R. (H. L.) 151, at p. 163.

[2] *Weller* v. *Kerr*, 1866, 4 Macp. (H. L.) 8.

[3] *Adam and Forsyth* v. *Forsyth's Trs.*, 1867, 6 Macp. 31, *infra*, p. 501.

[4] *White's Trs.* v. *White*, 1896, 23 R. 836.

[5] *Irvine* v. *M'Laren*, 1829, 7 S. 317.

[6] Per Lord M'Laren in *Reliance Life Assur. Soc.* v. *Halkett's Factor*, 1891, 18 R. 615.

not, however, be actually employed, if the intention that the payments shall be alimentary is made clear.[1] But an intention that the payments shall be alimentary is not presumed, or inferred from vague and general expressions. Thus where a father in a trust disposition disponed certain lands to trustees, with directions to divide the income between his two sons equally, and on their death to dispone the fee to their children, declaring that the lands and rents should not be attachable by creditors of the sons, and that the sons should not have power to sell or assign the same, or any interest or annual produce thereof, opinions were expressed by the judges, though the decision in the case did not turn on this point, that these expressions in the trust disposition were not in themselves sufficient to make a son's life-interest alimentary, in the absence of any express declaration that the provision was alimentary.[2] Similarly, where a wife, who by antenuptial marriage contract had conveyed her whole estate to trustees for payment to herself of the free income during the marriage, such payment being made exclusive of the *jus mariti* and right of administration of her husband, became a party to a bond and assignation granted by her husband in security of a loan, it was held, in an action by the creditors in the bond for payment of the annual income of the wife's estate, that she had power to make, and had made, an effectual assignation of the income of her estate, since there was no exclusion in the marriage contract either of voluntary assignations or of the diligence of creditors, either by express words or by the use of the word alimentary.[3] A less clear indication of intention that an interest shall be alimentary will, of course, suffice to protect it as between the parties to the deed than would suffice in a question with third parties. In *Reid* v. *Bell*,[4] for example, where the parties entered into an agreement that *inter alia* the one party should make the other a yearly payment "for maintenance," it was held that, in a question between the parties themselves, this expression, taken along with the circumstances of the case, was sufficient to impress the provision with an alimentary character, so as to render it not liable to compensation in a question between them; at the same time, several of the

[1] Fraser, *Husband and Wife*, 2nd ed., i. 767, and authorities there cited. See opinions of Lords Hatherley and Blackburn in *Chambers' Trs.* v. *Smith*, 1878, 5 R. (H. L.) 151; cf. terms of deed in *Nairn*, 1893, 1 S. L. T. 65, where the provision was for "proper maintenance and support."

[2] *Rogerson* v. *Rogerson's Tr.*, 1885, 13 R. 154.

[3] *Reliance Mutual Life Assur. Soc.* v. *Halkett's Factor*, 1891, 18 R. 615.

[4] 1884, 12 R. 178.

judges expressed an opinion that the terms of the agreement would not have sufficed to protect the provision in a question with creditors. The protection afforded by a declaration in a marriage contract that a provision shall be alimentary, ceases to be effectual on the dissolution of the marriage, unless a contrary intention is shown in the deed.[1]

An alimentary interest is protected only to the extent that it is a reasonable provision.

The protection afforded by law to an alimentary provision, in that it cannot be assigned in advance or attached for debt, is limited to the extent to which the fund in question consists of a reasonable provision, regard being had to the station and circumstances of the beneficiary; beyond this limit a provision will not be sustained either against the onerous deeds of the beneficiary or against the diligence of his creditors. In the words of Lord Stair, the protection extends only so far as the fund is "a proper aliment, and not exceeding the measure of aliment."[2] "It is fixed in our law," observed Lord Mackenzie, "that a party can make an alimentary provision not alienable. But there must be some limit to this power. A party cannot leave to another £20,000 a year, and render it inalienable by calling it alimentary."[3] It appears, however, that the Courts are inclined to look with leniency on such provisions, and will not restrict the annuitant to a bare subsistence. Thus in one case it was held that £1800 per annum was not more than a sufficient aliment for a peer.[4] On the other hand, £875 per annum was considered an excessive allowance for a young man of twenty-six, unmarried and with no profession; in this case the annuity was restricted to £500 per annum, and the balance was left open to the diligence of creditors.[5] This restriction in the beneficiary's right was made in spite of a most explicit declaration in the deed conferring the annuity that it was strictly alimentary.

Each termly payment, as it vests, and all arrears of an alimentary fund, are assignable.

While an assignation of an alimentary interest *de futuro* is invalid, yet each termly payment, when reduced into possession, is at the absolute disposal of the owner;[6] and, on vesting, is liable to be attached for alimentary debts. Similarly, arrears of alimentary funds are regarded as surplusage, and may be assigned or attached. So in *Drew* v. *Drew*,[7] it was held that compensation was plead-

[1] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 975; *Martin* v. *Bannatyne*, 1861, 23 D. 705, at p. 711.

[2] Stair, iii. 1. 37; Bell, *Com.* (M'L. ed.), i. 126; cf. also Ersk. iii. 6. 7.

[3] Per Lord Mackenzie in *Paterson*, 1849, 21 Sc. Jur. 125.

[4] *Harvey* v. *Calder*, 1840, 2 D. 1095.

[5] *Livingston* v. *Livingston*, 1886, 14 R. 43. See also *Bell* v. *Innes*, 1855, 17 D. 778; *Lewis* v. *Anstruther*, 1852, 14 D. 857; *Moinet* v. *Hamilton*, 1833, 11 S. 348; *Scott's Tr.* v. *Scott*, 1885, 12 R. 540.

[6] *Hewats* v. *Robertson*, 1881, 9 R. 175.

[7] 1870, 9 M. 163.

able against a claim for twenty years' arrears of alimentary payments, and an opinion was expressed that such arrears were attachable by creditors. In *Muirhead* v. *Miller*[1] the arrears of an alimentary annuity, which, under an antenuptial marriage contract, a husband was bound to pay to his wife, were held to pass to the husband's trustee in bankruptcy, the wife not being entitled to claim even as a creditor for such arrears. The only exception is where there are alimentary debts outstanding. If there exist debts due for past aliment, it appears that the creditors in these claims will have a preference on the arrears of an alimentary fund over the general creditors.[2] Further, the rule has been broadly stated that "where an advance is made for the purpose of enabling a party to pay alimentary debts, and such party assigns an alimentary fund in security of the advance, the assignee has as good a right to the fund as the cedent originally had."[3]

Rights, into which the element of *delectus personæ* enters, are not fully assignable—share in a partnership.

The second class of rights, which are non-assignable, or, at least, which are incapable of being fully and effectually assigned, are rights strictly personal in their nature, or, in other words, into which the element of *delectus personæ* enters. For example, in partnership, since the mutual confidence reposed by each partner in the other is a main element in the contract, it is a fundamental rule that no partner in a private firm can assign his share to the effect of making the assignee a partner in place of the cedent, unless either all the copartners give their consent or a power of substitution is expressly provided in the original contract of the partners.[4] At the same time, an assignation by a partner of his share in a partnership is far from being altogether inoperative; for the interest of a partner in a partnership concern, being a *jus crediti* against a third party, namely, the firm, may be assigned by its owner, either absolutely or in security, to the effect of entitling the assignee to the share of the stock and profits of the concern belonging to his cedent. The distinction, however, remains that here the assignee does not, as usually in an assignation, come completely into the place of the cedent, that is, the assignation does not make him a partner in the

[1] 1877, 4 R. 1139.

[2] *Muirhead* v. *Miller*, 1877, 4 R. 1139; *Drew* v. *Drew*, 1870, 9 M. 163; *Donald* v. *Donald*, 1860, 22 D. 1118.

[3] Per Lord Balgray in *Waddell* v. *Waddell*, 1838, 15 S. 151. Though the decision in this case seems to have been based on the application of this principle, the fund assigned, or at least a portion of it, consisted of arrears of aliment.

[4] As was the case in *The Lonsdale Hæmatite Iron Co.* v. *Barclay*, 1874, 1 R. 417.

firm.[1] "It cannot be disputed, upon the decided cases, that although there is a *delectus personæ* in the contract of copartnery, any partner may, if he chooses, assign his own share to a third party, so long as that does not interfere with the conduct of the company, or the respective rights and interests of the partners."[2]

Effect of assignation of share in a partnership (Partnership Act, 1890).

The assignation of a share in a partnership was, in the view of the older authorities, equivalent to the constitution of a sub-partnership between the cedent and the assignee; the old firm was not bound to take notice of this sub-partnership, which was limited to the share of the assigning partner, who continued, with respect to the company, the sole proprietor of his share, and bound to sustain all actions concerning it.[3] The effect of such an assignation is now regulated by the Partnership Act, 1890, 53 & 54 Vict. c. 39, s. 31. It is there provided that an assignment "does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners."[4] On a dissolution of the partnership, the assignee "is entitled to receive the share of the partnership assets to which the assigning partner is entitled, as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."[5] There is an absence of authority as to the means which a creditor in an assignation of this kind may take to enforce his right during the continuance of the partnership. As the rights of the assignee are limited to those mentioned in the above sections, it is clear that, so long as the partnership lasts, he has no power to compel the firm to come to an account with him; and though, in the event of a dissolution of the firm, the assignee's right and remedy are sufficiently defined, he has no power to insist on a dissolution of the firm, in the case of a partnership for a fixed time, if the period

[1] Partnership Act, 1890, s. 31. See statement in Lindley on *Partnership*, i. 634, approved as a correct statement of the law of Scotland by Lord Gifford in *Cassels* v. *Stewart*, 1879, 6 R. 936; affd. (H. L.) 8 R. 1.

[2] Per L. J. C. Moncreiff in *Cassels* v. *Stewart*, 1879, 6 R. 936, at p. 945.

[3] "Socii mei socius meus socius non est," *Dig.* 50. 17. 47, s. 1; Ersk. *Inst.* iii. 3. 22; see also per Lord Eldon in *Borrow*, 1815, 2 Rose, 215.

[4] Sec. 31, subs. 1.

[5] Sec. 31, subs. 2. See *Whettan* v. *Davy*, 1885, 30 Ch. Div. 574.

fixed for winding up has not arrived; nor is it clear that he has power to force dissolution, even in the case of a partnership at will.[1] Being able neither to become a partner nor to dissolve the partnership, the assignee is in the position of being able to take no effectual action, until, in some way or other, the dissolution of the firm takes place, when he can realise his cedent's interest in the concern in the manner described in sec. 31, subs. 2 of the Partnership Act.

In England, where a partner allows his share to be charged for his separate debt, a remedy is given for the benefit, not of the partner who is indebted, but of the other partners of the firm, in the form of conferring on them an option of dissolving the partnership. No similar remedy is given in the corresponding case in Scotland, but it is probable that the assignation of his share by a partner in a partnership for a fixed term, which had not expired, would form a ground for any of the partners, other than the partner who has assigned his share,[2] invoking the aid of the Court under sec. 35, clause (*f*), of the Partnership Act, 1890.

Liability of an assignee of a share in the profits of a partnership for partnership debts.

When a person takes in security an assignation of an interest in the profits of a partnership, the question arises whether he thereby becomes liable for partnership debts. In determining this question, the Courts, both in England and Scotland, look to the real nature of the transaction, and not merely to its form.[3] If the transaction involves the constitution neither of a partnership nor of the relation of principal and agent between the parties, but is a mere right in security between debtor and creditor, which subsists solely for that purpose, and is intended to terminate when that purpose is served, then the assignee will not, though he has an interest in the partnership profits, be liable for partnership debts.[4] The rule, indeed, in England used to be that participation in the profits of a business was sufficient in itself to infer the liability of partnership; but in

[1] In England, previously to the Act of 1890, an assignment by one partner of his share in the partnership dissolved the partnership if it were at will, and, in other cases, gave the copartners the right to dissolve (see Lindley on *Partnership*, p. 363). The effect of the Act of 1890 seems to be to alter this.

[2] 53 & 54 Vict. c. 39, s. 35, cl. *f*, provides that, "On application by a partner the Court may decree a dissolution of the partnership whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

[3] *Mollwo, March, & Co.* v. *Court of Wards*, 1872, L. R. 4 P. C. Appeals, 419.

[4] *Eaglesham & Co.* v. *Grant*, 1875, 2 R. 960; *Mess* v. *Low*, 1896, 33 S. L. R. 802; cf. *Miller* v. *Downie*, 1876, 3 R. 548; *Stott* v. *Fender & Crombie*, 1878, 5 R. 1104.

Cox v. *Hickman*[1] it was laid down, in accordance with what has always been the common law of Scotland, that the destination of profits, while a material circumstance, is nevertheless only a circumstance in determining the question of partnership liability. The law on the subject is now regulated by the Partnership Act, 1890 (53 & 54 Vict. c. 39), which provides, sec. 2, subs. 3: "The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on, or varying with, the profits of a business, does not of itself make him a partner in the business"; "and in particular . . . (*d*) The advance of money by way of loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such." Where, then, the transaction between the cedent and assignee amounts to nothing more than the constitution of a security-right, the assignee will not, from the mere fact that he shares in the partnership profits, thereby incur liability for the partnership debts.[2]

Where the assignee becomes a principal and the cedent his agent.

On the other hand, where a sole trader assigns his business to another, the effect of the arrangement between the parties being that the assignee becomes the real principal, and the cedent only his agent, without personal interest in the business, then the real principal, disclosed or undisclosed, is liable to third parties for debts incurred in the business. In other words, if the cedent, though he continues to be the ostensible trader, is shown to be carrying it on, not for himself but for the assignee, the latter is liable to third parties, and his liability is not affected by the fact that the third parties contracted in reliance on the credit of the cedent alone.[3]

Where the assignee becomes truly partner of the cedent.

Similarly, where the effect of the arrangement entered into between the cedent and the assignee is that the latter becomes truly the partner of the former, the assignee is liable as partner, and will not escape under the guise of being a creditor. An attempt to give a person the position and rights of a partner in a question with the cedent, and at the same time relieve him of obligations to third parties on the ground that he is merely a

[1] 1860, 8 H. L. C. 268; *Bullen* v. *Sharpe*, 1865, L. R. 1 C. P. 86.

[2] *Hardie* v. *Cameron*, 1879, 19 S. L. R. 83.

[3] *Edmunds* v. *Rushill & Jones*, 1865, L. R. 1 Q. B. 97; *Murray & M'Gregor* v. *Campbell & Co.*, 1827, 6 S. 147.

lender, is not permitted. "No person, who does not hold himself out as a partner, is liable to third persons for the acts of those whose profits he shares, unless he and they are really partners *inter se*. At the same time, persons may find that they are partners for all purposes, although they only intended to be so for purposes beneficial to themselves."[1] The question whether the assignee is a partner of the cedent is determined in each case by the nature of the agreement between the parties. Thus, in *Mess* v. *Low*,[2] the question at issue was whether a certain agreement, which was in form an agreement for a loan, was in substance a contract of copartnery. In that case a party had advanced £1000 to a firm on terms set forth in a minute of agreement, which proceeded on the narrative that "the first parties have applied to the second party for an advance by way of a loan to enable them the better to carry on their business," and provided *inter alia* as follows:—The profits were to be retained in the business till the expiry of the agreement, at the end of three years, when the loan was to be repaid, and the profits divided equally between the parties; the second party was primarily to apply his share of the profits to extinguish a prior debt due to him by the partners of the firm; the first parties were to have sole charge of the business of the firm, but were to supply half-yearly balance-sheets; should the balance-sheet at any time show that the capital of the firm had fallen to £500, the agreement was to terminate, and the balance was to be paid to the second party, who was "in no circumstances to be liable beyond the amount of his loan"; the second party was not to be deemed or held to be in any respect a partner in the firm. It was held that the contract was one of loan, and did not make the parties partners *inter se*.[3]

Share in a friendly society.

The question has been raised whether shares in a friendly society can be assigned in security. Though the question was not decided, opinions were expressed that a valid assignation of such shares in security is impossible otherwise than by substituting the assignee in the cedent's place as a member of the society.[4] Of course, if a friendly society holds money immediately payable to a member, that member may undoubtedly—unless such assignation be forbidden by the rules of the society—assign his claim to

[1] Lindley on *Partnership*, 6th ed., pp. 45, 46; quoted and approved by Lord Kinnear in *Mess* v. *Low*, 1896, 33 S. L. R. 802.

[2] 1896, 33 S. L. R. 802.

[3] Compare the English cases, *Mollwo, March, & Co.* v. *Court of Wards*, 1872, L. R. 4 P. C. Appeals, 419; *Badeby* v. *Consolidated Bank*, 1888, 38 Ch. Div. 238.

[4] *Grigor Allan* v. *Urquhart*, 1887, 15 R. 56.

a third party, just as any other creditor may assign a debt due to him.[1]

A contract involving future mutual liability is not assignable.

It appears that in every contract involving mutual future liability there is present an element of *delectus personæ*, which prevents the contract being assignable by one of the contracting parties without the consent of the other, to the effect of putting the assignee in the position of the cedent in a question with the other original contracting party. The one party in a contract of this kind contracts in reliance on the ability, solvency, and responsibility of the other. "Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."[2] On this principle, a party to an executory contract is not, generally speaking, bound to accept performance from a third person.[3] In a recent case a firm of wine merchants, who had let for three years to another firm, who sold a non-alcoholic wine, a page of their wine-list for advertisements, were found not entitled to assign the contract to a limited company, which had taken over their business; and the new company was held to have no title to sue for implement. The Lord Ordinary (Kincairney) arrived at this result, without deciding the general question of the assignability of contracts, on the ground that the particular contract involved *delectus personæ*; but the judges in the Inner House rested their decision on the general ground that a mutual contract is not assignable.[4] Similarly, it has been held in England, where A. ordered goods from B., and the goods were supplied by C., to whom B. had assigned his business, that C. could not maintain an action against A. for the

[1] As to shares in companies incorporated under the Companies Acts, see Chap. xv.

[2] Per Gray, J., *Arkansas Smelting Co.* v. *Belden Co.*, 1888, 127 U.S. 379, 387—quoted in Pollock on *Contract*, 6th ed., at p. 455.

[3] In two recent cases the doctrine that a mutual contract is unassignable has been laid down by judges in the Second Division—see per Lord J. C. Kingsburgh and Lord Young in *Grierson, Oldham, & Co., Lim.* v. *Forbes, Maxwell, & Co., Lim.*, 1895, 22 R. 812; also per Lord Trayner in *Reid's Tr.* v. *Watson's Trs.*, 1896, 23 R. 636, at 649. Similarly, generally speaking, the liability under a mutual contract cannot be transferred so as to discharge the person or estate of the original contractor, without the assent of the other contracting party—Pollock on *Contract*, 6th ed., at p. 453.

[4] *Grierson, Oldham, & Co. Lim.* v. *Forbes, Maxwell, & Co. Lim.*, 1895, 22 R. 812; *Tully* v. *Ingram*, 1891, 19 R. 65; *Robertson* v. *Fleming*, 1861, 4 Macq. 167; *Blumer & Co.* v. *Ellis & Son*, 1879, 1 R. 379; *Tinnevelley Sugar Refining Co.* v. *Mirrlees, Watson, & Co.*, 1894, 21 R. 1009; cf. *Hole* v. *Bradbury*, 1879, 12 Ch. D. 886; *Griffiths* v. *Tower Publishing Co.*, 1896, 13 T. L. R. 9.

price, A. having had no notice of the assignation.[1] If, however, the one party expressly consents to the assignation, or being informed of the assignation, impliedly consents by accepting performance from the assignee, this is enough.[2]

Distinction between contracts which can be performed through a third party, and contracts which must be performed by the original contractor.

There is, however, a further distinction, depending on *delectus personæ*, between contracts in which the one contracting party is not bound to accept performance from anyone except the other original contracting party, and contracts in which one of the contracting parties may, without the consent of the other, fulfil his obligations by getting a third party to perform the prestations he has undertaken. If *delectus personæ* is of the essence of the contract,—that is, where the contract is such as to involve special skill or even the exercise of strict personal supervision on the part of the contractor, or where it may be inferred that the contractor has been selected with reference to his individual competency or personal qualification,—the contract can be performed only by the original contractor himself. It has been held in England that a contract for the hire of a carriage, which the lessor agreed to paint once a year, involved *delectus personæ*.[3] On the other hand, where no element of *delectus personæ* is involved in a contract, the original contractor can perform it by the hands of another, though the right of action remains in his own person. So a continuing or current contract, which is not of such a nature as to imply that the contractor has been selected on account of qualities special to him, may be taken up by a trustee in bankruptcy; and a beneficial contract of this sort, if it can be carried out, is an asset of the bankrupt's estate.[4] The trustee in bankruptcy has an option either to adopt or give up the contract;[5] and, if he elects to take it up, intimation must be given to the other contracting party, and that timeously.[6] Examples of

[1] *Boulton* v. *Jones*, 1857, 2 H. & N. 564; cf. *Johnson* v. *Raylton*, 1881, 7 Q. B. D. 438; and *in re Family Endowment Society*, 1870, L. R. 5 Ch. App. 118.

[2] Cf. *Moore* v. *Gledden*, 1869, 7 Macp. 1016, in which case the cautioner of a contractor for the making of a railway, who, when the contractor was verging on bankruptcy, took over the contract by assignation from the contractor, obtained from the railway company a docquet indorsed on his assignation expressing their concurrence.

[3] *Robson* v. *Drummond*, 1831, 2 Bran. & Ald. 303. The decision in this case has been stated to be an extreme instance of the application of the principle. See opinions in *British Waggon Co.* v. *Lea & Co.*, 1880, 5 Q. B. D. 149.

[4] *Kirkland & Sharpe* v. *Gibson*, 1831, 9 S. 596; *Kirkland* v. *Caddell*, 1838, 16 S. 860; *Dundas* v. *Morrison*, 1857, 20 D. 225.

[5] Bell, *Com.* ii. 413.

[6] *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355. As to the position of a trustee who adopts a continuing contract of the bankrupt, see per Lord Pres. Inglis in *Myles* v. *City of Glasgow Bank*, 1879, 6 R. 718, at 725, 726.

the kind of contracts, which are held not to involve a special selection of the one contracting party by the other, are found in *West Stockton Iron Co.* v. *Neilson & Maxwell*,[1] and *Johnson & Reay* v. *Nicoll & Son*,[2] where it was held that an order for goods from a manufacturer might be fulfilled by delivery of goods manufactured by another party, if equal in quality with the goods manufactured by the person contracted with.[3] Similarly, in *Anderson* v. *Hamilton & Co.*[4] opinions were expressed that an executory contract for the supply of the iron required to build certain ships, did not involve *delectus personæ*, and might have been competently taken up by the trustee of the bankrupt contractor. In *British Waggon Co.* v. *Lea & Co.*,[5] the defendants hired railway waggons from a waggon company for a certain number of years for a fixed sum per annum, the waggon company coming under an obligation to keep the waggons in repair. It was held that the defendants were not entitled to bring their contract to an end on the business of the waggon company being transferred to another and similar company, which was prepared to fulfil the original contract with the defendants.

The right of a contractor to payment under the contract may be assigned in anticipation, and, when intimated to the employer, the assignation forms a valid security against creditors of the cedent—at least in respect of moneys becoming due before the bankruptcy of the cedent.[6] The assignee is, of course, in no better position than his cedent in a question with the employer as to whether the contract has been properly performed and the stipulated payment earned.

Other rights, which are non-assignable as involving *delectus personæ*.

Similarly, wherever a right held by a party is of such a nature, or granted in such a manner, as to imply that it is personal to the grantee, it cannot be effectually assigned. Thus a privilege, personal to the grantee, though it has been granted under a contract for onerous considerations, cannot be assigned. For example, the Magistrates of Arbroath contracted, in 1726, with a neighbouring proprietor for liberty to take stones from his quarry for a new pier and for all the public works of the burgh in time coming, without pay-

[1] 1880, 7 R. 1055.

[2] 1881, 8 R. 437.

[3] Contrast with these cases the decision in the English case, *Johnson* v. *Raylton*, 1881, 7 Q. B. D. 438.

[4] 1875, 2 R. 355. Compare observations per Lord Young in *Dewar* v. *Ainslie*, 1892, 20 R. 203.

[5] 1880, 5 Q. B. D. 180.

[6] *Marshall* v. *Ninmo*, 1847, 10 D. 328—a case of arrestment. As regards payments becoming due after the cedent's bankruptcy, cf. *ex parte Nichols, in re Jones*, 1883, 22 Ch. D. 782; *Wilson* v. *Alton* [1896], 2 Q. B. 254.

ment. After the agreement had been acted on by both parties for more than a century, an Act of Parliament was passed vesting the right and property of the harbour in Harbour Trustees, and making no mention of the contract in question. It was held that the privilege was not transmitted to the Harbour Trustees, along with the property in the harbour, as the privilege was personal to the magistrates, and could not be competently conveyed to other persons; and that the magistrates, by disponing to the trustees the harbour and its dues, ceased to have any patrimonial interest in the privilege.[1] So where the Magistrates of Edinburgh, by Act of Council, authorised A., for certain purposes, to erect a pier within the limits of the harbour of Leith, it was held on A. assigning this permission to B., who erected the pier, that the permission granted to A. was personal, and could not be assigned without consent of the magistrates, and therefore that B. had no right to erect the pier, and, having erected it, was bound to remove it.[2] On the other hand, where A., a feuar of land for building purposes, conveyed the land to B., his cautioner in the feu-contract, who had advanced money for carrying on the buildings, and B. granted a letter binding himself to reconvey to A. upon demand and repayment of past feu-duties any of the lots which remained unbuilt upon, it was held that A.'s right to demand a reconveyance was an assignable, and not a personal, right, and had been effectually assigned.[3] But an obligation, in a conveyance of lands by a Crown vassal to the sovereign, his heirs and successors, to relieve the sovereign and his heirs and successors of certain specified public burdens, is personal to the Crown, and is not capable of being assigned by the Crown to a subject, to whom part of the lands has been disponed.[4]

Goodwill.

Delectus personæ is, further, important in determining the assignability of the goodwill of a business, or, more correctly, in determining the value of such goodwill to an assignee. Where the profits of a business result almost entirely from confidence in the personal skill of the party employed, the goodwill is incapable of transference, or, more correctly, it is, as a matter of fact, not of appreciable value.[5] Though goodwill comprehends not merely the

[1] *Mags. of Arbroath* v. *Strachan's Trs.*, 1842, 4 D. 538.

[2] *Leith Dock Commissioners* v. *Colonial Life Assur. Co.*, 1861, 24 D. 64.

[3] *M'Callum's Trs.* v. *M'Nab*, 1877, 4 R. 520.

[4] *Orr-Ewing* v. *Earl of Cawdor*, 1884, 11 R. 471; 1885, 12 R. (H. L.) 12.

[5] Per Lord Justice Clerk in *Bain* v. *Munro*, 1878, 5 R. 416; see also Smith's *Merc. Law*, 10th ed., 212.

advantage of local situation, but every positive advantage connected with an established trade, it is only in exceptional cases, or in a business of a peculiar nature, that there can exist a real and substantial goodwill, capable of being assigned in security, and of tangible value, independently of the business being carried on in a particular place.[1] The chief instance of goodwill having a value, apart from the place of business, is where the goodwill is connected with a trade mark. Trade marks are regulated and protected by Statute, 46 & 47 Vict. c. 57. Trade marks can, when registered, be assigned and transmitted only in connection with the goodwill of the business concerned in the particular class of goods for which they have been registered, and are determinable with that goodwill.[2]

Local goodwill.

Where the goodwill of a trade, being a subject of value, is attached to the premises in which the business is carried on, it is a local, as distinguished from a personal goodwill, and consists simply in the chance that customers will continue to resort to the same place.[3] Where the goodwill is thus attached to a particular house or place, it does not exist apart from the house or place, or, if anything does exist which can be described by that name, it is not of tangible value apart from the house. For example, the goodwill of a public-house is local in the sense that it goes with the house. "It is quite plain that the goodwill of a public-house passes with the house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill."[4] Accordingly, where a publican, who carried on business in a public-house of which he was proprietor, died intestate, and his widow, who had entered into possession of the business and obtained a transfer of his certificate, also died, it was held in an action of accounting raised by the husband's executor against the widow's executor, that the goodwill of the business was not a part of the husband's executry estate, and that the price paid for it to the widow's executor (who had arranged for a lease with the owner of the premises) could not be claimed by the husband's executor.[5] Lord Rutherfurd Clark

[1] Instances of realisable goodwill not dependent on the place where the business was carried on may be found in *Donald* v. *Hodgart's Tr.*, 1893, 21 R. 246; *M'Cormick* v. *M'Cubbin*, 1822, 1 S. 541; cf. Brett, J., in *Llewellyn* v. *Rutherford*, 1875, L. R. 10 C. P. 456.

[2] 46 & 47 Vict. c. 57, s. 70.

[3] Per Lord Eldon in *Cruttwell* v. *Lye*, 1810, 17 Ves. 335; and also per Lord Rutherfurd Clark in *Philp's Exr.* v. *Philp's Exr.*, 1894, 21 R. 482 at 489.

[4] Per Jessel, M. R., in *ex parte Punnett, in re Kitchin*, 1880, 16 Ch. Div. 226.

[5] *Philp's Exr.* v. *Philp's Exr.*, 1894, 21 R. 482.

pointed out that the goodwill of such a business went with the house; that the husband's executor had no right to the house, and could give none; that he did not even have a licence, of which the purchaser could get the benefit; and that, in these circumstances, he had no right which he could assign.[1] On this principle, where premises to which a goodwill is attached have been mortgaged and are subsequently taken under compulsory powers, the mortgagee is entitled to the amount paid for the goodwill, which, being attached to the house, adds to the value of the house. In short, if the goodwill is incident to the house, and increases the value of the house, it goes as part of the value of the house to the mortgagee; on the other hand, if it is personal to the occupier of the house, it belongs to the man by whose skill it has been acquired.[2]

Goodwill of public-house: licence not assignable.

The goodwill of a public-house depends partly on the right of the person who carries on the business, whether as lessee or proprietor, in the house, and partly on the licence. The goodwill of such a business carried on by a bankrupt forms part of the bankrupt's estate, which passes to the trustee in the sequestration.[3] The licence is regarded as an accessory of the goodwill. Thus where the tenant of an hotel became bankrupt, and after his sequestration obtained, with the concurrence of the trustee, a new certificate or licence, it was held, on the trustee selling the goodwill of the business, that the licence was an accessory of the goodwill, and that the trustee was entitled to delivery of it for behoof of the creditors.[4] "The lease and goodwill of this hotel form part of the sequestrated estate, and the business cannot be carried on without the licence. . . . The existing certificate and licence are documents belonging to the bankrupt's estate, and go as accessories of it to the creditors. Therefore the trustee is entitled to the certificate and licence in order to get a transfer."[5] A licence or

[1] See observations of Lord Rutherfurd Clark in *Philp's Exr.* v. *Philp's Exr.*, 1894, 21 R. 482 at 489; cf. *Cooper* v. *Metropolitan Board of Works*, 1883, 25 Ch. Div. 472. As to the considerations which determine the value of the goodwill of a public-house, see *Llewellyn* v. *Rutherford*, 1875, L. R. 10 C. P. 456.

[2] See per Cotton, L. J., in *Cooper* v. *Metropolitan Board of Works*, 1883, 25 Ch. Div. 472. In *King* v. *Midland Rwy. Co.*, 1868, 17 W. R. 113, it was held that the assignees in liquidation of a baker, who had previously mortgaged his premises, were entitled to no part of the purchase money paid by a railway company for the premises, in respect of the goodwill of the business, as against the mortgagee whose debt exceeded the purchase money.

[3] *Selkirk* (*Coupland's Tr.*) v. *Coupland*, 1886, 23 S. L. R. 456; *Stewart's Tr.* v. *Stewart's Exr.*, 1896, 23 R. 739.

[4] *Selkirk* (*Coupland's Tr.*) v. *Coupland*, 1886, 23 S. L. R. 456. *Fraser's Tr.* v. *Fraser*, 1896, 23 R. 978.

[5] Per Lord Pres. Inglis in *Selkirk* (*Coupland's Tr.*), *ut supra*.

certificate for the sale of intoxicating liquors is, however, not itself assignable; it can be transferred only by the act of the licensing magistrates.[1] In the matter of granting a licence, the discretion of the justices is in the ordinary case absolute;[2] but a mortgagee has been held in England to be sufficiently aggrieved by the refusal of the renewal of the tenant's licence to be able to appeal to quarter sessions, in a case where the mortgage deed made the mortgagee attorney for the licence-holder in that respect.[3] The ordinary manner in which a creditor seeks to make a licence available as a security is by putting into the public-house a manager, who accounts to him for the drawings. Where the creditor's manager and the licence-holder are not one person, the danger is that the licence-holder may turn the manager out, whereupon the creditor has no remedy.[4] In *Clift* v. *Portobello Pier Co.*,[5] a company, proprietors of a refreshment room, engaged a manager on a written contract of service, one of the conditions of which was that he was to apply in his own name for a licence to sell exciseable liquors on their premises, which licence "he shall be bound to assign to such person or persons as the directors may require." On the manager being summarily dismissed, it was held that the certificate, although taken in the name of the manager, was the property of the company, and that the company were entitled to the delivery of it.

[1] *Sharpe* v. *Wakefield*, [1891], App. Cas. 173. As to the right of a trustee for creditors to deliver the certificate to a purchaser of the business, the latter applying for a transfer of the licence at the first Court, see *Brunfaut* v. *Neilson*, 1893, 20 R. (Just. Cas.) 68. A licence is not a right of property separable from the premises in which the business is carried on—*Yuille* v. *Rushbury*, 1888, 15 R. 828.

[2] *Clift* v. *Portobello Pier Co.*, 1877, 4 R. 462.

[3] *Garrett* v. *Justices of Middlesex*, 1884, 12 Q. B. D. 620.

[4] As to the possible liability of the security holder in cases of this sort for goods furnished to the publican, see *supra*, p. 460.

[5] 1877, 4 R. 462.

CHAPTER XIV

RIGHTS IN SECURITY OVER INCORPOREAL MOVEABLES

Assignation at common law.
Statutory forms.
Intimation.
Conflict of laws.
Rights of parties.

FORMS AND EFFECTS OF ASSIGNATION

Constitution of a right in security in an incorporeal moveable.

A RIGHT in security in an incorporeal moveable is constituted by the owner, *i.e.* the creditor, transferring the right to enforce payment of the debt or performance of the obligation to the person whose debt it is desired to secure. This is accomplished by a written instrument empowering the new creditor to stand in the original creditor's place, and to exercise his rights, accompanied by an intimation to the debtor that henceforward he is to account to the new creditor. The written instrument is an assignation; the granter of the assignation is the cedent; and the grantee is the cessionary or assignee.[1] When the assignee conveys to a third party, the deed is called a "translation"; when he reconveys to the cedent, he is said to "retrocede," and the deed itself is a "retrocession."[2] Both assignation and intimation are necessary in order effectually to convert the obligation of the debtor to pay to the cedent into an obligation to pay to the assignee.[3]

[1] There may be transferred by assignation, not only moveable rights but heritable rights, when they are not perfected by sasine, or when they require no sasine. "Assignation," says Erskine, "is a written deed of conveyance by the proprietor to another of any subject not properly feudal" (Ersk. iii. 5. 1).

[2] For forms of translations and retrocessions, see *Jurid. Styles*, ii. pp. 718 *et seq.*

[3] Where a debt is incorporated in a negotiable instrument, it is effectually transferred by mere delivery of the instrument, or by delivery accompanied by indorsation. Rights in security in negotiable instruments form the subject of Chap. XVII. There are other rights which are not properly transferred by the ordinary means of assignation and indorsation, *e.g.* shares in a joint-stock company. Rights in security in shares and policies of insurance, whose transference is regulated by special Statutes, are dealt with separately; see Chaps. XV. and XVI.

Older forms of assignation.

So long as debts were not capable of being transferred without the debtor's consent, the creditor found it necessary, in order to evade the law, to resort to the device of appointing the new creditor his mandatary for the purpose of receiving and discharging the debt. This indirect method of conveying debts continues to be apparent in the style of the deed of assignation generally in use. This deed, in its common form, does not contain words expressly assigning and transferring the right, but grants mandate or procuratory, authorising the assignee to demand payment in name of the cedent, and, as fully as he himself could, to receive the debt and discharge it. Hence an assignee was, in the language of the law, a *procurator in rem suam*;[1] and, though now assignations are regarded rather as proper conveyances than as procuratories, the view of an assignation as a mandate or procuratory is still frequently useful in throwing light on the legal relations of the parties.[2] In the older form, the assignation, being truly a procuratory, was in its nature revocable. Later, however, with the introduction of a clause "surrogating and substituting" the assignee in the full place and with the full power of the cedent, the deed began to operate a direct conveyance. In addition, the deed, in its usual form, contains clauses of warrandice, of delivery, of registration, and the usual testing clause. In later practice the deed frequently assumed the form of a direct conveyance, and the cedent "assigned, conveyed, disponed, and made over" the subject to and in favour of the assignee.[3] These older forms of assignation and the corresponding modes of intimation are still competently employed.[4]

Forms provided by the Transmission of Moveable Property (Scotland) Act, 1862 (25 & 26 Vict. c. 85).

Simpler forms for the assignation of personal bonds or conveyances of moveable estate were introduced by the Transmission of Moveable Property (Scotland) Act, 1862 (25 & 26 Vict. c. 85). By the interpretation clause of the Act,[5] the words "bond" and "conveyance" are declared—where there is nothing in the subject or context repugnant to such construction—to extend to, and include, "personal bonds for payment or performance, bonds of caution, bonds of guarantee, bonds of relief, bonds and assignations in security of every kind, decrees of any Court, policies of assurance of any assurance company or association in Scotland, protests of bills or of promissory notes, dispositions, assignations or other conveyances of moveable or personal property or effects, assignations, translations, and retrocessions, and also probative extracts of

[1] Stair, iii. 1. 3; Ersk. iii. 5. 2.

[2] See per Lord Pres. Inglis in *Lyon v. Irvine*, 1874, 1 R. 512.

[3] For a variety of styles applicable to the conveyance of different subjects, see *Jurid. Styles*, ii. pp. 671 *et seq.*

[4] 25 & 26 Vict. c. 85, s. 3.

[5] 25 & 26 Vict. c. 85, s. 4.

all such deeds from the books of any competent Court"; and by the same clause the words "moveable estate" in the Act extend to and include "all personal debts and obligations, and moveable or personal property or effects of every kind." Under sec. 1 of the Act it is competent for any party in right of such "personal bond" or "conveyance of moveable estate" to assign such bond or conveyance by assignation, either apart from, or on, the bond or conveyance in, or as nearly as may be in, the forms set forth in Schedules A and B annexed to the Act. One of these Schedules, A, is applicable to an assignation written apart from the bond or conveyance; the other Schedule, B, is applicable to an assignation written on the bond or conveyance. Such assignation is declared registrable in the books of any Court, in terms of any clause of registration contained in the bond or conveyance assigned, and "such assignation, upon being duly stamped and duly intimated, shall have the same force and effect as a duly stamped and duly intimated assignation, according to the forms at present in use."[1]

What is required for a valid assignation: an order which, if carried out, will operate a transference of the debt, is sufficient.

It is unnecessary, in order to an effectual assignation, that any of the above-mentioned forms should be employed; nor are any words of style essential. All that is necessary is that there should be an irrevocable order authorising one person to pay and another to receive the debt. An assignation, in other words, is effectual, though it contains no words of actual conveyance, if it shows a present intention to transfer, and if such acts are authorised as will make the assignee's right effectual. Thus an agreement between parties entitled to certain monies, held by testamentary trustees, and the creditors of these parties, that the sum due to the creditors in question should be paid by the trustees out of the said monies, the agreement being embodied in a minute wherein the parties "authorise and direct the trustees to pay over the said principal sum and interest, and declare that a receipt to the said trustees by the said payees for the same shall be as valid and effectual, to all intents and purposes, as if granted by the said whole parties," has been, on being intimated to the trustees, held a valid assignation.[2] It was pleaded that the agreement in question, seeing that it contained no words of conveyance, could not constitute an assignation. Referring to this plea, the Lord Justice Clerk (Inglis) said: "I cannot understand that plea, unless it is intended to mean that by the law of Scotland nothing but words of conveyance can operate an assignation. But, if anything is settled in the law of Scotland, it is that no words directly importing conveyance are

[1] 25 & 25 Vict. c. 85, s. 1.

[2] *Carter* v. *Macintosh*, 1862, 24 D. 925.

necessary to constitute an assignation, but that any words giving authority or directions, which if fairly carried out will operate a transference, are sufficient to make an assignation."[1] In *M'Cutcheon* v. *M'William*,[2] the creditor in a bond and disposition in security over heritable subjects, assigned the subjects disponed in the bond, but did not expressly assign the bond itself or the debt, though the assignation bore to be "in real security of" the sum in the bond. The assignation contained an assignation of writs conform to inventory, in which inventory the bond was included. On a question arising, between the assignee and the cedent's trustee in bankruptcy, whether the debt was assigned at the same time as the heritable subjects, it was held that, although the assignation did not conform to the statutory schedule provided for the transference of such securities (Schedule GG of the Titles to Land Consolidation Act, 1868), nor to previous practice, and although the debt was not assigned in express words, yet that, looking to the intention of the granter of the deed, apart altogether from forms of style or statutory schedules, there was evidence of a present intention to transfer the debt as well as the subjects over which it was secured, and that this was enough to make a valid assignation of the debt.[3]

Illustrations of this principle in assignations by bills.

The same principle is applied in dealing with assignations effected by means of bills of exchange and cheques. "Any words which express a present intention to transfer," observed Lord Justice Clerk Moncreiff, "are sufficient as an assignation, apart altogether from forms of style or the schedules of the recent Statute."[4] It is on this principle that in Scotland, at common law, a bill of exchange or cheque has always operated, when presented, as an effectual assignation of the funds of the drawer in the hands of the drawee in favour of the payee, the presentation acting as an intimation.[5] This common law doctrine has been expressly enacted by the Bills of Exchange Act, 1882, where it is provided that "in Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn, in favour of the

[1] Per L. J. C. Inglis in *Carter* v. *Macintosh* (*supra*), at p. 933.

[2] 1876, 3 R. 565.

[3] *M'Cutcheon* v. *M'William*, 1876, 3 R. 565.

[4] Per L. J. C. Moncreiff in *M'Cutcheon* v. *M'William*, 1876, 3 R. 565; cf. also *Ritchie* v. *M'Lachlan*, 1870, 8 Macp. 815, where a docquet, "Pay the above account to C.," written on an account, was, on being signed and delivered, held to be a mandate *in rem suam*, which, being recognised by the opposite party, was a valid assignation.

[5] See opinions in *British Linen Co. Bank* v. *Carruthers*, 1883, 10 R. 923.

holder, from the time when the bill is presented to the drawee."[1] So a bill of exchange accepted "payable at" a bank in Scotland operates, on presentment, as an intimated assignation of the funds of the acceptor in the banker's hands;[2] and a cheque, granted for value, operates, on being presented for payment, as an intimated assignation of the funds of the drawer in the hands of the bank up to the amount of the cheque.[3] "A cheque is a bare procuratory, when it is granted gratuitously; but when it is granted for value, it is a procuratory *in rem suam*, which is just one of the definitions of an assignation."[4] A bill may operate as an assignation though it is not accepted. Thus a bill drawn on, but refused to be accepted by, a party who held funds, which had not vested, but afterwards came to vest, in the drawer, was held, as being a precept or mandate to pay, a good assignation of the funds in the hands of the drawee when they subsequently vested.[5] The instrument in this case, though it was neither a probative writ nor holograph, and though it failed as a bill of exchange for want of acceptance, was nevertheless effectual as an assignation, simply on the ground that, between the granter and the payee, it was a subsisting order importing authority to the drawee to pay and to the payee to receive the money.[6] Protest, though it is unnecessary, is the best evidence of the presentment having been made, and of the date at which it was made. Even an irregular presentment may be sufficient, if the drawee enter in his books that it has been presented.[7]

A bill drawn upon three out of seven trustees *nominatim*, and the others by description, is sufficient to operate an assignation of a fund belonging to the drawer in their hands; though it would not be sufficient to make them liable to summary diligence on the bill.[8] "What is required for diligence is not required to operate assignation, and assignation may be effectually completed, though that may be wanting which is necessary for diligence."[9] In the same way, though a draft need not be an

[1] 45 & 46 Vict. c. 61, s. 53, subs. 2. Cheques are bills of exchange drawn on a banker payable on demand; sec. 73.

[2] *British Linen Co. Bank* v. *Rainey's Tr.*, 1885, 12 R. 825.

[3] *British Linen Co. Bank* v. *Carruthers*, 1883, 10 R. 923; *Sutherland* v. *Commercial Bank*, 1882, 20 S.L.R. 139.

[4] Per Lord Pres. Inglis in *British Linen Co. Bank* v. *Carruthers*, *supra*.

[5] *Carter* v. *Macintosh*, 1862, 24 D. 925.

[6] See observations of Lord Young in *British Linen Co. Bank* v. *Rainey's Tr.*, 1885, 12 R. 825, at 832.

[7] *Watt's Trs.* v. *Pinkney*, 1853, 16 D. 279.

[8] *Watt's Trs.* v. *Pinkney*, 1853, 16 D. 279.

[9] Per Lord Rutherfurd in *Watt's Trs.* (*supra*).

unconditional order to pay, as is necessary if it is to have the privileges of a bill, yet, on presentment, it has the effect of an intimated assignation.[1]

It is only where the drawee of a bill actually has in his hands funds belonging to the drawer that the bill operates as an assignation. So where the granter of a cheque has no funds in the bank, even though the bank has agreed to honour his overdrafts, the presentment of the cheque does not operate as an assignation, because there is no debt due to the drawer to be assigned. Though the drawee has goods in his hands belonging to the drawer, if these goods have not been realised, the drawing and presentment of a bill will not operate as an intimated assignation of the goods;[2] though it would appear that where, in such a case, the goods in the drawee's hands are, after the presentment of the bill, turned into money, an action will lie to the holder of the bill where no mid-impediment, such as an arrestment by a third party, has intervened.[3]

A mere proposal to assign does not operate as an assignation.

In order to effect an assignation, the instrument must amount to an order to convey, or an actual conveyance; a mere proposal to assign does not operate as an assignation, even where it is formally intimated to the debtor. In one case, for example, the executive council of an International Exhibition Association passed a resolution (in accordance with the Articles of Association[4]), hypothecating to a bank, in consideration of advances made by the bank, the letters of guarantee granted by the subscribers to the guarantee fund of the exhibition, and undertaking that all necessary proceedings should be taken at their instance to recover the sums for which the several guarantors were respectively liable under the letters, and to apply the same in reduction of the advances. This resolution was embodied in a minute. In conformity with this minute the letters of guarantee were delivered by the council to the bank, and a circular was sent by the law-agents of the bank to each of the guarantors, intimating that "in the event of there being any call upon you under your guarantee, the amount of such call will fall to be paid to the bank." The bank maintained that the effect of this minute was to give them an assignation to the debts contained in the letters, and that

[1] Bell, *Prin.* s. 311; cf. *Ritchie* v. *M'Lachlan*, 1870, 8 Macp. 815.

[2] Bell, *Prin.* s. 1465.

[3] Bell, *Prin.* s. 1465; *Stewart* v. *Ewing*, 1744, M. 1493.

[4] By the articles the executive council had power to borrow money, and "to assign and hypothecate on security thereof all or any part of the property of the association, and, in particular, the guarantee obligations."

the circulars issued by their law-agents was a due intimation of such assignation. The Lord Ordinary (Stormonth Darling) refused to so construe the minute, and held that the executive council, having power under the Memorandum and Articles of Association either to assign or hypothecate, had deliberately chosen to hypothecate, and that the undertaking to use all necessary proceedings at their own instance for recovery of the sums guaranteed was consistent with hypothecation and inconsistent with assignation. Further, the hypothecation or pledge of the letters of guarantee was ineffectual, since they were not negotiable instruments, to give the bank a preference over the debts against the liquidator, who was entitled to possession of the letters as accessories of the fund. This judgment was acquiesced in.[1] A letter from a banker to A.—"We are instructed by B. to advise you that a special credit for the sum of £40,000 has been opened by us in your favour, and that it will be paid to you rateably upon the receipt of certain certificates,"—was held by the House of Lords, in an English case, not to constitute an assignment or specific appropriation of the sum, but to be a mere statement that the person writing it would act as paymaster to the person to whom it was written, up to a certain amount, upon his performing the conditions set forth in it.[2] Similarly, in *Crossley* v. *The City of Glasgow Life Assurance Co.*,[3] S., having effected two policies of insurance upon his life for the purpose, as he expressly informed the assurance company, of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited the policies with C., and at the same time asked him by letter to instruct his, C's., solicitors "to prepare the necessary assignment." C., however, never actually took any assignment. On the death of S., C. gave the company notice in writing of the death, and that he held the policies in security for his debt, and the company acknowledged receipt of the notice in the ordinary form. On this state of facts, the Court held that there had been no assignment of the policies, and that the company were justified in refusing to pay C. in the absence of the consent of S.'s legal representatives. The distinction between a stipulation for the assignation of a debt, as part of a present or instant transaction, and a mere proposal or promise by the debtor that, if and when the creditor desires it, an assignation in security will be granted, is important when the assignation is not actually carried out till within sixty days of the debtor's bankruptcy. In the

[1] *Robertson* v. *British Linen Co. Bank Lim.*, 1891, 18 R. 1225.

[2] *Morgan* v. *Larivière*, 1875, L. R. 7 H. L. 423.

[3] 1876, L. R. 4 C. D. 421.

former case the assignation is not reducible under the Act 1696, c. 5; in the later case it is reducible.[1]

Delivery of the assignation.

The assignation, as a rule,[2] requires to be delivered to the assignee, unless it is a mutual contract, which requires no delivery.[3] The rules as to the delivery of assignations are identical with those regulating the delivery of other instruments.

Necessity for intimation to the debtor.

It is necessary, in order to the completion of an assignee's title, that the assignation be intimated to the debtor. Even where the deed of assignation has not been delivered, intimation of the assignation to the debtor will perfect the assignee's right.[4] Lord President Inglis, referring to *M'Lurg* v. *Blackwood*,[5] approved the principle there laid down, adding: "If you execute an assignation, that is made effectual by intimation, without delivery; just as a conveyance of land is effectual without delivery, if you take infeftment in favour of a third party. The infeftment and the intimation complete the right, and afford a complete publication or equivalent of delivery."[6] The doctrine that intimation completes, and is necessary to complete, the assignee's title, rests on the fact that intimation, in the case of an incorporeal moveable, is equivalent to the delivery or change of possession, which is required to complete the transference of a corporeal moveable. Taken by itself, an assignation of an incorporeal moveable, like the conveyance of a corporeal moveable, is a title to demand possession; and if, as in the case of an incorporeal, possession cannot be obtained, it is a title which, if intimated, will transfer the right. "But until possession is obtained, or until intimation is made, the right is not transferred, although there is a right in the person who holds it to have it transferred."[7] That being so, it is clear that, in a question with the cedent personally or his personal representatives, intimation to the debtor is unnecessary for the safety of the assignee, if the deed has been delivered; for, inasmuch as a granter cannot dispute his own deed, the assignee can enforce the assignation, even when unintimated, against both the cedent himself and

[1] *Moncrieff* (*Tod and Hill's Tr*). v. *Union Bank*, 1851, 14 D. 200; *Stiven* v. *Scott & Simson*, 1871, 9 Macp. 923; *Gourlay* v. *Mackie*, 1887, 14 R. 403.

[2] Intimation may operate as delivery, see next paragraph.

[3] Cf. *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121. See per Lord Kincairney (Ord.) at p. 1125, and per Lord Kinnear at p. 1130.

[4] Bell, *Prin.* s. 1462; *M'Lurg* v. *Blackwood*, 1680, M. 845, where an assignation intimated, but otherwise undelivered, was preferred to an arrestment.

[5] *Ut supra.*

[6] *Jarvie's Trs.* v. *Jarvie's Trs.*, 1887, 14 R. 411, per L. P. Inglis at 416.

[7] Per Lord Shand in *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078.

his personal representatives.[1] An unintimated assignation is not, however, effectual against the creditors of the cedent, or against a subsequent assignee holding an intimated assignation. This distinction between the rights of personal representatives of a cedent and the creditors of such cedent, as affected by an unintimated assignation, is illustrated by two old decisions on the rights of a deceased cedent's ordinary executor and his executor-creditor respectively, against the holder of an unintimated assignation. It was held that while, on the death of the cedent, an unintimated assignation granted by him was preferable to the right of his ordinary executor,[2] the holder of such an unintimated assignation must yield to the confirmation expede by an executor-creditor of the cedent.[3]

Effects of intimation —as regards the debtor.

The effect of the intimation of an assignation as regards the debtor in the obligation assigned, is to interrupt his *bona fides*. Till intimation, he continues bound to the cedent; after intimation, he is bound to the assignee. Or, viewing the matter from the point of view of the protection of the debtor, he is entitled to look to the person with whom he made his contract to accept performance of it, and to give him his discharge, unless and until distinct intimation is made to him that he must look to some other person. Accordingly, where an assignation has been granted, but not intimated, and the debtor has in good faith paid the debt to the original creditor, such payment operates as a good discharge;[4] and, on the same ground, it is provided by statute that if a debtor, in ignorance of his creditor's sequestration (which is a legal assignation, 19 & 20 Vict. c. 79, s. 102), have paid his debt in *bonâ fide* to the bankrupt, he is not obliged to pay it a second time to the trustee.[5] On the other hand, the debtor who, after intimation of the assignation, pays his debt to the original creditor, is liable to pay a second time to the assignee; for the payment to the original creditor is not a payment of the debt which has been assigned.[6] The effect of intimation, in short, as regards the debtor, is to substitute the assignee as the creditor in the debt in the place of the cedent, and to terminate all obligation on the part of the debtor to pay to the cedent.

[1] Ersk. iii. 5, s. 3; *Grant* (*Lillie's Tr.*) v. *Gray* (*Suter's Trs.*), 1828, 6 S. 489. See also Pollock on *Contract* (6th ed.), 207.

[2] *Thome* v. *Thome*, 1683, 2 Bro. Sup. 49.

[3] *Sinclair* v. *Sinclair*, 1726, M. 2793.

[4] *M'Dowall* v. *Fullerton*, 1714, M. 840 and 576.

[5] 19 & 20 Vict. c. 79, s. 111.

[6] *Hope & M'Caa* v. *Wauch*, 12 June 1816, F. C.

Effect of intimation —as regards the cedent and persons claiming through him.

In addition to interrupting the *bona fides* of the debtor, intimation has the effect of, and is necessary for, thoroughly divesting the cedent. No one can be fully divested of a debt till another has been invested therein; and, accordingly, the cedent is not wholly divested till, by intimation, the assignee has become the creditor and is fully vested in the debt. Similarly, intimation to the debtor, and that alone, effectually excludes claims by third parties; for such claims can be derived only from and through the cedent; and, as all right in the cedent is evacuated by intimation, claims by third parties derived from him are, after intimation, necessarily excluded.[1] Hence the effect of intimation is to perfect the title of the assignee, not only against the debtor but also against the cedent and third parties claiming rights through him.

Intimation, as affording the criterion of preference among assignations.

It follows that the date of intimation must in all cases form the criterion of preference in a competition among assignations. The debtor becomes bound to the assignee of whose assignation he first receives notice; he cannot be bound by any other assignation, though prior in time, of which he knows nothing. As payment to the original creditor frees the debtor, who has had no notice of an assignation, so payment to the assignee of whose right he has been first informed must equally free the debtor, who knows neither of any prior assignation by the original creditor, nor of any subsequent assignation by the new creditor. So, in England, as in Scotland, a subsequent assignee, who has given notice to the debtor, is preferred to a prior assignee who has not given notice.[2] Intimation is as necessary to make effectual an assignation contained in a marriage contract as it is to make effectual any other assignation; and the date of intimation is, as much in the one case as in the other, the criterion of preference should there be a competition. Thus in *Newlands* v. *Miller*,[3] a woman by antenuptial contract had granted a conveyance of all *acquirenda* to trustees. She, *stante matrimonio*, succeeded to a certain fund. Before the distribution of this succession, however, the spouses had granted sundry bonds and assignations in security over the wife's share in the succession in favour of third parties, who had made advances to the husband. In a question between the marriage-contract trustees and the assignees in these bonds, it was held that

[1] Accordingly, after assignation and intimation, an arrestment in the hands of the debtor to found jurisdiction against the cedent is ineffectual—*Whittall* v. *Christie*, 1894, 22 R. 91.

[2] *Dearle* v. *Hall*, 1823, 3 Russ. 1.

[3] 1882, 9 R. 1104.

the latter were to be preferred, though their assignations were posterior in time, on account of their having made prior intimation of their assignations. In *Campbell's Trs.* v. *Whyte*[1] a similar competition occurred between an onerous assignee of the proceeds of a legacy, which had fallen to a married woman, *stante matrimonio*, and the trustees under her marriage settlement, who held a general conveyance of *acquirenda*. The trustees under the marriage settlement had not accepted office or done anything to make good the assignation to them, till after the wife had granted the onerous assignation. Here, too, the whole question turned on priority of intimation, and on that ground the onerous assignee was preferred to the marriage-contract trustees. On the other hand, where a *spes successionis* belonging to a husband at the date of his marriage contract was conveyed to his marriage-contract trustees, and the assignation intimated, the right of the trustees was held effectual against a subsequent arrestment.[2] Since, by Statute, the act and warrant of confirmation in favour of the trustee on the cedent's sequestrated estate has the effect of an intimated assignation, it is clear that the title of the trustee must prevail over that of an assignee, who has not intimated his assignation to the debtor before the date of the cedent's sequestration.[3] No act, therefore, even of an assignee for value after the bankruptcy of the cedent can, in the ordinary case, give validity to an unintimated assignation as against the trustee in bankruptcy;[4] and it is immaterial, in a question between the assignee and the cedent's trustee in bankruptcy, that intimation was given by the assignee to the debtor, before the latter had notice of the cedent's bankruptcy.[5] The preferable right, which a second assignee of a fund held by trustees, who has given notice of his assignment to the trustees, possesses over a first assignee, who has failed to give notice, is unaffected by the fact that the second assignee took his assignment, not from the actual beneficiaries but from the legal representative of deceased beneficiaries.[6] In view of the possibility of an assignee having his title defeated, either by the supervening bankruptcy of his cedent or by a

[1] 1884, 11 R. 1078; see also *Tod's Trs.* v. *Wilson*, 1869, 7 M. 1100, which is commented on in *Watson* v. *Duncan*, 1879, 6 R. 1247.

[2] *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121.

[3] So also in England, *in re Webb*, 1867, 36 L. J. Ch. 341; *Barnes* v. *Pinkney*, 1867, 36 L. J. Ch. 815.

[4] As regards shares in a company, this does not hold; *Morrison* v. *Harrison*, 1876, 3 R. 406; see *infra*, p. 503.

[5] *In re Tichener*, 1865, 35 Beav. 317. This fact is material so far as the position of the debtor is concerned; see *infra*.

[6] *In re Freshfield's Tr.* 1879, 11 Ch. Div. 198.

second assignation of the debt being granted and duly intimated, it is important that the right under an assignation should be completed by intimation with the least possible delay, and that care be taken to preserve evidence both of the fact that such intimation was made and of the date at which it was made. An acknowledgment by the debtor of the intimation is the best evidence.[1] Neglect on the part of a law-agent, who acts for an assignee in the carrying out of the transaction, either to give due intimation to the debtor or to preserve evidence of his having so given intimation, may, if loss result from his neglect, render him liable in a claim for damages at the instance of his client, the assignee. Thus in *Lillie* v. *Macdonald*,[2] the heir of a law-agent, being unable to instruct that intimation had been duly made of a bond and assignation, granted twenty-five years before the date of the action, was held liable to the assignee for the loss sustained by him upon the loan in the bond.

Persons by whom, and to whom, intimation is made.

Intimation is equally effectual whether it is sent by the cedent or by the assignee. It has been expressly decided that intimation by the cedent is sufficient, though there has been no intimation by the assignee.[3] In practice, however, it is usually the assignee who sends notice to the debtor; for it is his title that is being completed and he is the person chiefly interested.[4]

The question of the person or persons to whom intimation must be made is settled, in the ordinary case, by determining who is the debtor in the obligation conveyed. It has been laid down by Lord Selborne that it is enough for the completion of the assignee's title, "if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment," as, *e.g.*, a trustee or an agent intrusted with a

[1] See Menzies, *Lectures*, 257; *Newton & Co.* v. *Callogan & Co.*, 1785, M. 850.

[2] 13 Dec. 1816, F. C.

[3] *A.* v. *B.* 1540, M. 843.

[4] The question by whom the intimation is made is of very secondary importance; the material point is that the debtor should be by some means made aware that an assignation of the debt has been effected. The statutory schedule of a notarial intimation appended to the Transmission of Moveable Property Act, 1862, does not bear on whose behalf the notary acted. See observations in *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121, in which case an entry in the sederunt-book of the trustees, who were the debtors in the obligation, bearing that the attention of the trustees had been directed to a previous intimation, was held sufficient to render the assignation complete, irrespective of the question by whom the intimation was made or whether the person making it was *in titulo* to make it.

particular fund.[1] Where the debt assigned is due, or held, by two or more persons, as trustees, executors, or co-debtors, intimation should, as a rule, be made to each of them, as if he were the sole debtor. It is advisable to do this even when they are all bound *singuli in solidum*, in order to prevent any of them from paying in *bonâ fide* to the wrong party. In the same way, where the debt is due by a principal debtor and his cautioners, separate intimation should be sent to each party. "Where there are many obligants, whether joint debtors or principals and cautioners, intimation made to anyone is sufficient for completing the conveyance; but such intimation is not effectual for interpelling those to whom no intimation was made from making payment to the cedent; and therefore assignees ought, in prudence, to make intimation to all of them."[2]

Intimation to trustees.

Where one of two trustees was an invalid and took practically no part in the administration of the estate, intimation, made to the acting trustee alone, was held to be adequate and preferable to a later arrestment.[3] But an arrestment, used in the hands of two out of six accepting trustees, where a majority of the trustees was declared to be a quorum, was inept.[4] A bill, drawn upon three out of seven trustees *nominatim*, and upon the others by description, and protested against three by name and the others in general, having further been noted in a memorandum book by the trustee who acted as factor of the trust, entered in the sederunt-book and approved by a meeting of the trust, was held to operate as a valid and intimated assignation.[5] If an assignation is duly intimated to the trustees in office at the date of the intimation, the assignee's right is good against any assignation subsequently intimated, though meantime the trustees have been changed.[6] In an English case where one set of trustees had been succeeded by another, an assignment of the trust funds had been granted and notice thereof duly given to the first set of trustees during their tenure of office; and, subsequently, the new trustees, being ignorant of the interest created by the aforesaid assignment and notice, acted on a second assignment of which

[1] Per Lord Selborne in *Addison* v. *Cox*, 1872, 8 Ch. 76 at 79.

[2] Ersk. iii. 5. 5.

[3] *Jameson* v. *Sharp*, 1887, 14 R. 643.

[4] *Black* v. *Scott*, 1830, 8 S. 367.

[5] *Watt's Trs.* v. *Pinkney*, 1853, 16 D. 279.

[6] Where intimation is made to trustees it is important that an entry of the fact should be made in the sederunt-book of the trust, so that it be brought to the knowledge of subsequent trustees.

notice was sent them.[1] On the question whether personal liability attached to the new trustees on the ground of their committing a breach of trust by acting on the second assignment and notice, the Court held that in England no such personal liability could attach, because, however desirable it might be for new trustees of a fund to inquire, on their appointment, whether there had been notice of any encumbrances on it, it is not the practice to make such inquiries, nor does the Court direct such inquiries to be made when it appoints new trustees. Seeing that in Scotland it is the practice to enter all intimations of assignation by beneficiaries of a trust estate in the sederunt-book of the trust, it would seem to be the duty of new trustees, before paying to an assignee, to examine the sederunt-book to discover whether any assignation has been previously intimated; and if, by neglecting to make such examination, new trustees pay to a second assignee, they would not be free from liability.

Intimation to companies.

Where the debtor is an ordinary trading company, intimation is given to the firm, *socio nomino*, at its principal place of business, as well as to all the partners individually, unless there is a manager formally appointed. It has been held that intimation to one of the partners, who was *de facto* the managing partner—the partner in question being himself the assignee—was not sufficient intimation to the partnership.[2] It is to be observed, however, that the interest assigned was not a debt exigible from the company, but a share of the company stock transferred from one partner to another; the case, therefore, goes no further than this, that to complete an assignation by one partner of the rights which he holds against his copartners, intimation must be made to them individually. It is now provided by sec. 16 of the Partnership Act, 1890, that "notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by, or with the consent of, that partner." Knowledge on the part of the manager of a Friendly Society—the manager being in this case the cedent in the assignation—has been held not to constitute an intimation of the assignation to the society, which was debtor or holder of the funds assigned.[3]

[1] *Phipps* v. *Lonegrove*, 1873, 42 L. J. Ch. 893. In this case, the question of priority among the encumbrancers—the estate being real, and in English law the doctrine of notice having no application to interests in land—was settled apart from any question as to the priority of notice.

[2] *Hill* v. *Lindsay*, 1846, 8 D. 472.

[3] *Grigor Allan* v. *Urquhart*, 1887, 15 R. 56.

Where a corporation is the holder of the fund assigned, intimation is competently made to the treasurer; but the chief point is that an entry of the assignation should be made in the books of the corporation.[1] When the debtor is an incorporated bank, it is common to make intimation to the chief officer at the head office, and where the money is actually lying, or payable, at a branch office, to the agent of that branch office, as well as to the principal officer at the head office.[2] In the case of companies registered under the Companies Act, 1862, "intimation may be given by leaving it, or sending it through the post in a prepaid letter, addressed to the company, at their registered office.[3] In the case of railway companies, intimation is made, in the same way as to other companies, at the principal office, or personally to the secretary, or, if there is no secretary, to one of the directors.[4] In the case of companies established under special Acts, provision is usually made in the Acts as to the official to whom intimation is to be made; and if a joint-stock company is not registered, intimation ought to be made either to the principal officer at the head office, or in accordance with the constitution of the company.

If the debtor is a married woman, intimation is made both to herself and her husband. If the debtor is a pupil, intimation is made to him and his tutors; and, if the debtor is a minor, to him and his curators. If a pupil has no tutors, or they are unknown, or if a minor has no curators, or they are unknown, then, in addition to intimation to the pupil or minor, edictal intimation should be made to the tutors or curators at the Office of Edictal Citations.

Modes of intimation: Regular intimation.

The regular mode of intimation is notarial. The old procedure in making notarial intimation was for the assignee or his procurator, in presence of a notary and two witnesses, to give notice to the debtor personally, to exhibit the assignation, and to deliver a copy of it to the debtor, along with a written statement, signed by the assignee or his procurator, called a schedule of intimation. This document, after reciting the bond and assignation, declared that intimation had been duly made; that the debtor must not make payment to any other than the assignee; and that, if he did so, he would be liable in repetition. The assignee, at the same time, took instruments in the hands of the notary; and the *res gestæ* were embodied in an instrument, signed by the notary and witnesses,

[1] *Keir* v. *Menzies' Cr.*, 1739, M. 738 and 850.
[2] Bell, *Conveyancing*, i. 315.
[3] 25 & 26 Vict. c. 89, s. 62.
[4] 8 & 9 Vict. c. 17, s. 137; 8 & 9 Vict. c. 33, s. 130; see also Land Clauses Act, 8 & 9 Vict. c. 19, s. 128.

which afforded evidence of the intimation. When a notary did not intervene, the older form of intimation was to produce the assignation to the debtor, deliver a copy to him, and obtain from him probative acknowledgment, usually indorsed upon the assignation, that the assignation had been intimated. This acknowledgment must either be holograph, in which case it proved its own date,[1] or it required to be authenticated in all respects like a formal deed.

Forms introduced by the Transmission of Moveable Property Act, 1862 (25 & 26 Vict. c. 85).

New forms of intimation were introduced by the Transmission of Moveable Property Act (25 & 26 Vict. c. 85). It is there provided (sec. 2) that an assignation may be validly intimated, either (1) by a notary public delivering a copy thereof, certified as correct, to the person or persons to whom intimation may be requisite, in which case the evidence is a certificate by the notary in the form of Schedule C of the Act; or (2) by the holder of an assignation, or any person authorised by him, transmitting a copy thereof, certified as correct, by post to the debtor, in which case a written acknowledgment of receipt of the copy by the debtor is sufficient evidence. The Act of 1862 makes no special provision for cases where the debtor is furth of Scotland, and there seems to be some doubt whether the forms of intimation introduced by that Act are available in such a case. The best practice is to intimate notarially at the Office of Edictal Citations, and also by letter to the party abroad.[2] Intimation may be given edictally, in the forms previously in use, at the office of the keeper of Edictal Citations on letters of supplement under the signet, in presence of a notary and two witnesses.[3]

Irregular intimation.

Besides the regular modes of intimation, certain irregular methods of intimation—or equipollents to formal intimation, as they are sometimes called—have been admitted. The main characteristic of these various means by which the legal effect of intimation may be attained, is that they all induce a state of matters by which the debtor becomes fully aware that an assignation has been made, and is to be acted upon. Thus intimation may be sufficiently given by certain forms of judicial procedure, as, for example, by the execution of a summons against the debtor by the assignee, in which the assignation is founded on;[4] or by a charge for payment put in force against the debtor by the assignee in virtue of a regis-

—by judicial proceedings.

[1] *Newton & Co.* v. *Callogan*, 1785, M. 850.

[2] 6 Geo. IV. c. 120, s. 51; 1 & 2 Vict. c. 118; A. S. 11 July 1828, 24 Dec. 1838.

[3] Bell, *Conveyancing*, i. 314, 315.

[4] *Whyte* v. *Neish*, M. 854; see *Watt's Trs.* v. *Pinkney*, 1853, 16 D. 279, at 288.

tered bond and assignation;[1] or by the production of the assignation by a claimant in a multiplepoinding to which the debtor is a party.[2] But it was held that a citation to an action of poinding of the ground, proceeding on powers contained in a bond and disposition in security, was not intimation to the tenants sufficient to interpel them from thereafter paying over the rents to the landlord,[3] unless the summons contained a special reference to the assignation of rents contained in the bond.[4] For an action of poinding of the ground is intended to affect, not the rents, but only the moveables upon the estate; nor does it necessarily imply that the poinder intends to put in force his right to the rents, or even that any such right exists.

Again, the facts and circumstances may be such as to show that the debtor or holder of the fund, though no formal intimation was given to him, could not have been ignorant of the assignation. If the state of things is such that a rational man would act with reference to the knowledge acquired, the mere fact that a subsequent assignee sent prior formal notice to the debtor will not give him priority over the first assignee.[5] Thus a written promise by the debtor to pay to the assignee,[6] or a partial payment, or payment of interest to the assignee,[7] or an offer to compromise, infers sufficient intimation having been made to the debtor.[8] A letter from the assignee or his agent, announcing the assignation to the debtor or his authorised agent taken with an answer sent thereto by the debtor or his agent, proving the intimation to have been made, has been held sufficient.[9] Such a letter by the debtor, acknowledging receipt of intimation, or an indorsation by him on the notice, if holograph, proves its own date.[10] Again, where the debtor is a party to the deed of assignation, it is sufficient intimation; but the mere fact of his having signed the deed as a witness is not enough.[11] Obviously no intimation is necessary where the assignee himself is the holder of the fund, and therefore is himself the person to whom intimation falls to be made. Thus where one of two partners assigned to the other, the Court considered that an intimation of the assignation by the assignee to himself would have been

—rebus ipsis et factis.

[1] Ersk. iii. 5. 4.

[2] *Dougal*, 1795, M. 851; *Carter* v. *Macintosh*, 1862, 24 D. 925.

[3] *Royal Bank* v. *Dixon*, 1868, 6 M. 995.

[4] *Lang* v. *Hislop*, 1854, 16 D. 908.

[5] *Lloyd* v. *Banks*, 1868, L. R. 3 Ch. 488.

[6] *Home*, 1674, M. 863.

[7] *Livingston*, 1626, M. 860.

[8] *M'Gill* v. *Hutcheson*, 1630, M. 860.

[9] *Gray* v. *Duke of Hamilton*, 1708; Robertson's App. Cases, 1; *Wallace* v. *Davies*, 1853, 15 D. 688.

[10] *Newton & Co.* v. *Callogan*, 1785, M. 850.

[11] *Ballenden*, 1707, M. 865; *Turnbull*, 1730, M. 868.

absurd and incongruous.[1] Where, however, the holder of the fund is a firm, and the assignee is *de facto* the manager of the firm, the mere fact that the manager, in his private capacity, has knowledge of the assignation will not supply the place of formal intimation to the company;[2] and, in the same way, where the holder of the fund is a friendly society, the fact that the manager of the society is the cedent in the assignation, does not render it unnecessary to intimate to the society.[3] The House of Lords, reversing a judgment of the Court of Session, has held that notice to the debtor's factor, with an entry of the transference of the debt by the factor in the books of the debtor, was sufficient intimation.[4] The presence of an assignee at a meeting of shareholders in a joint concern, and the production by him of the assignation in virtue of which he had a right to attend, were held to constitute a sufficient intimation of his right to the shareholders, and, the cedent having been sequestrated after the meeting, the right of the assignee to the shares assigned was preferred to the claim of the trustee on the sequestrated estate of the cedent.[5] In this case the proceedings of the shareholders at the meeting referred to were imperfectly recorded in a minute, and the Court allowed the imperfect minute to be explained by parole evidence. "It is settled," observed Lord Fullarton, "that intimation of an assignation may be proved *rebus ipsis et factis*." It is stated by Erskine[6] that "a verbal promise of payment by the debtor to the assignee, upon a communing, serves for intimation; but no verbal promise is accounted equivalent to an intimation unless it has proceeded on a communing"; but this doctrine is questioned by Professor Bell.[7] As a general rule, means must be taken by the assignee to inform the debtor of the character and effect of the assignation, or, in other words, there must be something importing a demand on the debtor to hold for him. Thus mere loose communications, applications to accede to a deed, and general statements as to the existence of an assignation, are not sufficient, because the debtor may not understand them to import a demand on him to hold for the assignee.[8] So, too, although private knowledge on the part of the

[1] *Russel* v. *Breadalbane*, 1827, 5 S. 827; 1831, 5 W. & S. 257; see also *Paul* v. *Boyd's Trs.*, 1835, 13 S. 818.

[2] *Hill* v. *Lindsay*, 1846, 8 D. 472.

[3] *Grigor Allan* v. *Urquhart*, 1887, 15 R. 56.

[4] *Earl of Aberdeen* v. *Earl of March*, 1730, 1 Paton, App. 44.

[5] *Hill* v. *Lindsay*, 1847, 10 D. 78.

[6] *Inst.* iii. 5. 4.

[7] Bell, *Com.* ii. 17; cf. *Home*, 1674, M. 863, where it was held that the promise must be proved by writ.

[8] *Bain* v. *M'Millan*, 1679, M. 863; *Donaldson* v. *Ord*, 1855, 17 D. 1053; see opinion of Lord Justice Clerk (Hope) at pp. 1069, 1070.

debtor, if legitimately proved, is sufficient to put the debtor paying to the cedent in bad faith in a question with the assignee, yet, in a competition, it is settled that mere private information, independently of distinct intimation, has no effect in perfecting the assignee's right;[1] nor can such knowledge be proved by witnesses.[2] Registration in the Register of Sasines of a heritable bond, or bond and disposition in security, granted by one not feudally vested, has been held sufficient intimation of the conveyance of the personal right in the lands, though the latter was not specially in view of the parties at the time;[3] but registration in a public record does not suffice for intimation. "The authorities are unambiguous in laying down that registration in a public record is not equivalent to intimation of an assignation."[4] The deed in the case referred to was registered in the Books of Council and Session, and the decision that such registration did not suffice for intimation to the debtor, proceeded on the ground that, as the main purpose of registration in these books is for preservation and execution, and not for publication, such registration did not bring the fact of the assignation home to the personal knowledge of the holder of the fund, so as to interpel him from paying it either to the original creditor or to any other assignee.

Certain legal assignations require no intimation.

There exist certain legal assignations, which, by force of law, are *ipso facto* equivalent to intimated assignations, and are accordingly complete without intimation. Thus, the judicial assignation involved in an adjudication,[5] and the legal assignations implied by marriage (previous to July 18, 1881), by sequestration in bankruptcy,[6] by cessio,[7] or by the issue of an English commission of bankruptcy,[8] carry the full right to the subjects thereby conveyed, without the necessity of intimation. These conveyances, however, do not of themselves interrupt the *bona fides* of the debtor, and therefore the debtor is safe in paying to the original creditor in the debt adjudged, or to the wife, or to the bankrupt, as the case may be, until such time as the adjudication, marriage, or bank-

[1] *Leith* v. *Garden*, 1703, M. 865; Bell, *Prin.* s. 1465; Bell, *Com.* ii. 17; *Faculty of Advocates*, 1718, M. 866.

[2] *Dickson*, M. 873.

[3] Ersk. iii. 5. 6; *Paul* v. *Boyd's Trs.*, 1835, 13 S. 818; *Edmond* v. *Gordon*, 1855, 18 D. 47, 3 Macq. 116.

[4] Per Lord Kinloch in *Tod's Trs.* v. *Wilson*, 1869, 7 M. 1100.

[5] A decree of adjudication, though no sasine has followed upon it, is preferred to a subsequent arrestment; see Lord Justice Clerk, 25 Feb. 1671, Mor. 2766.

[6] As to bankruptcy, see 19 & 20 Vict. c. 79, s. 102.

[7] As to cessio, see 43 & 44 Vict. c. 34, s. 9; *Gray* v. *Gray's Tr.*, 1895, 22 R. 326.

[8] *Selkrig* v. *Davies*, 1814, 2 Dow, 230.

ruptcy has become personally known to him.[1] It is, indeed, specially provided by statute that, if a debtor in ignorance of his creditor's sequestration pay his debt in *bonâ fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee.[2] It may be noted that the legal assignation of the wife's property, implied in marriage, prior to the Married Women's Property Act, 1881, did not enable the husband to compete with an assignee of the wife before her marriage, who had failed to intimate; for the husband was barred by personal exception, as being bound by his wife's warrandice.[3] Whether this disability extended to his creditors seems doubtful; an opinion is expressed by Professor Bell that it did not.[4]

The validity of an assignation depends on the *lex loci contractus*.

The law of England and Ireland as to what is necessary to constitute a right in security over an incorporeal moveable, differs in material points from the Scots law on the subject. Accordingly questions not infrequently arise as to which system of law is to govern particular transactions. The validity of a transfer or assignation of a moveable or personal right does not depend on the domicile of any of the parties to the transaction, but is in all cases determined by the law of the place where the assignation was made—the *lex loci contractus*. Thus where a domiciled Scotsman obtained a loan in England from a domiciled Englishman, and granted in security an assignation of a policy of insurance on his life with a Scottish company, which assignation was valid or invalid according as it was tested by English or Scots law respectively, the Court held that the question of the validity of the contract must be determined by the law of England, that being the country in which the transaction took place. Lord M'Laren (Ordinary), whose judgment was affirmed, expressed the principle thus: "The assignment of the right of credit in the policy is a new contract distinct as regards its nature, mode of constitution, and the law that regulates it, from the contract constituted by the policy itself. And the validity of an assignment will, in general, be determined by the *lex loci contractus*, that is, according to the law of the country in which the transference is made or the security given."[5] This principle was followed by Lord Stormonth Darling in a later case,[6] in which an Irishman, after depositing a policy issued by a

[1] Bell, *Prin.* 1467; Ersk. iii. 5. 4; Stair, iii. 1. 13.

[2] 19 & 20 Vict. c. 79, s. 111.

[3] Bell, *Prin.* 1466.

[4] Bell, *Com.* ii. 17; Bell, *Prin.* 1466. On the *tantum et tale* principle, it is probable that a trustee in bankruptcy would be now held to be in the same position as the bankrupt.

[5] *Scottish Prov. Inst.* v. *Cohen & Co.*, 1888, 16 R. 112, per Lord M'Laren, at p. 114.

[6] *The Scottish Prov. Inst.* v. *Robinson*, 1892, 29 S. L. R. 733.

Scottish office, in security, with an Irish creditor, subsequently assigned the policy by deed to a second creditor, also an Irishman. The deposit was not intimated to the office; but the assignation was intimated. In a competition between the depositary and the assignee, it was shown that by Scots law, intimation being necessary in Scotland to complete the title, the assignee was preferable; while, by Irish law, intimation not being necessary, the depositary was preferable. It was held that, as Ireland was the *locus contractus*, the depositary had a good title. Again, where an English creditor granted in England an assignation of a debt due by a Scottish debtor, which was valid by Scots law, but, owing to the want of a stamp, was invalid in England, the Scotch Courts refused to uphold it.[1] In an English case, *Lee* v. *Abdy*,[2] the assignee of a policy of insurance issued by an English office sued the English company. The defence was that the assignment was made in Cape Colony, and was void by the law of that colony, inasmuch as the alleged assignee was the wife of the assignor. This plea was sustained. "A chose in action," said Day, J., "has no locality. The general rule is that the validity and incidents of a contract must be determined by the law of the place where it is entered into."

Quære, as to which law determines the criterion of preference in a competition between assignee and creditors of cedent.

A different set of questions arise as to which system of law determines the criterion of preference in a competition between the assignee and the trustee in the cedent's sequestration, or a creditor of the cedent using diligence. Professor Bell states that, if no such intimation has been made to the Scottish debtor as is required by Scots law to complete the transference, an arrestment used in the hands of the debtor, though subsequent in time to the foreign assignation, will prevail over the right of the assignee.[3] So, in *Strachan* v. *M'Dougle*,[4] a policy of insurance on a Scottish office, issued to a Scotsman, was, on the death of the assured, arrested in Scotland. It had previously been assigned in England by a process which completed the assignee's right under English law, though, by Scots law, it was invalid through want of intimation. In these circumstances, the arrestment was held preferable. In *Donaldson* v. *Ord*,[5] the principle adopted was that a question of competing right between the trustee in a sequestration

[1] *Taylor* v. *Scott*, 1847, 9 D. 1504.
[2] 1886, 17 Q. B. D. 309.
[3] Bell, *Com.* ii. 18.
[4] 1835, 13 S. 954. See remarks on this case by Lord Stormonth Darling in *Scottish Prov. Inst.*, *supra*.
[5] *Donaldson* v. *Ord*, 1855, 17 D. 1053. The opinion of Lord Deas (Ordinary), whose judgment was affirmed by the Inner House, contains a valuable review of the earlier authorities.

or an arrester and an assignee, since it relates to a competition of diligences for attaching a fund in Scotland, must be determined by the law of Scotland. The question in this view is a question of remedy, as to which the law of the country, to whose Courts the party appeals, gives the rule.[1] On the other hand, it may be argued that the question is not one of competing diligences, but of the competing titles of creditors, each of whom claims the right to do diligence; and that if, as is settled, the validity of the assignation is determined by the *lex loci contractus*, the cedent, who has given a valid assignation, must be taken to have divested himself of his right, and therefore to be incapable of passing any right to his trustee in bankruptcy, or to an arresting creditor.[2] This view is strongly stated by Lord Rutherfurd (Ordinary) in *Wallace* v. *Davies*:[3] "If the right be complete by the law of the country which regulates the transfer, it seems impossible to maintain that, as a matter of remedy, something further must be done," *i.e.* intimation given to the debtor, "which the law of Scotland requires for completion of the right in the case only of transfers which are regulated by that law." Though the judgment of Lord Rutherfurd in *Wallace* v. *Davies*, which was a case of an assignment granted in England, was affirmed, the question whether intimation in Scotch form was necessary was not decided, as the Court, in sustaining the assignment, went entirely on the ground that circumstances equivalent to intimation had been proved. In a recent English case,[4] where the question arose as to the respective rights of an assignee in England, who had not intimated, and a posterior arrester, to a debt due in Scotland, the opinions of several of the leading members of the Scotch bar were obtained, to the effect that in such circumstances the arrester would be preferred.

Forms of assignation in security.

An incorporeal moveable subject may be conveyed in security either by an assignation expressly limited, or by an assignation *ex facie* absolute, qualified by a back-letter or other agreement.[5] In either case the right of the security-holder must be completed by intimation to the debtor in the obligation assigned, or, if the subject conveyed is a right of partnership, or a share in a company, by the assignee becoming a partner in place of the cedent.

[1] *Don* v. *Lippman*, 1837, 5 Cl. & Fin. 1; 2 Sh. & M'L. 682.

[2] Gillespie's trans. of Bar's *Priv. Int. Law*, 2nd ed., p. 605; see also *Scottish Prov. Inst.* v. *Robinson*, 1891, 29 S. L. R. 733.

[3] 1853, 15 D. 693.

[4] *Queensland Mercantile Agency Co.* [1891], 1 Ch. 219; cf. *Alcock* v. *Smith* [1892], 1 Ch. (C.A.) 238.

[5] As to the nature of the rights of debtor and creditor in a security by *ex facie* absolute title, see *ante*, pp. 151 and 163, and as to the mode of proof that an absolute title is in reality a security, p. 143.

In certain respects, however, the respective rights of debtor and creditor differ according to the form of security selected. These differences mainly relate to (1) the right of retention for debts unconnected with the advance for which the security is granted, and (2) the power of disposal of the subjects assigned.

Debts covered by an assignation expressly in security.

When an incorporeal moveable subject is assigned expressly in security, there is no rule of law to prevent the parties from agreeing that the creditor shall be entitled to retain in security not only of debts presently due, but also of debts to be contracted in future. Thus the security may be granted for a cash credit, or expressly in contemplation of future advances to be made by the grantee to the granter. And even if a security is granted expressly to cover a particular debt, yet, if further advances are made by the creditor to the debtor expressly in reliance on the security, these further advances will be covered, and the creditor will be entitled to retain the security until they are repaid, in a question with the other creditors of the debtor, or with a party to whom the subjects of the security have been assigned.[1] But the presumption in such a case is that the security covers only the particular debt, and further advances, not proved to have been made expressly in reliance on the security, will be unsecured. Thus A. assigned to B. a policy of assurance on his life in security of a debt of £500. B. afterwards advanced a further sum of £700 on personal bond without any reference to the security. On the death of A. his estates were sequestrated, and it was held that in a question with the trustee, B. could only apply the proceeds of the policy to meet the original debt of £500, and must rank as an unsecured creditor for the further advance of £700.[2]

Debts covered by assignation *ex facie* absolute.

When, on the other hand, a security is constituted by an assignation *ex facie* absolute, the security-holder obtains a title of property in the subjects, under a personal obligation to reconvey them, and, in the absence of any express agreement to the contrary, has an implied right to retain until all debts due to him by the debtor are discharged. The subject of retention on a title of property has already been discussed, and need not be elaborated here.[3] It may be stated generally that a party who has been invested with a title of property in a subject, has a right to refuse to fulfil his personal obligation to restore it to the real owner, until that real owner has paid all debts due to him.[4] This right,

[1] *Clyne* v. *Dunnet*, 1833, 11 S. 791; affd. 1839, M'L. & R. 28.

[2] *National Bank* v. *Forbes*, 1858, 21 D. 79.

[3] *Ante*, p. 153 and 331 *seq.*

[4] *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

however, in the case of a title given as a security for debt, is limited also by receipt of notice that the reversionary right of the debtor has been assigned, absolutely or in security, to a third party. After such notice, the right of the creditor over the subjects, in respect of any debt newly incurred, is subject to the interest acquired by such third party.[1] And as, on the bankruptcy of the debtor, the ultimate right to the subjects passes to the trustee for the benefit of the general creditors, a creditor holding an *ex facie* absolute assignation cannot retain the subjects in security of any advances made to the debtor after the bankruptcy.[2]

Power of creditor to dispose of subjects depends upon his apparent title.

A further distinction between the two methods of security lies in the power of disposal of the subjects which is conferred upon the creditor. When an assignation is made expressly in security, the assignee has no power to dispose of the subjects, save in so far as that power is conferred upon him expressly. Should he dispose of the subjects in any way not contemplated by his contract, the disponee could not possibly take any higher title than his author had. The case is different when the security is constituted by an *ex facie* absolute assignation, qualified only by a latent agreement. The creditor has then an apparently absolute title, and should he dispose of the subjects to a third party, who takes in good faith and for onerous causes, the latter will obtain a title to the subjects free from the latent equities which were enforcible against his author.[3] This rule rests on the ground that a party who has conferred on another all the *indicia* of ownership in a subject, is barred from challenging rights in that subject which a third party has been led to acquire for onerous causes, in reliance upon a state of facts for the existence of which the original owner was responsible. It was first established in the law of Scotland, with regard to incorporeal moveable subjects, by the judgment in the House of Lords in *Somervail* v. *Redfearn*.[4] There a firm purchased shares in a company, and took them in the name of one of the partners. As the rules of the company forbade the express recognition of a trust, the title was *ex facie* absolute. The partner pledged the shares in security of a private debt, and the pledgee took them in reliance on the title *ex facie* of the register, and without any notice of the trust. In the Court of Session the

[1] *National Bank* v. *Union Bank*, 1885, 13 R. 380; revd. 1886, 14 R. (H. L.) 1.

[2] *Callum* v. *Goldie*, 1885, 12 R. 1137.

[3] Bell, *Prin.* s. 1468; *Somervail* v. *Redfearn*, 1805, M. App. *voce* Personal and Real, No. 3, revd. 1 June 1813, F. C., 5 Pat. App. 707; *Attwood* v. *Kinnear & Son*, 1832, 10 S. 817; *Burns* v. *Lawrie's Trs.*, 1840, 2 D. 1348.

[4] *Supra.*

maxim *assignatus utitur jure auctoris* was applied, and it was in consequence held that the pledgee took the shares subject to the trust. The judgment was reversed on appeal, on the ground that the firm having placed the partner in the position of an apparently absolute owner of the shares, were barred from questioning the right acquired from him by the pledgee. This case was followed in two other cases presenting similar features, in each of which a transferee, taking shares from one who had an apparently unqualified title to them, was held to be preferable to a party for whom the transferor held under a latent trust.[1] No similar decision is believed to have been pronounced in Scotland in recent years, but the principle of *Somervail* v. *Redfearn* has been recognised by Lord Watson [2] and Lord President Inglis.[3] It is, however, to be observed that the title of the transferee depends upon his own *bona fides* in the matter. If he knew of the existence of the trust, or if he had the means of knowledge and wilfully abstained from availing himself of them, his title will be merely that of his author. This principle may render it doubtful whether *Somervail* v. *Redfearn* would be followed in the case of incorporeal subjects other than shares of a company. Shares in a company are held by registered title, and a party dealing with a registered owner has no knowledge, and no means of knowledge, of the party from whom his author's title was obtained. It is otherwise when the subject in question is a debt of which no register exists. Suppose, for instance, that A. assigns to B. a policy of assurance, by an assignation *ex facie* absolute, and duly intimated to the insurance company. In this case B. is the apparent owner of the policy, but any person dealing with him has notice from whom he obtained his title, and has the means of discovering, by inquiry addressed to A., what the nature of that title really is. It may be doubtful whether a party purchasing the policy without making such inquiry would obtain a title free from the equities between A. and B.

Property held on *ex facie* absolute title does not fall under the sequestration of the holder.

The principle of personal bar, on which the decision in *Somervail* v. *Redfearn* (*supra*) rests, does not extend to subject property held on an *ex facie* absolute, but really limited, title, to the diligence of the creditors of the party in whose name that title stands.[4]

[1] *Attwood* v. *Kinnear & Son*, 1832, 10 S. 817; *Burns* v. *Lawrie's Trs.*, 1840, 2 D. 1348.

[2] In *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1166; revd. 1892, 19 R. (H. L.) 43, at p. 47.

[3] In *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078, at p. 1082.

[4] *Dingwall* v. *Maccombie*, 1822, 1 S. 463, N. E. 501; *Gordon* v. *Cheyne*, 1824, 2 S. 675; *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1166; revd. 1892, 19 R. (H. L.) 43; *Fleeming* v. *Howden*, 1867, 5 Macp. 658; revd. 1868, 6 Macp. (H. L.), 113.

General creditors trust, or are supposed to trust, to the personal credit of their debtor, and not to the property to which he may have an apparently unqualified title.[1] Thus it was held that an adjudication of heritable property held under a latent trust attached that property *tantum et tale*, that is, that the right of the adjudger was subject to the trust obligations which were incumbent on his debtor.[2] And in two cases in which the subject was a share in a company held on an *ex facie* absolute title, but in reality in trust, it was decided that a trustee for creditors, whether in sequestration or under a voluntary trust-deed, had no higher title than the bankrupt.[3] In later cases the principle has been applied generally that "the trustee in bankruptcy takes the moveable estate of the bankrupt *tantum et tale*, and is bound to fulfil the obligations regarding it which were binding on the bankrupt."[4] This, however, is to be understood as meaning that the trustee takes *tantum et tale* with regard to obligations which are of the nature of inherent qualifications of the right of the bankrupt, as in regard to incompleted dispositions or assignations granted by the bankrupt, he takes an independent title, the act and warrant of his appointment being by Statute equivalent to an intimated assignation.[5]

Rights of debtor and creditor *inter se.*

In the preceding pages we have dealt with the effect produced on the respective rights of debtor and creditor in relation to third parties, as affected by the nature of the title conferred upon the creditor. We proceed to consider the rights of debtor and creditor *inter se.*

Warrandice.

The warrandice undertaken by the cedent in the assignation of an incorporeal moveable subject may be either express or implied. Where the warrandice is express, it is usually from fact and deed —that the cedent has not done, and will not do, anything in pre-

[1] See opinion of Lord Watson in *Heritable Reversionary Co.* v. *Millar*, *supra*, 19 R. (H. L.), at p. 46.

[2] *Thomson* v. *Douglas Heron & Co.*, 1784, M. 10229, Hailes, 1002.

[3] *Dingwall* v. *Maccombie*, 1822, 1 S. 463, N. E. 501; *Gordon* v. *Cheyne*, 1824, 2 S. 675.

[4] *Fleeming* v. *Howden*, 1867, 5 Macp. 658, revd. 6 Macp. (H. L.), 113; *Davidson* v. *Boyd*, 1868, 7 Macp. 77; *Watson* v. *Duncan*, 1879, 6 R. 1247; *Græme's Tr.* v. *Giersberg*, 1888, 15 R. 691.

[5] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), ss. 102 and 111; *Don's Tr.* v. *Cameron*, 1885, 22 S. L. R. 348; *Tod's Tr.* v. *Wilson*, 1869, 7 Macp. 1100. But see, *contra*, opinion of Lord Deas in *Watson* v. *Duncan*, *supra*, at p. 1252. The remark of Lord Westbury in *Fleeming* v. *Howden*, *supra*, that the trustee holds merely the position of a "gratuitous alienee," is criticised by the Lord President (Inglis) and Lord Shand in *Græme's Tr.* v. *Giersberg*, 1888, 15 R. 691, and by Lord Watson in *Heritable Reversionary Co.* v. *Millar*, 1892, 19 R. (H. L.) 43, at p. 49.

judice of the right he confers. This obligation is implied in every onerous assignation of a moveable subject, whether absolute or only in security.[1] If the subject assigned is a debt, warrandice *debitum subesse* is implied.[2] The cedent does not impliedly warrant the solvency of the debtor;[3] but he does warrant that the obligation is a binding one, not only upon the principal obligant, but also upon all parties bound as cautioners or collateral obligants.[4] Thus where a bond was assigned for onerous causes, and proved to be invalid as regards the cautioner, it was held that the assignee was entitled to demand repetition of the sum paid for it from the cedent, on the bankruptcy of the principal debtor.[5] But if it appears from the circumstances of the case that the assignation was granted on the understanding that the assignee should accept the title of the cedent as it stood, warrandice *debitum subesse* is not necessarily implied.[6] It is laid down by Professor Bell that an express clause of absolute warrandice in the assignation of a debt infers only the warrandice implied by law, *i.e.* warrandice *debitum subesse*, and that to infer warrandice of the solvency of the debtor an express obligation to that effect must be granted.[7] It has been held that the Court is entitled to look beyond the express terms of the warrandice clause, and give effect to the real contract between the parties.[8] This case, however, may perhaps be held to be shaken by a later decision in the House of Lords (though not in a question of warrandice), that the execution of a formal conveyance, even although it bears to be in execution of a previous contract, supersedes that contract *in toto*, and thenceforth becomes the sole measure of the rights and liabilities of the parties.[9]

Interest in profits from subject.

Where the subject assigned in security is of such a nature that profits are drawn from it, either at regular or irregular intervals, it is clear that in the case of an ordinary loan, whether the security is granted by a pledge or an assignation with an obligation to reconvey, the debtor, as the true owner of the subjects, is entitled to these profits, and the creditor, if he receive them, does so under an obligation to account.[10] The more intricate questions which arise as to the ownership of policies of assurance, or of the bonuses

[1] Ersk. ii. 3. 25–27.

[2] *Ferrier* v. *Graham*, 1828, 6 S. 818; *Russell's Trs.* v. *Mudie*, 1857, 20 D. 125.

[3] *Barclay* v. *Liddel*, 1671, M. 16591.

[4] *Reid* v. *Barclay*, 1879, 6 R. 1007.

[5] *Ib.*

[6] *Russell's Trs.* v. *Mudie*, 1857, 20 D. 125.

[7] Bell, *Prin.* s. 1469.

[8] *Leith Heritages Co.* v. *Edinburgh and Leith Glass Co.*, 1876, 3 R. 789.

[9] *Lee* v. *Alexander*, 1883, 10 R. (H. L.) 91.

[10] *Marquis of Queensberry's Trs.* v. *Scottish Union Insur. Co.*, 1839, 1 D. 1203; affd. 1842, 1 Bell's App. 183.

declared upon them, in cases of borrowing upon annuity or post-obit bonds, will be dealt with later.[1] In the case where shares of a company are held by a security-holder on an *ex facie* absolute title, whereby his name appears on the register as shareholder, questions may arise as to his duty should the company make a new issue of stock or shares, and offer to the existing shareholders the option of subscribing for it. In such a case it would seem that the creditor is the agent for the debtor, and that it would be his duty to inform the latter of the offer made by the company, and obey his instructions as to making application for the new stock. Failure in doing so would render him liable in damages to the debtor for any loss sustained, *i.e.* for the difference between the issue price of the new stock and its market price at the date of bringing the action.[2] As the debtor is entitled, on payment of the amount for which the security is held, to have the identical subjects restored to him, the creditor has no right to sell the subject, and repurchase similar subjects to meet the demand for reconveyance on the debt being repaid. On this principle, where shares were pledged with a stockbroker, and he sold them, and repurchased other shares which he proposed to reconvey on the debt being paid, it was held that he was bound to account to the debtor for the profits he had thereby made.[3]

Right of creditor to realise.

The right of the assignee in security to realise his security, and the forms he is bound to adopt in doing so, depend on the terms of the agreement between the parties, as shown by the assignation in security, or by the back-letter. Where the security is by *ex facie* absolute title, the creditor has the power, in selling, to give a good title to the purchaser, and though his right to sell must depend on the terms of the back-letter or other agreement, the remedy of the debtor for a violation of those terms is an action of damages against the creditor, and not a reduction of the sale.[4] When the assignation is expressly in security, the creditor cannot sell the subjects except in accordance with a power of sale granted to him, or under judicial authority, because, as his own right is expressly limited, he could not give a title of property to a purchaser. A power of sale is usually granted in every assigna-

[1] See p. 536 *et seq.*

[2] *Dougall* v. *National Bank*, 1892, 20 R. 8. Question whether, if the debtor refused to apply for the new stock, and the creditor did so on his own risk, he would be liable to account to the debtor for any profit on the transaction.

[3] *Langton* v. *Waite*, 1868, L. R. 6 Eq. 165.

[4] *Ante*, p. 161. *Henderson's Tr.* v. *Auld & Guild*, 1872, 10 Macp. 946; *Baillie* v. *Drew*, 1884, 12 R. 199.

tion in security, and must be exercised, not only with due regard to the form prescribed, but with regard to the interests of other creditors holding postponed securities over the subject, and of the debtor and his general creditors.[1] Where a sale is carried through by a creditor under a power of sale, the seller acts as a mandatary of the debtor, and a failure to observe the stipulated formalities will give the debtor a right to reduce the sale. Where, on the other hand, the holder of an *ex facie* absolute assignation sells, he does so in virtue of his own title, and informalities which might be fatal in the case of a sale under an express power, will not be relevant to reduce the sale, or to subject the creditor in damages, unless the debtor can prove that the result has been that the price obtained was not a fair one.[2] Where there is no power of sale in an express security, the creditor, if he wishes to realise, must obtain judicial authority. Where policies of assurance were assigned in security, under an obligation by the cedent to pay interest and premium, and the cedent became bankrupt and absconded, it was held that the creditor was entitled to succeed in a declarator of his right to sell the policies, in a question with the trustee for the creditors of the cedent.[3] A similar course might usually be adopted by the creditor, if the debtor was sequestrated, and the trustee refused to purchase the security.[4] When the debtor has absconded, or cannot be found, but is not sequestrated, it is usual in practice to proceed by petition to the Lord Ordinary on the Bills for the appointment of a judicial factor, with power of sale.

Expenses incurred by creditor.

There would seem to be no doubt that the expenses of a sale, even in the case where a power of sale is not expressly provided, would be a good charge against the debtor, and, in a question with his other creditors, would be covered by the security.[5] The question whether the creditor can charge the debtor, and retain the security, for money expended on the subjects, is more doubtful. Suppose, for instance, that a policy of assurance is assigned in security, and that the creditor pays the premiums without any express authority to do so, do these premiums form a good claim against the debtor, and, if so, can the

[1] See *ante*, p. 120, and as to catholic and secondary securities, p. 58.

[2] *Park* v. *Alliance Heritable Security Co.*, 1880, 7 R. 546, and see cases of sales under powers in heritable securities, *ante*, p. 111.

[3] *Wood* v. *Anstruther*, 1842, 4 D. 1363.

[4] As to valuation and deduction of securities in sequestration, see Bell, *Com.* ii. 306; Goudy, *Bankruptcy*, 2nd ed., pp. 197 and 330.

[5] *Wood* v. *Anstruther*, 1842, 4 D. 1363.

policy be retained in security of that claim? It would appear that, in the absence of any express agreement on the point, such payments by a creditor would only be sustained as a charge against the debtor on the principle of recompense—*i.e.* on the principle that a party who is in possession of property of another on a legal though defeasible title, and expends money upon it, has a claim against the real owner to the extent to which the latter is *lucratus*, but no further.[1] Thus, in *Nelson* v. *Gordon*, a proof was allowed whether the owner of a subject was *lucratus* by expenditure made by an *ex facie* absolute disponee.[2] And where a trustee in a family trust paid the premiums on a policy of assurance, and it was proved that the trust was not thereby *lucratus*, it was held that he had no claim against the estate for these payments.[3] From this the conclusion must be, that if the security-holder pays the premiums on a policy of assurance assigned to him, he will not be a creditor for these payments unless he can prove that the debtor is thereby *lucratus*. Assuming that a valid claim against the debtor, on the principle of recompense, is established, there is no doubt that if the security is by an *ex facie* absolute title, the creditor can retain the subject until reimbursed.[4] In one case, where policies of assurance were assigned expressly in security, and the cedent undertook to pay the premiums, but failed to do so, it was held that the assignee was entitled to succeed in an action of declarator of his right to sell the policies, and apply the proceeds in payment, *inter alia*, of the premiums which he had himself paid.[5] The question whether a security-holder could retain a subject expressly assigned in security, for expenses incurred in regard to that subject, and which were not contemplated or provided for in the constitution of the security, would appear to be undetermined.

Rights of assignee of a debt against the debtor.

The assignation of an incorporeal moveable subject confers on the assignee a right over an obligation prestable by a third party—the original debtor therein. In the earlier history of the law of Scotland, a creditor had no power thus to assign a debt due to him, such an assignation being supposed to be likely to lead to undue litigation.[6] The device of taking bonds blank in the name of the creditor, designed to meet this difficulty, was

[1] Stair, i. 8. 6; Bell, *Prin.* s. 538; *York Buildings Co.* v. *Mackenzie*, 1797, 3 Paton's App. 579; *Fernie* v. *Robertson*, 1871, 9 Macp. 437.

[2] *Nelson* v. *Gordon*, 1874, 1 R. 1093.

[3] *Brown* v. *Meek's Tr.*, 1896, 4 S. L. T. No. 69, narrated *ante*, p. 405.

[4] *Nelson* v. *Gordon*, 1874, 1 R. 1093.

[5] *Wood* v. *Anstruther*, 1842, 4 D. 1363.

[6] Bell, *Prin.* s. 1459.

met by an Act of Parliament which rendered such bonds invalid.[1] The older form of assignation, which was expressed as a mandate, substituting the assignee for the cedent, shows traces of the original inability of a creditor to assign his right directly. But it is now settled that a debtor has no right to object to the assignation of the debt, unless he has expressly stipulated against it, nor can he restrain the assignee from making use of all the remedies which belonged to the cedent.[2] The assignee may sue for the debt either in his own name or in that of the cedent, unless the power to use the name of the cedent is expressly excluded, as it commonly is in assignations granted by a bank.[3] He may execute diligence either in his own name or in that of the cedent, if alive; but he cannot carry out diligence begun in the name of the cedent. This was decided after a report on the subject by the Society of Writers to the Signet, the reason being that the messengers who execute diligence are not judges of the validity of conveyances.[4]

Assignatus utitur jure auctoris.

The right of an assignee to enforce the obligation assigned to him is, in general, merely that of the cedent. Excluding cases of negotiable instruments, his title is not strengthened in a question with the original debtor, by the fact that he has given value for the assignation, and took it in ignorance of the objection urged in defence.[5] His position is usually expressed by the maxim *assignatus utitur jure auctoris*. The rule expressed in these words does not extend to the transfer of negotiable instruments, of heritable property, or of corporeal moveable subjects.[6] But in the case of incorporeal moveable property the rule would seem to be of universal application, except in cases where the conduct of the debtor has been such as to preclude him from pleading latent equities. Thus if a debt is assigned, the defence of payment, even although made before the term stipulated, is good against the assignee.[7] And when it was provided in a marriage contract that £5000 should be paid to the husband, or his assigns, on the death of the father of the wife, and this prospective right was assigned, but forfeited by the husband being

[1] Act 1696, c. 25.

[2] Bell, *Prin.* s. 557; *Gray* v. *Thomson*, 1847, 10 D. 145. As to cases where a creditor is bound to assign on receiving payment, see *ante*, p. 56.

[3] Mont. Bell, *Convey.* i. 304.

[4] *Stewart* v. *Hay*, 1745, M. 834; *Kyle* v. *Thomson*, 12 June 1813, F. C.; 1 & 2 Vict. c. 114, s. 7.

[5] *Inglis* v. *Lawrie*, 1676, M. 10284; *Johnstone Beattie* v. *Dalzell*, 1868, 6 Macp. 333; *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078; cases cited, *infra*.

[6] *Scottish Widows' Fund* v. *Buist*, *supra*, per Lord Pres. (Inglis).

[7] *Davidson* v. *Boyd*, 1868, 7 Macp. 77.

divorced for adultery, it was held that the assignee had no higher right than his cedent, and lost all right by the forfeiture.[1] And in cases where trustees are in possession of funds under a discretionary power to render them alimentary, and inalienable by the beneficiary, the fact that the beneficiary has assigned his rights is not, as a rule, a bar to the exercise by the trustees of the discretionary power vested in them.[2] On the same principle it has been held that where a policy of assurance is assigned, the assignee, in questions with the company, is in the same position as the cedent, and the company may therefore plead the fraud of the cedent as avoiding the policy, in a question with the assignee.[3] Again, the debtor is entitled to plead compensation on a debt due by the cedent to him, in a question with the assignee, provided that the *concursus crediti et debiti* existed before intimation of the assignation was received.[4] Thus, where a member of a building society assigned a debt due to him by the society, and it was proved that the society was insolvent, and that the cedent was therefore liable in calls to an extent at least equal to the debt assigned, it was held that the society was entitled to plead compensation in answer to a demand for payment by the assignee.[5] Compensation cannot be pleaded against an assignee on a debt which becomes due by the cedent after intimation of the assignation has been received,[6] but it is probable that the receipt of intimation, and formal acknowledgment of it, would not debar the debtor from afterwards raising a plea of compensation when a demand for payment was made.[7]

Cases of personal bar.

The maxim *assignatus utitur jure auctoris* yields, however, in exceptional cases, where the debtor has enabled the cedent to defraud the assignee, or where he has recognised the right of the assignee as a binding obligation. He may then be barred from

[1] *Johnstone Beattie* v. *Dalzell*, 1868, 6 Macp. 333; see also *Johnstone Beattie* v. *Johnstone*, 1867, 5 Macp. 340.

[2] *Ker's Trs.* v. *Weller*, 1863, 2 Macp. 371, aff. 1866, 4 Macp. (H. L.) 8; *Chambers' Trs.* v. *Smith*, 1877, 5 R. 97, revd. 1878, 5 R. (H. L.) 151. These powers, however, must be exercised within a reasonable time—*Adam & Forsyth* v. *Forsyth's Tr.*, 1867, 6 Macp. 31.

[3] *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078; *Scottish Equitable Life Assur. Co.* v. *Buist*, 1877, 4 R. 1076, affd. 1878, 5 R. (H. L.) 64.

[4] Bell, *Com.* ii. 131; *Wallace* v. *Edgar*, 1663, M. 837; *Shiells* v. *Ferguson, Davidson, & Co.*, 1876, 4 R. 250.

[5] *Shiells* v. *Ferguson, Davidson, & Co.*, *supra.*

[6] Bell, *Com.* ii. 131; *Chambers' Jud. Factor* v. *Vertue*, 1893, 20 R. 257.

[7] *Low* v. *Bouverie* (1891), 3 Ch. 82. As to the duty of a debtor to intimate to the assignee the defences he has against the cedent, see per Lord Pres. Inglis in *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078. *Vide infra*, p. 528.

stating defences which would have been good against the cedent.[1] Thus it has been held in England that if a company registers a forged or fraudulent transfer, and thus furnishes the transferee with an apparent title to shares to which he has no actual right, and that transferee sells the shares to a *bonâ fide* purchaser, the company is barred from denying, in a question with the purchaser, that the transferee was a shareholder. This was held even in a case where the company had taken all usual and necessary precautions, by writing to the person in whose name the shares stood, before registering the transfer which proved to be forged.[2] Again, in *Adam & Forsyth* v. *Forsyth's Trustee*, trustees had a discretionary power to declare the share of a beneficiary alimentary. The beneficiary assigned his *spes successionis* before the term of payment, and that assignation was duly intimated. After the term of payment had arrived, the assignee raised a multiplepoinding to decide the question whether the fund was heritable or moveable, and in that process the trustees appeared. The actual payment was delayed, and, four years after the term of payment, the trustees, by resolution, declared the fund alimentary. This resolution was reduced at the instance of the assignee, on the ground that the trustees, having recognised his right, were barred from exercising their discretionary power in prejudice of it.[3]

Case cannot be referred to oath of cedent, in question with assignee.

The title of the assignee may be stronger than that of the cedent, if the latent defence is one which admits of proof only by the oath of the cedent. If the assignation is intended to result in an absolute transfer of the right to demand the debt, the cedent has no further interest, and a reference to the oath of a party in a matter in which he has no interest is incompetent.[4]

The methods by which a security may be extinguished have already been dealt with in questions of heritable securities. It does not appear that incorporeal moveable subjects present, in this particular, any specialties sufficiently marked to justify separate treatment. The reader is therefore referred to a preceding page.[5]

[1] The nature of the plea of personal bar is discussed, *ante*, pp. 203 and 260, and *infra*, p. 563 *et seq.*

[2] *In re Bahia and San Francisco Rwy. Co.*, 1868, L. R. 3 Q. B. 584; *Simm* v. *Anglo-American Telegraph Co.*, 1879, 5 Q. B. D. 188.

[3] *Adam & Forsyth* v. *Forsyth's Tr.*, 1867, 6 Macp. 31; cf. *Bovill* v. *Dixon*, 1854, 16 D. 619, affd. 1856, 3 Macq. 1, and other cases on documents of title, *ante*, p. 260.

[4] Stair, iii. 1. 18; Ersk. iii. 5. 9; *Lang* v. *Hyslop*, 1854, 16 D. 908; *Campbell* v. *Campbell*, 1860, 23 D. 159.

[5] See as to express securities, p. 131 *seq.*; as to securities by *ex facie* absolute title, p. 163 *seq.*

CHAPTER XV

RIGHTS IN SECURITY IN INCORPOREAL MOVEABLES

Registration in books of company.
Delivery of duly executed transfer, with certificates.
Delivery of blank transfer, with certificates.
Deposit of share certificates.

SHARES IN JOINT STOCK COMPANIES

The transfer of shares.

THE ordinary form of assignation, accompanied by intimation to the debtor, by which rights in security are constituted over other incorporeal moveable subjects, is not a competent, or at least not an appropriate, mode of acquiring a right in security over shares in a company. A complete code for the transfer of such shares is contained in the Companies Act, 1862 (25 & 26 Vict. c. 89). The directors of every company under the Act are required to keep a register of shareholders, and to enter from time to time therein the names, addresses, and occupations of the shareholders of the company; the shares held by each of them, distinguishing each share by its number; the amount paid on each share; the date at which the name of any person was entered on the register; and the date at which he ceased to be a shareholder.[1] The register is *primâ facie* evidence of any matters authorised to be inserted therein.[2] Every member is entitled to require a certificate specifying the shares held by him and the amount paid up thereon;[3] and such certificate is *primâ facie* evidence of the title of the member to the shares therein specified.[4] A transmission of shares *inter vivos* is effected by an instrument of transfer, in a statutory form, executed both by the transferor and transferee; and the transferor remains the holder of the shares until the name of the transferee is entered in the register in respect thereof.[5] The mode of transmission of shares thus prescribed by Statute probably does not preclude shares from

[1] Companies Act, 1862, s. 25.
[2] *Ib.* s. 37.
[3] *Ib.* Sched. I. Tab. A, Art. 2.
[4] *Ib.* s. 31.
[5] *Ib.* Sched. I. Tab. A, ss. 8 and 9.

being transferred by any mode habile in law to transfer personal property of that kind; but, in all cases, the entry of the transferee's name on the register of the company is a condition precedent to the completion of his title, and to his being a partner in the company.[1]

Right in security in shares constituted by transfer in the books of the company.

In order that a lender, who takes shares in security, may obtain a complete title, it is necessary that the borrower's name be removed from, and the lender's name be placed upon, the register of the company as the proprietor of the shares. Until a transfer, with the corresponding share certificates, has, at least, been lodged with the company for registration, the lender runs the risk of having his preference impaired by the fraudulent act of the borrower, or by an arrestment by a creditor of the borrower in the hands of the company; for the only intimation that is effectual to perfect the right of a transferee of shares is the statutory one of going upon the register. Thus in *Morrison* v. *Harrison*,[2] a question arose between the holder of a regular transfer of shares, who had not intimated his transfer to the company till after the date of the transferor's bankruptcy, and the trustee in the transferor's sequestration, who founded on the intimated assignation implied in his appointment as trustee. After the date of the sequestration, the transferee had himself duly entered on the company's register as holder of the shares, while the trustee took no step to go upon the register. It was held that the true criterion of preference was not bare intimation to the company, but registration in the books of the company, and therefore the holder of the registered title was preferred to the trustee.[3] "Mere assignation," observed Lord Neaves, "is not the proper mode of completing a right of this kind. Assignation is the transmission of a *jus crediti*. . . . Assignation and intimation are not applicable to the transfer of a bilateral right like partnership, a position involving both active and passive consequences, both rights and liabilities. There must be some proceeding necessary to complete the transfer, amounting to a claim on the part of the transferee to exercise the rights of a partner, and an agreement on his part to assume the liabilities of a partner. . . . The transmission of shares in a company is a thing *sui generis*, to be governed, not by the rules which regulate the transmission of a unilateral debt, but by the

[1] *Morrison* v. *Harrison*, 1876, 3 R. 406; per L. J. Fry in *Nicol's* case, 1885, 29 Ch. D. 421, at p. 447.

[2] 1876, 3 R. 406.

[3] Cf. the English case *in re London and Provincial Telegraph Co.*, 1870, 9 Eq. 653.

necessity of the transferee asserting the position of a partner."[1] In an earlier case, decided before the date of the Companies Act, where shares in a railway company, under a private Act, by which the mode of transference of shares in the company was prescribed, were assigned in security, it was held that the assignee, who had intimated his assignation to the company but had not complied with the regulations of the company's statute as to the mode of transfer, was preferable to a subsequent arrester, who arrested the shares in the hands of the company and of the factor for the cedent. The decision proceeded on the ground that it was *jus tertii* to the arrester to found on the form of transfer prescribed by the company's statute, and that, though the assignation was not enough to put the assignee on the books of the company as a shareholder, it was, on being duly intimated, sufficient to exclude the subsequent arrester.[2] In view, however, of the opinions expressed in *Morrison* v. *Harrison*, and of the *ratio* of the decision in that case, it may be doubted whether a bare intimation to a company of an assignation of shares would now be held to give the assignee a good title against an arresting creditor of the cedent; though an intimation by the lodging of a transfer with the company for registration would probably suffice to protect the transferee's right.[3]

Effect of intimation to the company in a question with the company.

In England, as in Scotland, it appears that the principle under which priority of notice of assignments is the criterion of the priority of rights among the respective assignees is inapplicable to the case of shares of a company; for a company is not bound to receive or record notices of equitable interests, and such a notice cannot affect the company with any trust.[4] Nevertheless, intimation given to a company may affect the company in their capacity as traders, with notice of the interest of third parties, other than the shareholder, in shares of the company. Thus in *Bradford Banking Co.* v. *Briggs*, a shareholder in a company which, by its articles of association, had a lien over its shares for debts due by the shareholder to the company,[5] deposited his share certificates with a

[1] Per Lord Neaves in *Morrison* v. *Harrison*, 1876, 3 R. 406, at 409.

[2] *Thomson* v. *Fullarton*, 1842, 5 D. 379.

[3] When the transfer and certificates are lodged for registration, the transferee agrees to become a member of the company. The officials of the company have in the ordinary case merely a ministerial duty to perform in registering the transferee, and they do not, by the neglect of this duty, affect the rights of the parties who have the only true interest.

[4] See per Lord Selborne in *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20.

[5] In Scotland, companies have such a lien at common law. See opinions in *Bell's Trs.* v. *Coatbridge Tinplate Co. Lim.*, 1886, 14 R. 246.

bank as security for the balance due, and to become due, on his current account, and the bank gave the company notice of the deposit. It was held that the notice to the company of the deposit of the certificates with the bank was effectual to prevent the company from claiming priority, in respect of monies becoming due from the shareholder to the company after notice of the deposit, over advances to the shareholder by the bank made after such notice.[1] So in Scotland, in a question with the company, mere intimation of the resignation of one of several trustees, who are entered on the register, is effectual to give the trustee, whose resignation is intimated, an absolute right to have his name removed from the register, though no transfer has been executed.[2]

Where a security over shares is constituted by means of a transfer of the shares from the name of the borrower to the name of the lender, the transfer is usually qualified, as between the borrower and lender, by an obligation, either mutual or on the part of the lender only, explaining the terms of the loan, providing for depreciation in the value of the stock while it is held in security, and regulating the powers of sale granted to the lender. Such an agreement, known as a mortgage of stock, requires to be stamped with a duty of 10s. for every £5000 or part of £5000 borrowed; no *ad valorem* duty is chargeable upon its discharge.

Drawbacks to this form of security: —from the lender's point of view.

In a security constituted by an absolute transfer of shares, accompanied by registration of the name of the transferee, there is no danger of any preference being acquired by any other transferee or creditor of the borrower. If, then, the shares are fully paid up, this is an unobjectionable form of security from the point of view of the lender. Where, however, any liability attaches to the shares, it is a form of security to be avoided, since, by going upon the register, the security-holder renders himself liable in all the obligations of a member of the company. In determining the rights and obligations of a person whose name appears on the register, it is irrelevant to inquire whether he has, or has not, a beneficial interest in the shares in respect of which he is entered. The security-holder is registered individually, and individually he is liable. No company is bound

[1] *Bradford Banking Co. Lim.* v. *Briggs*, 1886, 12 App. Cas. 29.

[2] *Dalgleish* v. *Land Feuing Co. Lim.* 1885, 13 R. 223. A resignation of a trustee not intimated to the company has no effect in a question with the company—*Sinclair* v. *City of Glasgow Bank*, 1879, 6 R. 571; *Tochetti* v. *City of Glasgow Bank*, 1879, 6 R. 789.

to take notice of a trust on the register. Companies registered in England and Ireland are expressly prohibited from receiving or entering on their register notice of any trust, express, implied, or constructive.[1] In Scotland, on the other hand, it is the practice to notice trusts both in the transfer and on the register. But this practice "is not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust."[2] And it is quite settled that though a party has accepted stock "in trust," has signed the transfer "in trust," and has been registered in the books as "trustee," he is none the less a partner in the company, and, as such, his liability is not limited to the extent of the trust estate.[3] Even after the loan has been repaid and the shares retransferred to the original holder, the mortgagee may be liable, as a past member of the company, when the company is wound up.[4] In England,—as probably in Scotland,—if a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him, unless he comes to redeem the shares.[5] Where the lender is a firm, it does not matter whether the firm go on the register in its corporate name or in the name of one of the partners; for if one partner of a firm has the authority of the firm to lend money on the security of shares in a company, and, in exercise of this authority, takes a transfer of the shares, he binds his partners as contributories in the event of a winding-up.[6]

—from the borrower's point of view.

From the borrower's point of view, the expense of transference and the measure of publicity, which the change in the register may involve, are drawbacks. Further, where the transfer of the security is *ex facie* absolute, the borrower runs the risk of the lender fraudulently disposing of the shares to a *bonâ fide* onerous third party, against whom he would have no remedy.[7] If,

[1] Companies Act, 1862, s. 30.

[2] Per Lord President in *Muir* v. *City of Glasgow Bank*, 1878, 6 R. 392, at 400.

[3] *Lumsden* v. *Buchanan*, 1865, 4 Macq. 950; *Muir* v. *City of Glasgow Bank*, 1878, 6 R. 392.

[4] *In re Land Credit Co. of Ireland* (*Weikersheim's* case), 1873, 8 Ch. App. 831.

[5] Addison on *Contracts*, 9th ed., p. 766; Smith, *Manual of Equity*, 11th ed., p. 339.

[6] *Re Land Credit Co. of Ireland* (*Weikersheim's* case), 1873, 8 Ch. App. 831. See also *Niemann* v. *Niemann*, 1890, 43 Ch. Div. 198; *Fraser* v. *City of Glasgow Bank* (*Caledonian Bank* case), 1879, 6 R. 1259.

[7] *Redfearn* v. *Somervail*, 1813, 1 Dow, 50; *Burns* v. *Lawrie's Trs.*, 1840, 2 D. 1348. *Vide supra*, p. 492.

indeed, the limitation in the lender's title appears *ex facie* of the register of the company, as where he is registered as holder "in trust," this suffices to put on any transferee from him the duty of inquiring whether the holder's transfer is authorised; and, if the transferee do not make inquiry, he cannot make good his title against the borrower, for whom the shares were held in trust.[1] Again, this method of constituting a security is open to practical objections, where the borrower is a director and holds his shares as his qualification, or where he is an officer of the company on condition that he should hold a certain number of shares.

Other modes of constituting a security over shares.

In view of the above-mentioned drawbacks to a security constituted by the security-holder going upon the register, it is important to consider whether an effectual security can be constituted over shares without the security-holder actually becoming a partner in the company by being put upon the register. The method by which this is commonly sought to be accomplished is by delivering to the creditor the certificates of the shares together with a formal transfer, either completely executed or blank, in the name of the transferee and the date. The acceptance of such a transfer of shares by a mortgagee does not render him liable to be put on the register of the company, even at the instance of the liquidator of the company in a winding up.[2] In addition to the avoidance of liability by the security-holder, an advantage of this form of security — not infrequently regarded by the borrower as important — is that the notoriety implied in a change on the register is avoided. Whether the transfer is fully executed or is blank, it ought, as in the case of other securities constituted by *ex facie* absolute title, to be qualified by a memorandum evidencing the terms of the agreement between the parties, under which the transferee holds the security.

Right in security in shares by delivery of duly-executed transfer with share certificates.

If the transfer be delivered, completely executed in the name of the transferee, he thereby is placed in a position in which he can at any time complete his title to the shares, by presenting his transfer for registration.

Difficulties, indeed, may arise with the company in the way of

[1] *Bank of Montreal* v. *Sweeney*, 1887, 12 App. Cas. 617. If the title of the lender is *ex facie* absolute, the borrower may have difficulty in vindicating his property in the shares in a question with the lender himself or the lender's creditors, unless he take the precaution to have written evidence, in the lender's hand, of the really qualified nature of the latter's title.

[2] *Sichell's* case, 1867, 3 Ch. 119.

Possible difficulties with the company in the way of registration.

the registration of the transfer. For example, a company registered under the Companies Acts has a right of retention, at common law and by statute, over its shares for debts due to the company by the registered shareholders; and this right of retention may be made effectual by a refusal to register a transfer until the debts, in security of which the company is entitled to retain, have been paid.[1] Also where the borrower is a director of the company, there may, on his transferring his shares, emerge equities against him as a director, arising, for example, from his having been a party to a postponement of a call to enable him to get rid of his shares, and so evade liability, which will enable the company to refuse to register the transfer.[2] A company is entitled, for its own protection, to a reasonable time to make inquiries as to the title of the party producing the documents, and to intimate to the registered shareholder the receipt of the transfer and certificates of his shares.[3] When notice of a prior title, or an objection to the registration of the transfer, is sent to the company, this power on the part of the company to make inquiry may become a duty, and it has been held in England that, if a company, to which a transfer, with corresponding certificates, has been sent for registration, have, before registering the transfer, received notice of a pre-existing equitable title, the company is not bound to act upon such transfer so as to effectuate a fraud.[4] In the case referred to, however, owing to specialties in the deed of settlement under which the company was formed, the transferee had not, as between himself and the company, an unconditional right to be registered.[5] And in Scotland it has been laid down that it is the duty of the company, if any objection is intimated to the registration of a transfer

[1] *Bell's Trs.* v. *Coatbridge Tinplate Co.*, 1886, 14 R. 246; *Hotchkiss* v. *Royal Bank*, 1799, M. 2673, affd. 3 Paton, 618. By the Companies Act, 1862, Sched. I. Table A, Rule 10, a company may decline to register any transfer of shares made by a member who is indebted to them; see *Bentham Mills Spinning Co.*, L. R. 11 Ch. Div. 900.

[2] *In re Crawly & Co.*, 1890, 42 Ch. Div. 209. By the articles of association of certain companies it is provided that all transferences of shares shall be subject to the approval of the directors (*e.g. in re South Yorkshire Wine and Spirit Assoc.*, 1892, Ch. Div. 87 L. R. 413); or the directors may have power to decline registering any transfer without assigning a reason, *e.g. Property Invest. Co. Lim.* v. *Duncan*, 1887, 14 R. 299.

[3] *In re Bahia and San Francisco Rwy. Co.*, 1868, L. R. 3 Q. B. 584; *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20, per Lord Blackburn, at pp. 35 and 41; *Taylor* v. *Great Indian Penins. Rwy. Co.*, 1859, 28 L. J. Ch. 285.

[4] *Roots* v. *Williamson*, 1888, 38 Ch. D. 485.

[5] If a company improperly refuses registration, it may be liable to an action of damages—*Skinner* v. *City of London, etc., Co.*, 1885, 14 Q. B. D. 882.

which is complete and regular upon the face of it, to call upon the objector to bring an interdict against the party presenting the transfer, and, if he fails to do so, to register the transfer in the usual way.[1]

Relation of lender who holds in security a duly-executed transfer, with certificates, to the company:

A lender, who has in good faith, and without notice of any prior title, got from a borrower a duly-executed transfer, with the relative certificates, and so has, as between himself and the company, a present right—subject to the qualifications mentioned in the previous paragraph—to be placed upon the register as holder of the shares, whenever he chooses to hand over the certificates and transfer to the company for that purpose, holds a security in many respects unexceptionable. So long as he does not register the transfer, he has not entered into any contract with the company, nor agreed to become a partner, and cannot therefore be held liable as a contributory in the event of the company being wound up.[2] For the borrower, who remains entered as owner in the certificates and register, continues, notwithstanding his having parted with the certificates and transfer, to be the only shareholder recognised by the company, until the transferee perfects his right by obtaining registration in his own name.

—to the trustee in the borrower's sequestration.

At the same time the security-holder, though, as regards the company, he is not invested with the ownership of the shares, holds, in a question with the borrower, a security, which is completed, so far as it can be completed, by the act of the borrower, and which therefore gives him a preference over any other inchoate right derived from the borrower. Thus, where a transfer of shares is duly executed and delivered, with the accompanying certificates, in security of advances made at the time, the lender's title to the shares cannot be reduced by the borrower's trustee in bankruptcy under the Act 1696, c. 5, though the borrower has remained

[1] *Shaw* v. *Cal. Rwy. Co.*, 1890, 17 R. 461, per Lord M'Laren; see report of this case at an earlier stage, 1888, 15 R. 504. Notice should also be sent to the transferee; cf. English cases, *Tahiti Cotton Co., ex parte Sargeant*, 1873, 17 Eq. 273, at 280, and *re Cadogan, etc., Co.*, W. N. (1886), 91.

[2] *Sichell's* case, 1867, 3 Ch. 119. As between the seller and purchaser of shares the case is different. "A purchaser of shares, having accepted a transfer, has thereby agreed with the transferor that he shall, in his place, become a member of the company. And the transferor is, by force of this contract, entitled to have his own name taken off the register and the transferee's put on," per Lord Pres. Inglis in *MacDonald* v. *City of Glasgow Bank*, 1879, 6 R. 621, at 628. A seller is entitled to have the buyer's name substituted for his own even after the stoppage of the company—*Howe* v. *City of Glasgow Bank*, 1879, 6 R. 1194; *Stenhouse* v. *City of Glasgow Bank*, 1879, 7 R. 102.

the registered owner and received the dividends till the eve of his sequestration, and the lender has not got his transfer registered till within sixty days of the borrower's sequestration; for the registration, by which the lender's title is completed, is not the act of the bankrupt.[1] Further, as the trustee in a sequestration takes the moveable estate of a bankrupt *tantum et tale* as it was in the bankrupt, and subject to all equitable exceptions pleadable against the bankrupt, it would seem that, from the date when the transfer is intimated to the company by being lodged for registration, the title of the lender is secure against the trustee in bankruptcy of the borrower, though the transfer has for some reason not been actually registered at the date of the sequestration.[2] So in England it is settled that an unregistered transfer, accompanied by delivery of the certificates, has the effect, even when the transfer is in blank, of putting the shares outside the "order and disposition" of the registered shareholder on his bankruptcy.[3]

—to third parties to whom the borrower may subsequently transfer the shares.

A certain risk may attach to a security constituted in this form owing to the possibility that the registered holder of the shares, after having parted with the certificates and executed the transfer, may fraudulently execute another transfer to a *bonâ fide* third party. In this case the third party, who has no notice of the prior transfer, would, by entering the register, be able to cut out the prior security-holder who had not perfected his title by registration. The fact, however, that the share certificates have been parted with, places a serious practical difficulty in the way of the holder attempting again to dispose of the shares. The absence of the certificates, even if it does not put the second transferee on his inquiry—which would be a question on the facts of the particular case—would in general necessitate stringent inquiries on the part of the company before the transfer was registered. In no case are the directors of a company bound to permit a transfer of shares to be registered without the production

[1] *Guild (Kettle's Tr.)* v. *Young*, 1884, 22 S. L. R. 520. On the other hand, where the arrangement between the lender and borrower is that the latter shall execute a transfer of shares when it is desired, the borrower's trustee in bankruptcy can reduce a transfer, which has not been executed till within sixty days of the borrower's bankruptcy — *Gourlay* v. *Mackie*, 1887, 14 R. 403.

[2] *Watson* v. *Duncan*, 1879, 6 R. 1247; *Græme's Tr.* v. *Giersberg*, 1888, 15 R. 691; *Struthers* v. *Commercial Bank*, 1842, 4 D. 460; *Thomson* v. *Fullarton*, 1842, 5 D. 379. As to difficulties arising with the company preventing or postponing registration, see *supra*, p. 508.

[3] *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426.

of the certificates.[1] Whether, if they permit registration to take place without the certificates being produced, they can be made answerable for the loss suffered by a third party through the registration, seems to be, to a certain extent, a question of circumstances.[1] In the common case, however—especially where each certificate bears a note to the effect that no transfer of the share will be registered, unless accompanied by the certificates,—a transfer without the share certificates is not regarded as being "in order," and any company registering such a transfer without full and satisfactory explanation as to the cause of the absence of the certificates, would incur a liability to make good the loss suffered by a third party through the registration.[2] Similarly, if a company has negligently or recklessly issued new certificates to the registered holder of the shares, whereby he is enabled to transfer the shares to a *bonâ fide* third party, the company would be liable in damages; for a company issuing share certificates is, in a question with a *bonâ fide* transferee, held to warrant the truth of the statements made in the certificates—*e.g.* that the shares are fully paid up, or that the person named in the certificate is the registered owner of the shares—and so is liable in specific performance, if that be possible, and, if that is impossible, in pecuniary reparation.[3] In short, if new certificates are not issued, the second transferee could, in view of the want of the certificates, hardly be acting in good faith, as the want of the certificates would put him on his inquiry; and, if new certificates are issued, this would, in the ordinary case, amount to such negligence on the part of the company as would expose them to an action for damages at the instance of the lender.

Shares in a company are subject to arrestment at the instance of the creditors of a shareholder in the hands of the company,

—to a creditor of the borrower arresting the shares in the hands of the company.

[1] *The Shropshire Union Rwy. Canal Co.* v. *The Queen*, 1875, L. R. 7 H. L. 496, per Lord Cairns, at p. 509. *In re London and Provincial Telegraph Co.*, 1870, L. R. 9 Eq. 653. Some companies, not registered under the Companies Acts, have printed on their share or stock certificates a notice to the effect that the certificate is no evidence of the ownership of the shares. In such cases the company does not ask delivery of the certificates along with a transfer for registration. The British Linen Co. Bank is an instance in point.

[2] *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20, per Lords Selborne and Blackburn; *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426; *Swan* v. *North British Australasian Co.*, 1862, 7 H. & N. 603.

[3] *In re Bahia and San Francisco Rwy. Co.*, 1868, L. R. 3 Q. B. 584; *Balkis Consolidated Co.* v. *Tomkinson* [1893], App. Cas. 396; *Clavering Sons & Co.* v. *Goodwins, Jardine, & Co.*, 1891, 18 R. 652; *Burkinshaw* v. *Nicolls*, 1878, 3 App. Cas. 1004.

and, by means of a furthcoming, the arrester may obtain from the Court an order on the company to give effect to the judicial transfer, so as to enable him to turn the shares into money.[1] Until the transfer and certificates are lodged by the lender with the company for registration, the security-holder is, accordingly, liable to have his security carried off by a creditor of the borrower using arrestments; for, until then, he is in the position of the holder of an unintimated assignation.[2]

—to the borrower.

Where a lender holds a transfer of certain shares, with the corresponding certificates, in security of a loan, his right to complete his title by going upon the register is always subject to the terms of his agreement with the borrower. If the security-holder, in breach of his contract with the lender, proceeded to register the transfer, the borrower could interdict him, and, even if registration had taken place, could bring an action to rectify the register, provided that meantime no *bonâ fide* third party had acquired an interest in the shares for value.[3]

Right in security in shares by delivery of blank transfer, with certificates.

Where a security is constituted by the delivery of a fully-executed transfer, accompanied by the corresponding share certificates, the security-holder cannot transfer his security to a third party, or realise it in any way, without going on the register;[4] for the transfer, being fully executed in the name of the transferee, would not be available to a third party, and the transferee, not being a member of the company, cannot himself execute a new transfer. For this reason, combined with a desire to evade the stamp duty, a form of security frequently adopted is to deliver to the lender a transfer executed by the borrower in blank, as regards the transferee and the date of execution, accompanied by the share certificates. The lender may then either fill in his own

[1] *Sinclair* v. *Staples*, 1860, 22 D. 600.

[2] As to whether mere intimation to the company of the lender's right in security will prevent a subsequent arrestment from being effectual, see discussion, *supra*, p. 504; see also *ex parte Stewart*, 1865, 34 L. J. (bk.) 6. Notice to the company may at least be useful in putting the company on their inquiry, if they are requested to register a transfer of the shares in the name of another transferee.

[3] As to the position of the cedent and assignee in an assignation *ex facie* absolute, but really in security, see *supra*, p. 492.

[4] The trustee of a bankrupt shareholder can sell the shares without going on the register (Bankruptcy Act, 1856, s. 103). See observations of Lord Pres. Inglis in *Myles* v. *City of Glasgow Bank*, 1879, 6 R. 718, at 726. So executors and persons who succeed to shares belonging to a deceased shareholder can realise and dispose of the shares, without having their names put on the register (Companies Act, 1862, s. 24). See *Macdonald* v. *City of Glasgow Bank*, 1879, 6 R. 621, at 628.

name, and send the fully-executed transfer to the company for registration; or he may hand the blank transfer and certificates to a new transferee, who again either inserts his own name or delivers the transfer, still in blank, to another, and so on.

Effect, in England, of the delivery of a blank transfer, with certificates:

In England, the legal effect of executing a transfer in blank, and handing it, with the share certificates, from one person to another, varies according to the class of shares so dealt with. If a deed is required for the transfer of the shares of a company, either by the regulations of the company or, for example, by the company being subject to the Companies Clauses Act, a transfer in blank is void at law; for it is wholly inoperative as a deed.[1] In such a case, even the registration of the shares in the transferee's name, not being preceded by a valid deed transferring the stock from the owner of it, does not give the transferee a good title.[2] The blank transfer may, however, be validated by the transferor redelivering it, after the blanks are filled up; and such redelivery is, it seems, inferred, if it is shown that the transferor has recognised the transfer after he knew that it was filled up.[3] Further, even where a deed is required, an onerous holder of a blank transfer has, in a question with the transferor, a right in equity to demand a proper transfer, and thereby to obtain a right to become the registered owner of the shares.[4] For, as between transferor and transferee, the question is not as to the validity of the instrument as a deed, but whether there has been a valid contract for the transference of the shares.[5]

—where a deed is required for the transfer of the shares.

—where a deed is not required for the transfer of the shares.

On the other hand, where the articles of association or the regulations of the company do not require transfer by deed, but permit transfers to be made by "instruments in writing," the effect of a shareholder signing a blank transfer and handing it over to a lender is to enable the lender to insert his own name, and, when his name is filled in as transferee, the lender can send in the transfer for registration, and no objection can be raised by the company to its validity.[6] Further, the lender may, without

[1] *Hibblewhite* v. *M'Morine*, 1840, 6 M. & W. 200; *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20.

[2] *Powell* v. *London and Provincial Bank* (1893), 2 Ch. 555. Where a deed is necessary the directors of the company have no power to dispense with it—*Murray* v. *Bush*, 1873, L. R. 6 H. L. 37.

[3] *Hibblewhite* v. *M'Morine*, 1840, 6 M. & W. 200; *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20.

[4] *Morris* v. *Cannan*, 1862, 4 De G., F. & J. 581; *Powell* v. *London and Provincial Bank* (1893), 2 Ch. 555.

[5] *Langer's* case, 1868, 37 L. J. (Ch.) 292.

[6] *In re Tahiti Cotton Co., ex parte Sargeant*, 1873, 17 Eq. 273. The company cannot object to a transfer on

filling up the blank transfer with his own name, hand it, along with the certificates, to a third person, who may do the like, and thus the blank transfer and certificates may pass from hand to hand, until ultimately some holder of the transfer fills in his own name and procures a registration of himself as owner of the shares. "When the indorsed transfer," explained Lord Watson in an English case, in which forms of transfer, blank in the names of the transferor and transferee, were indorsed on the back of the certificates, "has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or his authority, transmits his title to the shares, both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour." [1]

Blank transfers, with certificates, are not negotiable instruments.

Blank transfers, with certificates, though they may be passed from hand to hand, are not negotiable instruments; in other words, mere possession of them does not confer a good title to the shares mentioned in the transfer, if the transferor's title is defective, although the holder has taken the instruments in good faith and without notice of the defect in the title of the person from whom he received them. Thus where the plaintiff, wishing to sell certain shares, executed a transfer in blank, and his broker, having fraudulently filled up the transfer with the description of shares in another company, sold them to a *bonâ fide* purchaser, it was held that the sale was ineffectual, and that the plaintiff was entitled to have his name restored to the list of shareholders.[2] In another English case, the holder of shares in a company handed a blank transfer of the shares, with certificates, to B., as security for £150. B. handed the blank transfer and certificates, as security for £250, to C., who, after B.'s death, filled in his own name as transferee. The Court held that the original shareholder, by delivering the blank transfer

the ground that it has been filled up after subscription; their duty extends, at the furthest, to an obligation to give notice to the registered holder that a transfer has been presented for registration.

[1] Per Lord Watson in *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 267, at 275.

[2] *Swan* v. *North British Australasian Co.*, 1863, 32 L. J. Ex. 273. In this case the distinction between share transfers and negotiable instruments is discussed by Byles, J.

to B., did not enable B. to delegate to another person authority to fill it up for purposes foreign to the original contract; and, further, that the fact that the transfer was in blank affected C. with notice, so that he could not be in the position of a purchaser without notice, and did not acquire a greater right than the person from whom he himself received the instrument. Accordingly, it was found that C. had no title to the shares beyond a claim for the £150 originally advanced by B. to the registered shareholder.[1] Again, where certain share certificates of an American railway, on the back of which blank transfer forms were indorsed, were stolen by a bank manager and pledged with the plaintiffs for his private account, it was held, on the manager subsequently obtaining them back from the plaintiffs (the pledgees) by fraud and restoring them to his own bank, that the instruments were not negotiable, and therefore that the plaintiffs (the pledgees) had no title to them.[2] Similarly, where the executors of a shareholder in an American company executed blank transfers, which were indorsed on the back of the share certificates, and handed them to a broker for sale, it was held, on the broker fraudulently pledging them with a bank for advances, that the executors were entitled to get the certificates back from the bank.[3]

Quære, Whether blank transfers are struck at by Act 1696, c. 25?

In Scotland, the effect of a blank transfer is not complicated by a distinction between shares requiring to be transferred by deed and shares which can be transferred by an instrument in writing, or by a distinction between legal and equitable title. The question whether transfers of shares executed in blank are struck at by the Act 1696, c. 25, "anent blank bonds and trusts," has not been definitely determined. In a recent case, where the objection was

[1] *France* v. *Clark*, 1884, 26 Ch. Div. 257.

[2] *London and County Bank* v. *River Plate Bank*, 1887, 20 Q. B. D. 232. In this case evidence was led to show that then such certificates, with blank transfer forms on the back, were treated as negotiable in the English market.

[3] *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 267. Documents of this kind may be "negotiable by estoppel" (see p. 563). It was on this ground, as Lord Watson pointed out, that it had been held by the Supreme Court of New York, in a case where blank transfers and certificates had been fraudulently delivered, that the registered owner of the shares could not recover from a holder for value and in good faith. In *Colonial Bank* v. *Cady and Williams* the doctrine of negotiability by estoppel was held to be inapplicable, since the conduct of the executors in delivering the transfers was consistent with an intention to sell or pledge the shares or to have themselves registered as owners. Accordingly, they were not estopped by their conduct, in delivering the blank transfers to the broker, from setting up their title against the bank.

taken that share transfers, which were afterwards registered, were, when delivered, blank in the name of the transferee, it was held upon the evidence that the plea was not supported by the facts, so that the Court found it unnecessary to decide the point.[1] The terms of the Act are wide, and its operation, which is not limited to bonds,[2] has been held to extend to a holograph writing signed by the granter, promising to pay a sum of money, but not containing the name of a payee.[3] An exception is made in the Act of "indorsations of bills of exchange and the notes of any trading company." The exact limits of the exception made by this clause of the Act in favour of the notes of trading companies, have not been determined. The tendency has been to give a wide interpretation to the exception. Bills, cheques, promissory notes, bills of lading, and other mercantile documents are not struck at.[4] In a case which came before the whole Court, the general doctrine was laid down by a large majority of the Court that the Act 1696, c. 25, did not apply to documents *in re mercatoriâ*, but only to formal bonds and obligations, such as would require, when not holograph, to be authenticated in the manner provided by the Act 1681.[5] Although a transfer has been originally delivered in blank, yet, if the transferor has homologated it after the blanks were filled up, or if circumstances are proved from which a redelivery of the transfer, after the blanks were filled, can be inferred, the transfer is valid.[6]

Rights of parties, while the borrower remains solvent.

Even on the assumption that a transfer delivered in blank as to the name of the transferee is invalid as a legal transference,[7]

[1] *Shaw* v. *Cal. Rwy. Co.*, 1890, 17 R. 466.

[2] *Kennedy*, 1722, M. 1681; *Abernethie* v. *Forbes*, 1835, 13 S. 263; *Pentland* v. *Hare*, 1829, 7 S. 640. A transfer of shares is in its nature bilateral; the Act 1696, c. 25, seems to refer mainly to unilateral obligations.

[3] *Duncan's Trs.* v. *Shand*, 1872, 10 M. 986.

[4] Cf. *Bovill* v. *Dixon*, 1854, 16 D. 619; affd. H. L., 1856, 3 Macq. 1. Though the judgment of the Court of Session was affirmed in this case, the decision of the House of Lords proceeded on specialties, and opinions were expressed that the documents were invalid. *Dimmack* v. *Dixon*, 1856, 18 D. 428; *Commercial Bank* v. *Kennard*, 1859, 21 D. 864; *Connal & Co.* v. *Loder*, 1868, 6 Macp. 1095; *Colvin* v. *Dixon*, 1867, 5 Macp. 603; *Hamilton* v. *Dixon*, 1873, 1 R. 72.

[5] *Dimmack* v. *Dixon*, 1856, 18 D. 428. This decision was arrived at while *Bovill* v. *Dixon*, *ut supra*, was under appeal to the House of Lords, and the authority of the case is undoubtedly weakened by the opinions subsequently expressed in the House of Lords in *Bovill* v. *Dixon*.

[6] *Earl of Buchan* v. *Scottish Widows' Fund*, 1857, 19 D. 551; *Donaldson*, 1749, M. 9080; cf. *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907.

[7] As has been pointed out (*supra*, p. 509), the mere execution of a transfer, complete in every respect, does not pass the title to shares. If a transfer, for example, has been exe-

yet, so long as the parties are solvent, no difficulty arises. Behind the blank transfer is the contract between the borrower and the lender, and by this contract their respective rights are regulated. Where a blank transfer, with certificates, is taken in security of a loan, it is desirable that the arrangement between the parties should be reduced to writing. When this is done, the power of the lender to fill up the transfer and go on the register is regulated by the terms of the written memorandum. Even if there is no express mandate, however, it would seem that, where a registered shareholder executes a blank transfer and hands it, along with the certificates, to another person by way of security for a loan, his purpose and meaning must be to give authority to this person, in certain contingencies, to complete his security by filling up the transfer and obtaining registration. Accordingly, though, where a deed is blank at the time of signature, the general rule is that it rests on the party founding upon the deed to show that it was filled up with the knowledge and consent of the granter;[1] yet the delivery of the blank transfer with certificates, as security, would probably be held in such circumstances to imply a mandate by the borrower to the lender to insert his own name for the purpose of making his security effectual; and a heavy burden of proof would lie on the borrower who asserted that such an authority was not given.[2] The lender, then, holding this implied mandate coupled with an interest, occupies, in a question with the borrower, the position of a *procurator in rem suam*; and, that being the position, the borrower cannot revoke the mandate without paying his debt.[3] A danger of this form of security from the point of view of the borrower is that the lender may fill in his own name and have himself registered as owner, when, his title being *ex facie* complete, he can transfer the shares to a *bonâ fide* purchaser for value, without notice of the limitation in his title, and the borrower would have no right, as against such a purchaser,

cuted to one person, who has not been registered, and subsequently a transfer is executed to another person, who procures registration, the second transferee's title is effectual—*Nanney* v. *Morgan*, 1887, 37 Ch. Div. 346, at 354.

[1] *Earl of Buchan* v. *Scottish Widows' Fund*, 1859, 19 D. 551; *Donaldson*, 1749, M. 9080; cf. *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907.

[2] See observations of Lord Selborne in *France* v. *Clark*, 1884, 26 Ch. Div. 257, at 263.

[3] *Broughton* v. *Stewart & Co.*, Dec. 17, 1814, F. C.; *Struthers* v. *Commercial Bank*, 1842, 4 D. 460; *Carter* v. *Macintosh*, 1869, 24 D. 925. "A procuratory *in rem suam* is just one of the definitions of an assignation," per Lord Pres. Inglis in *British Linen Co. Bank* v. *Carruthers*, 1883, 10 R. 923. *Vide supra*, pp. 470, 473.

to recover the shares.[1] If the lender, instead of filling in his own name and going on the register, hands the blank transfer and certificates to a third party for value, this third party cannot, even though he procures registration, be in a better position than his cedent; for blank transfers, with certificates, are not negotiable instruments.[2]

Rights of parties, on the borrower's bankruptcy.

Where the borrower becomes bankrupt, while he is still registered owner of the shares, it is doubtful whether it would be held in Scotland—as it is held in England[3]—that the lender's possession of a blank transfer, with certificates, would give him a title to the shares, valid against the trustee in the borrower's bankruptcy. If, indeed, the act and warrant of confirmation in favour of the trustee is sent to the company before the lender has lodged the completed transfer with the company for registration, there can be little doubt, as the principle of equitable mortgage is not recognised in Scots law, that the security of the lender would be cut down. On the other hand, if the lender, having filled up his transfer, has been registered as shareholder before the bankruptcy, his title, even though the transfer was filled up and lodged within sixty days of the borrower's bankruptcy, would not be cut down under the Act 1696, c. 5, or the Bankruptcy (Scotland) Act, 1856, s. 110; for these provisions do not apply where, as in the case supposed, money has been advanced on the faith of a specific security, and the security has been completed within the sixty days by the act of the security-holder, and not by the act or deed of the bankrupt.[4] Even although the lender has not actually been registered as owner, yet if he has lodged the completed transfer and the certificates with the company for registration before the borrower's sequestration, it might be that his title would be preferred to that of the trustee.

Further, even if the transfer, being delivered in blank, is, by the Act 1696, c. 25, null as a conveyance, yet behind the transfer is the contract between the parties to transfer the shares;[5] and

[1] *Vide supra*, p. 506. So long as the lender holds the shares, the borrower of course can recover them on paying his debt.

[2] See *supra*, p. 514.

[3] *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426.

[4] *Scot. Prov. Inst.* v. *Cohen*, 1888, 16 R. 112; *Guild* (*Kettle's Tr.*) v. *Young*, 1884, 22 S. L. R. 520; *Watson* v. *Duncan*, 1879, 6 R. 1247. The security would not stand if the agreement between the borrower and lender is merely that the former will execute a transfer, if desired, and the transfer is executed within the sixty days; for here the security itself is granted within the sixty days—*Gourlay* v. *Mackie*, 1887, 14 R. 403.

[5] *Langer's Case*, 1868, 37 L. J. (Ch.) 292.

it might be argued that, as the effect of the transaction is to make the lender a mandatory *in rem suam*, it is not in the power of the mandant or his trustee in bankruptcy, who takes *tantum et tale*, to revoke such a mandate after the lender has performed it by filling up the transfer and lodging it for registration.[1] The mandate to fill up the transfer and go upon the register may be proved by parole evidence or by circumstances;[2] and, as has been pointed out, there is a presumption that a borrower who hands a blank transfer, with certificates, to a lender in security, gives the latter a mandate to make his security effectual.[3] In view of the doubt whether a blank transfer is not struck at by the Act 1696, c. 25, and of the further doubt whether, if it is struck at, the doctrine of an implied mandate to complete the transfer and go on the register would avail to circumvent the explicit provision of the Act, it is clear that in Scotland the delivery of a blank transfer of shares, with certificates, is not a desirable form of security.

Deposit of certificates.

Certificates of shares in companies registered under the Companies Act are by statute *primâ facie* evidence of the title of the member therein named to the shares or stock specified.[4] "A certificate is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company; and it is given by the company with the intention that it should be so used by the person to whom it is given, and acted upon in the sale and transfer of shares."[5] Moreover, the company is held to warrant the truth of the statements which the certificate makes.[6] In England, an equitable mortgage over the shares may be constituted by the

[1] *Struthers* v. *Commercial Bank*, 1842, 4 D. 460, per Lord Fullerton; *Watson* v. *Duncan*, 1879, 6 R. 1247; Bell, *Com.* i. 525; *Broughton* v. *Stewart & Co.*, Dec. 17, 1814, F. C. The lender, having *ex hypothesi* advanced money on the faith of the mandate, is, in the words of Erskine (*Inst.* 3. 3, 40) "concerned that the mandate shall not be revoked."

[2] Bell, *Prin.* s. 216; cf. *Horne* v. *Morrison*, 1877, 4 R. 977. The proof of a custom among stockbrokers and bankers to take blank transfers as security would be valuable. Cf. *Anderson* v. *Buck & Holmes*, 1841, 3 D. 975. In England, such a custom exists, and, as explained by Lord Watson, the rule that a security by a blank transfer, with certificates, is not cut down by the bankruptcy of the borrower, rests on the principle of estoppel on the part of the borrower arising from this custom. See per Lord Watson in *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 267, at p. 278.

[3] Ersk. iii. 3. 40.

[4] 25 & 26 Vict. c. 89, s. 32.

[5] Per Cockburn, C. J., *in re Bahia Rwy. Co.*, 1868, L. R. 3 Q. B. 584, at 595.

[6] *Tomkinson* v. *Balkis Co.* (1891), 2 Q. B. 614 [1893], App. Cas. 396; *Shropshire Union Rwy. Co.* v. *Reg.*, 1875, L. R. 7 H. L. 496. *Bloomenthal* v. *Ford* [1897], App. Cas. 156.

mere deposit of the certificates, unaccompanied by any transfer;[1] but the doctrine of equitable mortgage is unknown to the law of Scotland, and it is settled, in the case of analogous securities, though it has never been decided as to shares in a company, that deposit of the documents creates no security over the subject.[2] It is inconsistent with the principles of Scots law to sanction a burden on the real right without an act of transference of the right itself, unless in the case where the debts and vouchers are inseparable, *i.e.* where the instruments are negotiable.[3] Accordingly, in the case of shares, the property in which passes by transfer and registration, the deposit of the certificates gives the holder no right to retain them in a question, for example, with the trustee on the sequestration of the depositor, for the trustee has a right to the certificates as accessories to the shares. Possession of share certificates, if granted in security of an advance, may indeed give the grantee a right of detention as against the granter personally; but, in the absence of a transfer, he has no means of making his security effectual, and his right to hold the share certificates, till his debt is satisfied, would not be available against an onerous transferee of the registered owner.[4]

[1] *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20; *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426; Buckley, *Companies Acts*, 6th ed., 454.

[2] *Christie* v. *Ruxton*, 1862, 24 D. 1182; *Robertson* v. *British Linen Co. Bank*, 1891, 18 R. 1225; *Scot. Prov. Inst.* v. *Cohen*, 1888, 16 R. 112. So in *Gourlay* v. *Mackie* (1887, 14 R. 403), it was assumed that the mere deposit of certificates, in security for an advance, gave the depositary no security, and it was held that a transfer subsequently executed in his favour within sixty days of the borrower's bankruptcy was reducible under the Act 1696, c. 25.

[3] Thus possession of a scrip certificate may confer a good title. Cf. *Rumball* v. *Metropolitan Bank*, 1877, 2 Q. B. D. 194; *Baker* v. *Nottingham Bank*, 1891, 60 L. J. Q. B. 542.

[4] As to the effect of the possession of the share certificates by the lender, in preventing a transfer of the shares by the borrower, see *supra*, pp. 510, 511.

CHAPTER XVI

POLICIES OF INSURANCE AS SECURITIES

Marine and fire policies as collateral securities.
Life policies as independent securities.
Life policies as collateral securities.
Post-obit bonds.

Marine and fire insurance policies as collateral securities.

POLICIES of marine and fire insurance are, at common law[1] and by Statute,[2] contracts of indemnity. No one can recover the amount insured unless he has, at the time of the happening of the event upon which the policy becomes payable, an insurable interest in the subject insured. Accordingly, such policies can be effectually assigned only to a person who has an interest in the subject insured,[3] and, consequently, cannot be used as independent securities, but only as collateral securities passing with the property in the subject. A policy of marine insurance is assignable without the consent of the insurers, and is usually assigned together with an assignation of the ship. So a bill of lading, a corresponding policy of marine insurance, and a letter of hypothecation under the hands of the drawers, stating that the bill of lading and the policy are to be held in security of the sum in the bills of exchange, with a power of sale in the event of these bills not being retired, regularly accompany bills of exchange drawn by foreign merchants against produce shipped by them for constituents. On the other hand, a policy of fire insurance is a personal contract and cannot be assigned, except by the consent of the insurers, even to a person obtaining a right to the subject which the policy covers.[4]

[1] The fact that fire and marine insurances are contracts of indemnity at common law is pointed out by Lord President Inglis in *Glasgow Provident Invest. Soc.* v. *Westminster Fire Office*, 1887, 14 R. 947, and by Brett, J., in *Castellain* v. *Preston*, 1883, 11 Q. B. D. 380, at 386.

[2] 19 Geo. II. c. 37.

[3] 14 Geo. III. c. 48.

[4] The distinction between the assignability of fire and life policies is fully discussed in *Mutual Life Insur. Co.* v. *Allen*, 1884, 52 Arn. Rep. 245, at 247; also per Brett, L. J., in *Rayner* v. *Preston*, 1881, 18 Ch. D. 1; but see Bell, *Com.* i. 674; Bell, *Prin.* s. 516.

Life policies as securities.

These objections do not apply to policies of life assurance, which, if originally valid, can, as a rule,[1] be effectually assigned to one who has no interest. Life policies may be made available as securities for debt in two ways. In the first place, an existing policy on the life of the debtor and in the debtor's name, or a policy on the life of a third person, to which the debtor has acquired a title, may be assigned to the creditor. In this case the policy constitutes in itself an independent security; but, unless the policy has already acquired a value, the security is defective unless additional means are taken to secure the payment of the premiums by the debtor. In the second place, life policies are frequently used as supplementary to other securities. For example, where a liferent or other terminable interest, dependent on the debtor's life or the life of a third party, is assigned to a creditor as security, a policy of insurance on the life of the debtor or of the third party, upon whose life the debtor's interest depends, is taken out by the creditor directly or, being taken out by the debtor, is assigned by him to the creditor. The liferent or other terminable interest assigned covers the interest on the loan and the premiums upon the policy; while the policy secures the repayment of the principal sum on the death of the debtor or the third party, on the duration of whose life the debtor's interest in the estate depends. Similarly, a reversionary interest may be assigned along with a policy upon the life on whose survivance the reversion depends. The reversion may be burdened not only with the principal sum due, but with the whole or a part of the interest and premiums upon the policy. In both of these latter cases, the policy of insurance is merely a collateral or supplementary security, the principal security being, in the one case, the liferent or terminable interest, and, in the other case, the reversion.[2]

Life policies as independent securities.

It is expedient that a creditor, before taking an assignation of an existing policy of insurance as a security for debt, should inquire (1) whether the policy in question is assignable; (2) whether the proposed cedent is the owner of the policy; (3) whether the insured had, at the time of effecting the policy,

[1] For exceptions, see *infra*, p. 523 *et seq.*

[2] In the system known as that of borrowing upon annuity, the lender hands to the borrower a sum which, to all intents and purposes, is the purchase money of an annuity sufficient to pay both interest on the sum borrowed and the premiums on a policy of insurance effected on the life of the borrower for a sum equal to the price of the annuity. As to such arrangements, see *Knox* v. *Turner*, 1870, L. R. 5 Ch. App. 515; *Shand* v. *Blaikie* 1859, 21 D. 878; and *infra*, p. 538 *et seq.*

an insurable interest in the life; (4) whether the policy is voidable on any ground; (5) whether the insurance company or other third party has a prior claim on the proceeds of the policy.

Assignability of life policies.

A policy of life assurance is, as a general rule, assignable like any other reversionary interest. A contract of insurance is not, as was formerly held in England,[1] a contract of indemnity, but a contract on the part of the company to pay a certain sum upon the happening of a certain event.[2] By various Statutes, however, the assignability of certain classes of life policies has been curtailed. Thus policies under the Customs Annuity Benevolent Fund,[3] and under the Friendly Societies Acts,[4] are not assignable, though the insured has a power of apportionment under certain conditions. Similarly, post-office assurances and annuities can only be assigned subject to the provisions of the Acts regulating them.[5]

Policies by a husband for behoof of wife or children.

By the Married Women's Policies of Assurance (Scotland) Act, 1880,[6] a policy of assurance effected by a married man upon his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, is deemed a trust for her or their benefit; and such a policy, on being effected, vests in the husband and his representatives, as trustees for the wife or children, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the company, and does not form a part of the estate of the husband, is not liable to the diligence of his creditors, or revocable as a donation between husband and wife, or reducible on any ground of excess or insolvency.[7] The receipt of such trustee for the sum secured by the policy, or for the value thereof, in whole or in part, is a sufficient and effectual discharge to the assurance office.

At common law, a policy taken by a husband in name of trustees for his wife and children formed a mere destination, and did not, without delivery, actual or constructive, of the policy, confer a vested right upon the beneficiaries.[8] When delivery was proved, on the other hand, the policy was regarded as a post-

[1] *Godsall* v. *Boldero*, 1807, 9 East, 72.

[2] *Dalby* v. *India and London Life Co.*, 1854, 24 L. J. C. P. 2; *Law* v. *London Indisputable Co.*, 1855, 24 L. J. Ch. 196.

[3] 56 Geo. III. c. 73, as extended by 34 & 35 Vict. c. 103, and the Rules of 1872 thereunder; *M'Lean's Trust*, 1874, L. R. 19 Eq. 274, per Jessel, M. R.

[4] 38 & 39 Vict. c. 60; 39 & 40 Vict. c. 32.

[5] 27 & 28 Vict. c. 43, s. 11.

[6] 43 & 44 Vict. c. 26.

[7] *Ib.* s. 2; *Kennedy* v. *Sharpe*, 1895, 23 R. 146.

[8] *Jarvie's Trs.* v. *Jarvie's Trs.*, 1887, 14 R. 411.

nuptial provision for the wife, and not as a donation *inter virum et uxorem*, and therefore not revocable.[1] In a policy effected under the Act, the husband is effectually excluded from all beneficial interest in the policy, and cannot assign it to a creditor in security of debt. At the same time, as there is no provision in the Act for compelling the husband to keep up the policy by paying the premiums, and as he may become unable to do so owing to insolvency, it has been held that the husband or other trustee may surrender the policy for cash, with the concurrence of the beneficiaries.[2] In the case referred to, the insurance was effected by a husband on his own life, for the benefit of his wife as sole beneficiary, and both husband and wife concurred in the receipt for the surrender value. In the same case Lord Shand expressed an opinion that the receipt of the husband as trustee, even if the wife did not concur, would have been a sufficient discharge to the insurance company, provided the company had no notice of an intended fraud. In such circumstances, however, it is expedient that the insurance company, in order to preserve the trust fund for the beneficiaries, should, instead of paying cash to the assured himself as trustee, either require the appointment of an independent trustee, who shall administer the trust in accordance with the purposes expressed in the policy; or issue a new fully-paid policy, subject to the original trust, of such value as represents the cash surrender value of the old policy.[3] Further, it has been laid down, in England, that a lender who, in order to preserve the trust funds, advances money to pay the premiums on the policy, at the request of the beneficiaries, acquires a lien over the policy to the extent of his advances.[4] A trustee specially appointed in terms of the Act may himself advance the premiums of insurance, in order to preserve the trust fund, and so acquire a lien upon the policy; or, if he borrows money and applies it to this purpose, he can transfer his lien on the policy to a lender.

It has been held, under the corresponding English Act, that, where the company has contracted to pay to the executors of the assured, the right to sue upon the policy, on the death of the assured, vests in his executors, if no trustee has been appointed,

[1] *Galloway* v. *Craig*, 1861, 4 Macq. 267.

[2] *Schumann* v. *Scottish Widows' Fund Soc.*, 1886, 13 R. 678. Where the trustee is not the insured husband himself, the latter, having a reversionary interest, must concur.

[3] *Schultze* v. *Schultze*, 1887, 56 L. J. Ch. 356.

[4] *In re Leslie*, 1883, 23 Ch. Div. 552; *Falcke* v. *Scottish Imperial Co.*, 1886, 34 Ch. Div. 234; cf. *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 Macp. 595.

and not in the beneficiaries.[1] In the case referred to, the policy was on the life of Maybrick, for the benefit of his wife, and payment was resisted on the ground that the death of the insured had been brought about by the felonious act of his wife, and that it would be against public policy that she should take any benefit from the insurance. The Court rejected this defence, on the ground that the right to sue was in the executors of the assured, and that no question of public policy could arise with them.

Whether the proposed cedent is owner of the policy?

Questions of difficulty often arise as to the ownership of a policy where, for instance, one person pays the premium, the policy is taken on the life of another, and the beneficial obligation is in favour of a third party. In determining the title to the policy, the material point to be inquired into is, in favour of whom is the beneficial obligation undertaken by the company? It is he alone who has the power to assign it.[2] At common law, when a policy is taken by a husband on the life of his wife, payable to her heirs, it has been held that, though the property in the policy is in the wife, the interest in it accrues to the husband during his life *jure mariti*, so that during the subsistence of the marriage the husband can make it available as a security for debt.[3] Such a policy, if not disposed of by the husband during his life, goes to the wife and her representatives on the dissolution of the marriage by the death of the husband.

Where the beneficial interest in a policy is taken *ex facie* in the name of one man, but is really in another, the person in whose name it is taken is a trustee, so that, under the Act of 1696, c. 5, the actual title to the policy can be proved only by writ or oath.[4] But where a policy, in reality for the benefit of a firm, is taken in the name or on the life of one partner, the Act 1696, c. 5, does not apply; and a proof, *prout de jure*, of the real facts is competent. Also, where one of two obligants in a joint obligation took out in his own name a policy of insurance on the life of the other in security, it was held that, as the case was from the first one of joint obligation and not of trust, the question to whom the policy really belonged could be proved *prout de jure*.[5]

Whether the insured had an insurable interest in the life?

In order to the validity of an insurance policy, the person for

[1] *Cleaver* v. *Mutual Reserve Fund Life Assoc.* [1892], 1 Q. B. 147.

[2] *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227. See per Lord J. C. Moncreiff, at 1229.

[3] *Wright* v. *Brown*, 1849, 11 D. 459; *Smith* v. *Kerr & Smith*, 1869, 7 Macp. 863; *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227. The Married Women's Property Act, 1881, has doubtless altered the law on this matter.

[4] *Forrester* v. *Robson's Trs.*, 1875, 2 R. 755; *General Baptist Churches* v. *Taylor*, 1841, 3 D. 1030.

[5] *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.

whose behoof the insurance is made must, at the time of effecting the policy, have an insurable interest in the life insured.[1] When a person effects an insurance on the life of another, the value of his interest in such life at the time of the insurance is the limit of the sum which can be recovered from the insurance office.[2] Further, a creditor is not entitled, by insuring the life of his debtor in more than one office, to recover more than the amount of his debt; and if he recover his full interest by payment under one of the policies, he cannot recover anything under the others.[3] If, however, an insurable interest exists at the time when the policy is effected, the contract of insurance is valid; and it is immaterial whether the interest continues to subsist or not.[4] A policy is not affected by the cessation of the insurable interest, as by payment of the debt which occasioned it, before the happening of the event insured against; and the policy may be competently assigned to an assignee, who never had any interest in the life. It is, it seems, *jus tertii* in anyone but the company, as, for instance, a postponed assignee, to raise the question of want of insurable interest.[5]

A man's interest in his own life is unlimited and validates an insurance thereon to any amount. An insurable interest in the life of another must be a pecuniary interest, and one legally enforceable.[6] The interest need not be a vested interest, but a mere expectancy is not sufficient. Thus the fact that a man is heir-at-law to the proprietor of heritable estate, does not entitle him to insure the life of such proprietor.[7] The pecuniary interest may depend on the obligation to support which the law in certain

[1] 14 Geo. III. c. 48.

[2] *Bradford* v. *Saunders*, 1877, 25 W. R. 650, in which case a policy, taken out by one of two joint obligants under a bond on the life of the other for the sum due under the bond, was held effectual only to the extent of one-half of that sum, that being the extent of the insured's interest in his co-debtor's life. Where a creditor insures his debtor's life in his own name, as in a loan upon a reversion or post-obit bond, in which the interest on the loan is allowed to accumulate until the expectancy is realised, the lender has an insurable interest in the borrower's survivance, to the extent not only of the original advance, but of the interest for the period it has lain over, and the premiums of insurance (cf. *Marquess of Northampton* v. *Salt*, 1890, 45 Ch. D. 190; [1892], App. Cas. 1.

[3] *Hebden* v. *West*, 1863, 3 B. & S. 579.

[4] *Ashley* v. *Ashley*, 1829, 3 Sim. 149; *Dalby* v. *India and London Life Co.*, 1854, 24 L. J. C. P. 2; 15 C. B. 365.

[5] *Lindsay* v. *Barmcotte*, 1851, 13 D. 718; *Worthington* v. *Curtis*, 1875, 1 Ch. Div. 419; cp. *Stevenson* v. *Cotton*, 1846, 8 D. 872.

[6] *Halford* v. *Kymer*, 1830, 10 B. & C. 724, 3 Ross's L. C. 725; *Hebden* v. *West*, 1863, 3 B. & S. 579.

[7] *Lucena* v. *Crauford*, 1808, 1 Taunt. 325.

cases attaches to relationship, or it may arise from contract. A wife has an insurable interest in the life of her husband; and the opinion has been expressed, though it has not been expressly decided, that in Scotland a husband has such an interest in the life of his wife.[1] But a father has been held, in England, not to have an insurable interest in the life of his son, unless he has a right of property dependent on the life of the son.[2] Where the insurable interest depends on contract, the contract must establish between the person effecting the insurance and the person whose life is insured a reasonable expectation of pecuniary advantage from the continuance of the life.[3] A creditor has an insurable interest in the life of his debtor, though the debt is not immediately exigible, or though its amount is not definitely ascertainable;[4] a cautioner, in the life of the principal debtor;[5] an obligant, in the life of a co-obligant.[6] On the same principle, an employee, who has contracted with his employer for a fixed period and at a fixed salary, has an insurable interest in his employer's life to the extent of the capitalised value of the salary for the period in question.[7] Similarly, it has been held, in an American case, that a partner has an insurable interest in the life of his co-partner.[8]

Whether the policy is avoidable on any ground?

The assignee of a policy of insurance takes it subject to all the defences and exceptions which the insurers have against the cedent.[9] Even if the insurance company have paid the insurance money to the assignee, both being in ignorance of a fraud practised by the cedent, the company, on discovering the fraud, are entitled to recover the money paid.[10] In contracts of insurance, the utmost good faith is required on both sides. The contract can be avoided not only on the ground of fraud, but on the ground of innocent misrepresentation by either of the contracting parties.[11] If any of the representations in the proposal for insurance, which

[1] *Wight* v. *Brown*, 1849, 11 D. 459, per Lord Moncreiff, at p. 470.

[2] *Halford* v. *Kymer*, 1830, 10 B. & C. 724. In England, a parent has no direct claim for maintenance against a child, but in Scotland the law does impose such an obligation upon children; accordingly, the contrary might be held in Scotland.

[3] *Bradford* v. *Saunders*, 1877, 25 W. R. 650.

[4] Cf. *Barnes* v. *London, Edinburgh, and Glasgow Life Insur. Co.* [1892], 1 Q. B. 864.

[5] *Stevenson* v. *Cotton*, 1846, 8 D. 872.

[6] *Bradford* v. *Saunders*, 1877, 25 W. R. 650; cf. *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.

[7] *Hebden* v. *West*, 1863, 3 B. & S. 579.

[8] *Connecticut Mutual Life Insur. Co.* v. *Luchs*, 1882, 108 U. S. 498.

[9] *Scottish Equitable Life Insur. Co.* v. *Buist*, 1877, 4 R. 1076.

[10] *Lefevre* v. *Boyle*, 1832, 3 B. & Ad. 877.

[11] *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363, per Jessel, M. R., at 367.

usually form the subject of one of the conditions in the policy, is untrue in fact, then, if this misrepresentation is material to the risk, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.[1] Further, insurance contracts, being *uberrimæ fidei*, are made under an implied condition that all material facts known to either party will be disclosed; and the concealment of a material fact is a ground of avoiding the contract.[2] Many policies, indeed, contain agreements modifying these common-law rules,[3] so that it is difficult to lay down general rules. Broadly, however, policies of insurance on life may be distinguished as *conditional* and *indisputable*. In a conditional policy, the absolute accuracy in point of fact of the statements, whether material or not, in the proposal or other preliminary document, is made a condition precedent to any right accruing under the policy. In an indisputable policy, the right of the insurance office to dispute the policy, except on the ground of fraud, is abandoned.[4]

Where a policy is effected by one man on the life of another, the person whose life is assured is not the agent of the person effecting the policy. Accordingly, while the person effecting the assurance is responsible for the accuracy of the statements he himself makes, untrue representations by the life, if not known by the assured to be untrue, do not avoid the policy, unless the policy is expressly granted on condition of the absolute accuracy of the information furnished to the company.[5] On the other hand, where the policy is conditional on the absolute accuracy of the statements in the proposal, untrue answers by the life, though the assured was not aware of their untruth, will avoid the policy.[6]

If the notice of an assignation of a policy, sent by the assignee to the company, is such as would show a reasonable man that the assignee was ignorant of material facts which avoid the policy, the company is bound to inform the assignee of the real state of

[1] *Life Association* v. *Foster*, 1873, 11 Macp. 351; *British Equitable* v. *Great Western Rwy.*, 1869, 38 L. J. Ch. 314; *Standard Life Assur. Co.* v. *Weems*, 1884, 11 R. 658, revd. 11 R. (H. L.) 48; see as to the rule regulating the rescission of insurance contracts, per Lord Herschell in *Derry* v. *Peek*, 1889, 14 App. Cas. 337, at 359.

[2] Per Blackburn, J., in *Ionides* v. *Pender*, 1874, L. R. 9 Q. B. 537.

[3] Stipulations in a policy are construed strictly against the insurance company—*Fowkes* v. *Manchester and London Co.*, 1863, 32 L. J. Q. B. 153.

[4] *E.g. Wood* v. *Dwarris*, 1856, 11 Exch. 493; *Wheelton* v. *Hardisty*, 1857, 8 El. & Bl. 232.

[5] *Wheelton* v. *Hardisty*, 1857, 8 El. & Bl. 232; 27 L. J. Q. B. 241.

[6] *Macdonald* v. *Law Union Insur. Co.*, 1874, L. R. 9 Q. B. 328; cf. *Cazenove* v. *British Equitable Assur. Co.* (1859), 6 C. B. (N. S.) 437.

the facts; and if they do not, they will be barred, in a question with a *bonâ fide* onerous assignee, from pleading the real state of the facts.[1] Further, if, after a policy has been assigned, the insurance company become aware of objections to its validity, so clear and conclusive that the mere statement of them is enough, there may be a duty of communication to those whom the company know to be interested in the policy. It would not be consistent with good faith that they should, in such circumstances, go on receiving the premiums on a policy that they intended to challenge in the end.[2] Where a policy is reduced upon any ground, into which fraud does not enter, the premiums should, according to the ordinary rule of law, be returned; but a provision to the contrary is usually inserted in policies, and the premiums paid are declared to be forfeited to the company.

Whether the insurance company or other party has a prior right in the policy?

Before taking as security an assignation of an existing policy, it is expedient for the proposed assignee to inquire at the insurance office whether any prior assignation has been notified. The insurance company, in replying to such an inquiry, are bound to give an honest answer to the best of their knowledge and belief. If they do so, they incur no liability to the inquirer for misrepresentations, even though they induce him to make advances, provided their statement does not amount to a guarantee.[3] Further, in taking an assignation of an existing policy, it is expedient to inquire whether he is in debt to the company issuing the policy. For, if an insurance company advance money to the holder of a policy, they have, without any assignation of the policy, a prospective right of retention in the sum due under the policy. This right, it appears, is available against an assignee of a policy under an assignation completed subsequently to the advance by the insurance company. If during the currency of the policy the insured becomes bankrupt, the insurance company, in virtue of its prospective right of retention, holds a valuable security, and the trustee in bankruptcy must either purchase the security at the valuation put upon it by the insurance company, *i.e.* at its surrender value, or leave the company the right of paying themselves out of the proceeds of the policy, when the policy becomes payable.[4] In the case referred to, the nature of the right of the insurance company was described in the

[1] *Mangles* v. *Dixon*, 1852, 3 H. L. Cas. 702.

[2] Per Lord Pres. Inglis in *Scottish Equitable Life Insur. Co.* v. *Buist*, 1877, 4 R. 1076, at 1081.

[3] Cf. *Low* v. *Bouverie* [1891], 3 Ch. 82. As to liability under a representation, see *infra*, p. 665.

[4] *Borthwick* v. *Scottish Widows' Fund Soc.*, 1864, 2 Macp. 595.

opinion of three of the consulted judges as follows: "The company's right is simply to withhold fulfilment of their obligations as obligors in the policy, so long as the assured remains their debtor. The right must always be of a merely passive kind, and it will come into practical operation only when the sum in the policies shall become due. But though this prospective and contingent right does not now entitle them to take any active proceedings for forcing a settlement or otherwise, it constitutes at present a valuable security over the estate of the bankrupt, giving them a preference over the other creditors, and as such it must be valued and deducted from their claim. It is a right arising *ex lege*, which the defenders may ultimately make the means of operating a preference, and securing, wholly or in part, their claim against the sequestrated estate."[1] This right of an insurance company is somewhat analogous to the right of a company registered under the Companies Acts to refuse to register a transfer of shares until all debts due to the company by the transferor have been paid.[2] There seems no doubt that the right of an insurance company to make advances to the insured in reliance on their prospective right of retention, comes to an end on their receiving notice of an assignation of the policy to a third party.[3]

Mode of assignation.

A policy of insurance may be assigned by the ordinary methods competent for the assignation of other incorporeal moveable subjects, the assignation being completed by intimation to the debtor in the obligation, the insurance company. A statutory form of assignation, competent throughout the United Kingdom, has been provided by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144). By this Statute the assignment may be made either by indorsement on the policy, or by a separate instrument in the words or to the effect set forth in a schedule attached to the Act, such indorsement or separate instrument being duly stamped.[4] Every insurance company must, on every policy issued by them, specify their principal place of business, at which notices of assignment may be given in pursuance of the Act.[5] The assignee of a policy, if he has given written notice of the date and purport of the assignation to the insurance company at their principal place of

[1] Per Lord President and Lords Curriehill and Barcaple in *Borthwick* v. *Scottish Widows' Fund Soc.*, 1864, 2 Macp. 595, at 601.

[2] *Vide supra*, p. 508.

[3] *Bradford Banking Co.* v. *Briggs*, 1887, 12 App. Cas. 29.

[4] 30 & 31 Vict. c. 144, s. 5. The Schedule is as follows: I, *A. B.* of , in consideration of , do hereby assign unto *C. D.* of , his executors, administrators, and assigns, the [*within*] policy of assurance granted [*here describe the policy*]. In witness, .

[5] 30 & 31 Vict. c. 144, s. 4.

business, has a right to sue upon the policy in his own name;[1] and the date on which such notice shall be received, regulates the priority of all claims under any assignation; and a payment *bonâ fide* made in respect of a policy by an insurance company, before the date on which such notice is received, is valid as against the assignee giving such notice.[2] Every insurance company to whom notice has been duly given of the assignment of a policy under which they are liable, is bound, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment of a fee not exceeding five shillings, to deliver an acknowledgment in writing, under the hand of the manager, secretary, or other principal officer of the company, of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, or other principal officer of the insurance company, is conclusive evidence as against such insurance company of their having duly received the notice to which such acknowledgment relates.[3]

Notice.

The provisions of the Act as to notice of the assignment have made little change in the requirements of the common law. There is no decision on the question what constitutes "written notice of the date and purport of the assignment," but, probably, intimation in one or other of the methods prescribed by the Transmission of Moveable Property (Scotland) Act, 1862 (25 & 26 Vict. c. 85), would suffice. That Act is expressly made applicable to the assignation of policies of assurance issued by Scottish companies. The essential points are that the notice shall identify the policy so assigned, and specify the name of the assignee and the date of the assignation. Information as to whether the assignation is absolute or by way of security is necessary in determining the stamp duty,[4] but it is unnecessary for the purpose of the intimation whereby the assignee's right is completed. It has been held that the provision as to priority of notice in the third section of the Act was passed for the benefit of insurance companies, to enable them to recognise as the first claim, the claim of the person who first gave notice as required by the Statute, and to render payment to him a sufficient discharge of the obligation under the policy. Accordingly, the statutory provision only applies in questions with the company, and questions of priority between assignees are determined by the

[1] 30 & 31 Vict. c. 144, ss. 1 and 3. In Scotland, an assignee has this right at common law.

[2] *Ib.* s. 3.

[3] *Ib.* s. 6.

[4] *Vide infra*, p. 533.

common law. Thus where the holder of an earlier assignation gave notice, which, though not in the form prescribed by the Act, was sufficient to satisfy the rules of the common law in regard to intimation, a later assignee, who gave notice in terms of the Act, gained no preference.[1] Until notice of the assignation is given, the cedent has it in his power to defeat the assignee's right by surrendering the policy to the office;[2] but, after proper notice, the company cannot accept a surrender without rendering itself liable to the assignee.[3] In order that priority of notice may have the effect of giving priority of right, there must be an actual assignation; and an agreement to execute an assignation on request is not such an assignation. Thus, in an English case, a lender, who had possession of a policy in security of his debt, but who had not given notice to the office, was preferred to a posterior lender, who had taken a written agreement from the borrower that the latter should execute an assignation when required, and who had given notice of the agreement to the office.[4]

Delivery.

Further, it is expedient for the assignee to obtain delivery of the policy along with the assignation.[5] Delivery of the policy is not, however, in Scotland, necessary to the safety of the assignee, as the assignation, accompanied by intimation, is effectual to carry the debt whatever becomes of the policy. Nor can the cedent, though he has retained possession of the policy, reinstate himself in the right to its proceeds without a formal retrocession, with notice to the company.[6] In England, delivery of the policy is advisable, as, otherwise, questions may arise with a third party, with whom the policy has been deposited, with notice to the company, in security of debt; and even in Scotland there may be special cases, *e.g.* law agent's right of hypothec, in which the possession of the policy by a third party may cause trouble to the assignee.

Stamp.

By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 118, it is provided that: (1) "No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped; and no payment

[1] *Newman* v. *Newman*, 1885, 28 Ch. Div. 674.

[2] *Stocks* v. *Dobson*, 1853, 22 L. J. Ch. 884.

[3] *Andrews* v. *Bousfield*, 1847, 10 Beav. 511. As to what constitutes proper notice, see *in re Haycock's Policy*, 1876, 1 Ch. D. 611.

[4] *Spencer* v. *Clarke*, 1878, 9 Ch. D. 137. *Vide supra*, pp. 474, 475.

[5] It is not infrequently stipulated by the company, that payment will not be made without the production of the policy—*Spencer* v. *Clarke*, *supra*.

[6] Bell, *Com.* ii. 24. As to cedent's right to reconveyance, *vide infra*, p. 540.

shall be made to any person claiming under any such assignment unless the same is duly stamped. (2) If any payment is made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to Her Majesty from the person by whom the payment is made."[1] The want of a stamp does not probably render an assignment void, but merely precludes the assignee from suing on the assignment till it is stamped; so that a posterior intimated stamped assignment would not be preferred to a prior intimated assignment unstamped. The effect of sec. 118 is to make the company liable to the revenue for the want of, or a deficiency in, the stamp. The company is bound to see not only that the last assignment, in respect of which the claim is made, is stamped, but that all intermediate assignments, on which the assignee's title depends, are duly stamped. A different stamp is required according as the assignment is absolute or merely in security. By sec. 88 (2) of the Stamp Act, 1891, where no limit is set to the amount for which the security is to be available, it is available for such amount only as the *ad valorem* duty thereon extends to cover; but where any advance or loan is made in excess of the amount covered by that duty, the security is, for the purpose of stamp duty, deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made;[2] but money advanced for keeping up any policy of life insurance comprised in the security, is not reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.[3]

Deposit of policy in security.

By the law of England the deposit of a policy of life assurance, in security of a loan advanced upon the faith of such deposit, if followed by notice to the company, confers upon the lender, while the policy remains in his hands, an equitable charge or preferable right to the proceeds of the policy, to the extent of the unpaid portion of the loan in question, and even of fresh advances.[4] Further, mere deposit of a policy upon an advance of money, without notice to the insurance company, may create a lien on the policy if such be the intention of the parties, though not a word passed at the time the deposit was made.[5] In Scotland no security is

[1] As to the penalty for making, executing, or delivering a policy not duly stamped, see 54 & 55 Vict. c. 39, s. 100.

[2] Sec. 88 (2).

[3] Sec. 88 (3).

[4] *Talbot* v. *Freere*, 1878, 9 Ch. D. 568, 572.

[5] *Green* v. *Ingham*, 1867, L. R. 2 C. P. 525; *Scottish Prov. Inst.* v. *Cohen*, 1888, 16 R. 112.

constituted by the mere delivery of the policy, without an assignation. Thus an unintimated assignation with deposit of the policy does not give the depositary an effectual right in competition with a subsequent arrester.[1] In a later case it was decided that the deposit of a policy conferred no right upon the holder, or persons claiming through him, to the contents of the policy; and an executrix, who, by confirmation, had made up a title to the policy, was held to have a right preferable to that of the depositary, and to be entitled to enforce from him the unconditional surrender of the policy.[2] The possession of a policy, if granted in security of an advance, may indeed give a right of retention against the granter personally, until the debt is satisfied; but this right is not available against the granter's creditors.[3] "It is an important general principle of our law, and there is none more vital, that the delivery of the *corpus* of a deed or instrument will not carry the real right that is contained within such deed or instrument."[4] The questions of private international law that have arisen owing to the difference between the law of Scotland and the law of England in this matter, have already been discussed in treating of assignations in general.[5]

Warrandice.

When a security is constituted by an assignation of a policy of assurance, arrangements should be made for keeping the policy in force. Where the obligation undertaken by the assured was merely to pay the premiums and keep up the policy, the suicide of the assured, though avoiding the policy, was held not to be a breach of his obligation.[6] Hence the expediency of the obligations by the insured being couched in a negative form, as, for example, that he will do nothing whereby the policy may be avoided. Where the assured had, after having assigned the policy, avoided it by going abroad, the measure of damages was, in an action by the assignee, held to be the market value of the policy at the date of the breach of agreement.[7] But if the assignation is in security, the limit of the damages which the assignee can recover is the amount of the debt for which the security was given.[8] It is usual in

[1] *Strachan* v. *M'Dougle*, 1835, 13 S. 954.

[2] *United Kingdom Life Insur. Co.* v. *Dixon*, 1838, 16 S. 1277; *Christie* v. *Ruxton*, 1862, 24 D. 1182.

[3] Bell, *Com.* ii. 23.

[4] Per Lord MacKenzie in *Strachan* v. *M'Dougle*, 1835, 13 S. 954; cf. Bell, *Com.* ii. 23; *Scottish Prov. Inst.* v. *Cohen*, 1888, 16 R. 112; *Robertson* v. *British Linen Co. Bank*, 1891, 18 R. 1225; *Scottish Prov. Inst.* v. *Robinson*, 1892, 29 S. L. R. 733.

[5] *Vide supra*, p. 488 *et seq.*

[6] *Dormay* v. *Borrodaile*, 1847, 10 Beav. 335.

[7] *Hawkins* v. *Coulthurst*, 1864, 12 W. R. 825.

[8] *Dormay* v. *Borrodaile*, 1847, 10 Beav. 335, per Lord Langdale.

policies to stipulate that residence abroad, after a certain number of years, shall not avoid the policy, or may be arranged for on payment of an increased premium. An obligation to pay such increased premium should be taken from the cedent, especially where the policy assigned is one granted on the life of a third party; for, otherwise, the assignee may have no remedy in the event of the person whose life is assured violating the conditions of the policy. The suicide of the assured avoids the policy at common law; and there is commonly an express stipulation to this effect. But this objection is frequently waived after a certain number of years; and an agreement is usual that *bonâ fide* interests acquired by third parties shall not be prejudiced by the suicide of the assured.[1] It has been held in England, however, that such a stipulation does not avail to protect the interest acquired by creditors by operation of law under the bankruptcy Statutes.[2]

Rights of assignee in security.

The rights of an assignee in security of a policy of life assurance, do not materially differ from those of the assignee in security of other incorporeal moveable subjects.[3] A power to sell or surrender the policy, on the failure of the cedent to pay interest or premiums, should be taken. It has been decided that an arrester is entitled, in a furthcoming, to have the policy sold,[4] and such a power would ordinarily be granted to an assignee in security, on an application to the Court.[5] An assignee in security is entitled, without special agreement, to keep up the policy himself by payment of the premiums, if the cedent fail to do so, and to add the amounts so paid by him, with interest thereon, to the amount of his secured debt, on the ground that he is justified in using all proper means for preserving his security.[6] But he cannot recover the premiums by direct action against the cedent personally, unless, as is usual, the latter has come under an obligation to pay them.[7] If the cedent has so contracted, the assignee has an action of damages against him for breach of contract, and may recover either the amount of the premiums paid by him to keep up the policy, with interest thereon; or the sum necessary to

[1] See *Amicable Society* v. *Bolland*, 1831, 4 Bligh. (N. S.) 194.

[2] *Moore* v. *Woolsey*, 1854, 4 El. & Bl. 243, 24 L. J. Q. B. 40; *Jackson* v. *Forster*, 1859, 1 El. & El. 463; 29 L. J. Q. B. 8.

[3] *Vide supra*, p. 492 *et seq.*

[4] *Bankhardt's Trs.* v. *Scottish Amicable Soc.*, 1871, 9 Macp. 443.

[5] *Wood* v. *Anstruther*, 1842, 4 D. 1363.

[6] Davidson, *Precedents in Convey.* (4th ed.), ii. pt. 2, p. 63. *Vide supra*, p. 498.

[7] The security-holder may be able to enforce payment of the premiums indirectly by realising the security, and applying the proceeds in payment of the premiums, and the balance to account of the principal debt (Mayne on *Damages* (3rd ed.), p. 241).

renew the policy, if, through the non-payment of premiums by the cedent, it has dropped; or, in case of complete forfeiture, the amount of his loss, not exceeding the debt in security of which the assignation was granted.[1] A bonus, if nothing be stipulated to the contrary, is an incident of the policy, and belongs to the party in right of the policy.[2] To such additions the principle *accessorium sequitur principale* applies. Accordingly, the assignee, being entitled in a question with the company to receive the bonus, can retain it as an additional security for his debt. But it is usually arranged, where a policy is assigned in security of a debt, and the premiums are paid by the cedent, that he shall have the benefit of any bonus. Where the bonus is thus made the subject of special arrangement, no claim of set-off is pleadable against it. Thus where money secured by a policy on the life of the settlor had, with other property, been assigned to the trustees of his marriage settlement, it being declared that any bonus which might accrue on the policy should go to the settlor, it was held that the trustees had no right to retain the bonus, although the settlor had died in their debt for an amount far exceeding it.[3]

Policies of assurance as collateral securities.

In addition to their use as independent subjects of security, policies of assurance may be used as collateral securities, in cases where a debt is secured over property in which the debtor has only a life interest, or over subjects to which he has a right to succeed if he should survive the party in possession. Thus when money is borrowed by an heir of entail in possession, it may be secured by a bond and disposition in security over his life interest, combined, in order to meet the contingency of his death before payment, with an assignation of existing policies on his life; or, if no such policies exist, with new policies, taken out either by the debtor himself on his own life, or by the creditor on the life of the debtor. Again, where money is borrowed on the security of a reversion or expectancy, the subjects of the reversion are conveyed to the creditor, and a policy is usually effected on the life of the debtor as against that of the party on whose death he is entitled to succeed.[4] In all such transactions a somewhat complicated and difficult question may arise as to the ownership of

[1] *Dormay* v. *Borrodaile*, 1847, 10 Beav. 335, per Lord Langdale.

[2] *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227; *Sparks* v. *Burnett*, 1890, 17 R. 997.

[3] *Hallett* v. *Hallett*, 1879, 13 Ch. D. 232; cf. *Christison* v. *Bolam*, 1887, 36 Ch. D. 223.

[4] As to the form of these transactions, see *Marquess of Northampton* v. *Salt* [1892], A. C. 1; *Menzies* v. *Menzies*, 1893, 20 R. (H. L.) 108 (actuarial evidence in Session papers).

the policies, either on the debt being repaid, or on the policies becoming payable on the death of the assured.

Policies effected by a creditor on the life of his debtor, *primâ facie* belong to creditor.

The case is comparatively simple where the creditor insures the life of the debtor as a precaution, and pays the premiums himself. This may be done whether the debt is otherwise secured, or rests merely on personal credit. In such a case the debtor, though he must, as a rule, be aware of the existence of the policy, has no concern with it, and no claim to an assignation of it on payment of the debt. Nor have his representatives any right to demand the proceeds on his death.[1] If the amount of the policy exceeds the amount of the debt as at the date at which it was effected, the insurance company may have a right to raise a question as to the insurable interest of the creditor; but if they do not, it is *jus tertii* in the debtor or his representatives to do so.[2] And as the debtor has no concern with the policy, payment of the sum assured does not discharge the debt in respect of which the policy was effected, and the creditor is entitled both to receive the proceeds of the policy and to claim payment of the debt from the estate of the debtor.[3] Thus, in *Stevenson* v. *Cotton*, A. undertook to manage the affairs of B., and as these affairs were involved, made certain advances on his behalf. To secure these, he effected a policy for £300 on the life of B. for the next seven years; the sum of £300 being considerably in excess of any actual debt due by B. to him. On this policy A. paid the premiums, and B. was in ignorance of its existence. On the policy becoming payable by the death of B., his representatives brought an action against A., concluding for payment to them of the surplus proceeds after satisfying A.'s claims against B.'s estate. It was held that this was an ordinary case of a creditor insuring his debtor's life, and that, as there was no ground for holding that B. had ever had any interest in the policy, or that the premiums had been paid out of his funds, his representatives had no right to the proceeds. The fact that A. had not an insurable interest in the life of B. to the extent of £300 was held to be an objection which it was only for the company, and not for the pursuers, to raise.[4]

Where debtor liable for premiums policy belongs to him.

Although, as a general rule, a policy effected by a creditor on the life of his debtor belongs to himself, yet the circumstances of the case may be such as to show that the real interest is in

[1] *Stevenson* v. *Cotton*, 1846, 8 D. 872; *Bruce* v. *Garden*, 1869, L. R. 5 Ch. 32.

[2] *Stevenson* v. *Cotton*, *supra*.

[3] Per Lord Medwyn in *Stevenson*, *supra*, at p. 884; *Marquess of Northampton* v. *Salt* [1892], A. C. 1.

[4] *Stevenson* v. *Cotton*, 1846, 8 D. 872.

the debtor. In such cases the Court will look beyond the formal terms of the documents, and consider whether the original import of the contract was that the policies were to be the property of the creditor, or whether they were intended to be attached to the transaction merely as a security, and therefore, on payment of the debt, to belong to the debtor.[1] But it has been laid down in England that, in order to give a debtor a right to a policy effected on his life by his creditor, "there must be distinct evidence of a contract that the creditor has agreed to effect a policy and that the debtor has agreed to pay the premiums, and in that case the policy will be held on trust for the debtor."[2] In *Bruce* v. *Garden*, an army agent insured the life of an officer to whom he was in course of making advances. The officer was aware of the existence of the policy, and the premiums were charged against him in the agent's books, but there was no evidence that he had ever agreed to pay them, or that he was aware that he was charged with them. On his death, it was held that the policy belonged to the agent, as there was no evidence that the officer had agreed to pay the premiums, or could have been compelled to meet them.[3] On the other hand, in *Lindsay* v. *Barmcotte*, two brothers, A. and B., borrowed £500 on their joint obligation from an insurance company. The loan was applied in starting A. in business. In security of the loan, B. effected a policy for £1000 on the life of A., and assigned it to the company. The interest and part of the principal of the loan, and the premiums on the policy, were paid by B., but with money remitted to him by A. On the death of A., it was held that the real interest in the policy was in him, and that the proceeds, after satisfying the balance of the loan due to the company, formed part of his estate.[4]

Borrowing upon annuity. To whom policies belong.

A similar question as to the ownership of policies of assurance was raised in loans under the system of borrowing upon annuity, devised to evade the usury laws. This system was most frequently employed, and was most applicable, in cases where money was advanced to a borrower who was in possession of a liferent interest. The borrower then sold an annuity to the lender at a certain price, reserving a power of redemption at the same amount. Policies of assurance to the amount of the price were

[1] See opinion of Lord President (M'Neill) in *Shand* v. *Blaikie*, 1859, 21 D. 878, at p. 883.

[2] Per Hatherley, Lord Chancellor, in *Bruce* v. *Garden*, *infra*.

[3] *Bruce* v. *Garden*, 1869, L. R. 5 Ch. 32.

[4] *Lindsay* v. *Barmcotte*, 1851, 13 D. 718; see also *Forrester* v. *Robson's Trs.*, 1875, 2 R. 755.

effected on the life of the borrower (or, if such policies existed, they were assigned to the lender), and the borrower's life interest was assigned in security of the payment of the annuity. The amount of the annuity was calculated to cover, in addition to the interest, at the specified rate, on the sum paid as a price, the premiums on the policies of insurance. The marked feature of this system of security was that the lender was not a creditor of the borrower for the principal sum advanced. The borrower was bound to pay the annuity, but, although he had an option to redeem it, he was under no obligation to do so. In such transactions the English Courts have had regard to the form of the contract as a sale with an option to repurchase, and have accordingly held that the policies of insurance are the property of the lender, if they are effected by him, and if he is under no obligation to keep them up.[1] In Scotland these transactions have been regarded as securities; and it has been held to be an implied condition of the contract that, on the redemption of the annuity, the policies of insurance should be assigned to the borrower, and that, on the death of the borrower without redeeming, the lender should be bound to account for any surplus of the policy after his advances have been repaid.[2] In one case, where existing policies to the amount of the purchase price of the annuity were assigned, with an express condition that on redemption the lender should be bound to restore all policies held by him at that date, it was held that, on the death of the borrower without having redeemed the annuity, the lender was bound to account for a bonus which had accrued on the policy in so far as the sum thus received under the policy exceeded the amount he had advanced in purchasing the annuity.[3] And a similar decision was pronounced in another case, in spite of the facts that the policy was effected by the lender, that there was no express obligation to assign it if the annuity should be redeemed, and that, in consequence, it was entirely in the option of the lender to keep up the policy or allow it to drop.[4] There would appear to be no marked distinction between the facts in this latter case and those in the English cases noted above, in which it was held that

[1] *Gottlieb* v. *Cranch*, 1853, 4 De G., M. & G. 440; *Knox* v. *Turner*, 1870, L. R. 5 Ch. 515; *Lewis* v. *King*, 1875, 44 L. J. Ch. 259; *Preston* v. *Neale*, 1879, 12 Ch. D. 760.

[2] *Marquess of Queensberry* v. *Scottish Union Insur. Co.*, 1839, 1 D. 1203; affd. 1842, 1 Bell's App. 183; *Adam* v. *Aberdeen Assur. Co.*, 1848, 10 D. 722; *Shand* v. *Blaikie*, 1859, 21 D. 878.

[3] *Marquess of Queensberry*, *supra*.

[4] *Shand* v. *Blaikie*, *supra*.

the policies belonged to the lender. The principle would appear to be, that if the transaction is regarded as a sale with a power of repurchase, the exact terms of the contract will be given effect to: if it is regarded as a security, it will be held that all the accessories are held in security, and subject to the reversionary right of the borrower on payment of the loan.

Where policy assigned in security, a right of redemption is implied.

Where a policy of insurance is expressly assigned in security, or where a new policy is effected by a debtor on his own life, and assigned to the creditor, the usual intention of the parties is that the policy shall remain the property of the debtor. As a rule, therefore, it is expressly stipulated that the policy or policies shall be reassigned on payment of the debt. Such a provision is, however, implied from the very nature of the contract.[1] And in a contract which is in its nature a security, and not a sale, an agreement that the subjects conveyed shall be restored on the debt being paid within a certain time, is construed as implying a further right in the debtor to a reconveyance on the debt being paid after the prescribed period has expired, and therefore a right in his representatives to claim the surplus of the proceeds of the policy after the debt is satisfied.[2]

Agreements that policy shall belong to lender on a certain event.—Post-obit bonds.

Cases are not infrequent where the contract of the parties is that the policies, though originally the property of the debtor, and conveyed by him in security to the creditor, shall become the absolute property of the creditor on the occurrence of a certain event. Thus in loans upon a reversionary interest, in which the life of the borrower is insured as against that of the party on whose death the succession opens, it may often be the intention of both parties that, on the predecease of the borrower, the proceeds of the policy shall belong to the lender. This may be stipulated in order to counterbalance the risk of loss should the opening of the succession be long delayed, and the borrower prove unable, in the meantime, to pay the interest on the debt or the premiums on the policies. This is an arrangement, however, which will not be given effect to, even if expressly stipulated, in cases where it appears that the policies were originally the property of the debtor, and were by him assigned to the creditor as a security. An agreement that, on a certain event, a right in security shall become a right of property, is one which cannot be given effect to without a declarator of irritancy of the right of the granter. This principle is expressed in England by the phrase "once a mortgage, always a mortgage," and was given effect to in a case where

[1] *Shand* v. *Blaikie*, *supra*.

[2] *Marquess of Queensberry* v. *Scottish Union Insur. Co.*, *supra*.

the circumstances were remarkably favourable to the creditor.[1] Lord Compton, who was entitled to succeed to an entailed estate on the death of his father, borrowed £10,000 from a London insurance company. In security of this loan he granted a bond and disposition in security over the entailed estate. To complete the security, it was arranged that the company should insure the life of the borrower as against that of his father, for the sum of £34,500, in any office which they might select, that the interest and premiums of the policy should be allowed to accumulate at compound interest for five years, and that after that period the company should be entitled to demand repayment of the debt, or to continue to pay the premiums, and to accumulate them, with the interest, as a charge against the borrower. The form of the contract thus made Lord Compton liable for the premiums. It was expressly agreed that if the borrower should predecease his father without having repaid the loan, the policy should belong absolutely to the lenders. The company effected the policy in their own office, and Lord Compton predeceased his father without having paid anything under the loan. In these circumstances, it was held that the company were bound to account to his representatives for the amount of the policy, under deduction of their claim for the loan of £10,000, the interest which had accrued thereon, and the premiums on the policy of insurance. This was held on the ground that the liability of the borrower for the premiums proved that the policy was originally his, and assigned by him to the company, and that the agreement whereby, on his predecease, it should belong absolutely to the company, was an attempt to fetter the right of redemption, which equity would refuse to enforce. The case had an appearance of hardship, as the result was that the insurance company, besides advancing £10,000, were found liable in a large amount for which they had received no consideration; but this arose entirely from the fact that the policy was effected in their own office, and was thus to be regarded merely as one of a large number of insurance transactions, upon the balance of which a profit might be expected even although an individual case resulted in a loss.

Conventional irritancies in rights in security are not enforceable.

The principle of this case is recognised in the law of Scotland. "The rule is quite fixed, that if a transaction is only a security it cannot be converted into a right of property without a declarator of the extinction of the former proprietor's right."[2] This principle was perhaps most strongly exemplified in the interpretation of

[1] *Marquess of Northampton* v. *Salt* [1892], A. C. 1.

[2] Per Lord Pres. Inglis in *Smith* v. *Smith*, 1879, 6 R. 794, at p. 800.

the Act 1672, c. 19, by which it was enacted that lands adjudged "shall remain heritably and irredeemably with the creditor in case they be not redeemed within the space of five years after the decree of adjudication." In spite of the words of the Act, it was held that the lands remained redeemable until a declarator of expiry of the legal was obtained.[1] Similarly, it has been held that where a subject has been conveyed in security, an agreement declaring that on failure of payment within a certain period the right of the creditor shall become absolute, is one which will not be enforced according to its terms. Although in other contracts, such as partnership[2] or lease,[3] conventional irritancies have been enforced strictly, yet, in contracts constituting a pledge or other right in security, their only effect is to give the creditor the means of securing a right of property by obtaining a decree of declarator of irritancy of the right of the debtor. Without such a declarator, nothing, short of the negative prescription of forty years,[4] will preclude the right of the debtor to redeem the subjects of the security by payment of the debt.[5] The same rule applies even though the security is in form an absolute conveyance, with an obligation to reconvey, provided that the Court comes to the conclusion that the contract, *ab initio*, was a security, and not an absolute sale.[6]

Post-obit bonds.

It is not easy to suggest a method by which the difficulty caused by this rule of law could be overcome, so as to admit of a post-obit bond under which the policies of insurance should belong to the lender on the death of the borrower without succeeding to the estate. It is true that in a contract of sale, with an option to the seller to repurchase, the question of irritancy does not arise, because the right of the seller is from the first an absolute right of property, and such contracts therefore have been construed according to their terms, so that, if the power of repurchase is limited to a certain period, the expiration of that period terminates the power.[7] But the cases decided on the system

[1] *Campbell* v. *Scotland*, 1794, M. 321, 1 Ross's L. C. 155; *Stewart* v. *Lindsay*, 1811, 1 Ross's L. C. 164.

[2] *Hannan* v. *Henderson*, 1879, 7 R. 380.

[3] *Stewart* v. *Watson*, 1864, 2 Macp. 1414; *Lyon* v. *Irvine*, 1874, 1 R. 512.

[4] *Pollock* v. *Storie*, 1738, M. 7216.

[5] Stair, i. 13. 14; *Cleghorn* v. *Ferguson*, 1636, M. 7204; *Earl of Tullibardine* v. *Murray*, 1667, M. 7206; *Thomson* v. *Threshie*, 1844, 6 D. 1106; *Adam* v. *Aberdeen Assur. Co.*, 1848, 10 D. 722, per Lord Fullerton, p. 731; *Smith* v. *Smith*, 1879, 6 R. 794.

[6] *Cleghorn* v. *Ferguson*, and *Smith* v. *Smith*, *supra*.

[7] *Beatson* v. *Harrower*, 1679, M. 7208; *Boyd* v. *Steel*, 1771 M. 7221; *Latta* v. *Park & Co.*, 1865, 3 Macp. 508; *Martin* v. *Duncanson*, 1875, 13 S. L. R. 86.

of borrowing on annuity show that in such questions a contract which is nominally a sale will be treated as a security if it appears that that is its real import, and that, in considering what the real import of the contract is, the transaction will be looked at as a whole.[1] If, therefore, the lender on a post-obit bond were to adopt the form of a purchase of the reversion, with a power to the borrower to repurchase, in order to secure a right to the policies of insurance, it would seem probable that the transaction would be regarded as in reality a security, except in the very special case where the amount advanced could be regarded as an adequate price for the present value of the reversion. Even if this difficulty were surmounted, it would appear that any arrangement, in the form of a sale, by which the policies of insurance would belong to the lender on the death of the borrower, would necessarily imply that if the borrower should come into possession of the reversion but die without exercising the power of repurchase, the estate would belong absolutely to the lender, and the representatives of the borrower would have no power to redeem it. This follows from the consideration that, if the whole contract is to be looked upon as one transaction, the right of the lender over the policies of insurance must be the same as his right over the estate, and therefore, if the death of the borrower without repurchase gives an absolute right to the policies, it will also give an absolute right to the estate. Such a result is certainly not usually contemplated by borrowers on post-obit bonds, and it would therefore seem that the form of a sale is inapplicable to such transactions. Should a lender on a post-obit bond effect a policy on the life of the borrower as a transaction entirely separate from the loan, and without imposing on the borrower, directly or indirectly, any liability for the premiums, it is possible that it might be held that the policy was the absolute property of the lender, but the case of *Shand* v. *Blaikie*[2] suggests doubts as to this result.

[1] *Supra*, p. 538; and see Stair, i. 13. 14.

[2] 1859, 21 D. 878; narrated *supra*, p. 539.

CHAPTER XVII

RIGHTS IN SECURITY IN NEGOTIABLE INSTRUMENTS

Characteristics of negotiable instruments.
Negotiability by Statute.
Negotiability by usage.
Quasi-negotiability by personal bar.
Bills and notes.
Cheques.
Bank notes.
I. O. U.'s.
Deposit receipts.
Debentures.
Coupons.
Stock certificates to bearer.
Exchequer bills, etc.
Dividend warrants.
Post Office orders.
Letters of credit.
Foreign Government bonds, etc.
Scrip.
Share warrants.
Pledge of negotiable instruments by agent in fraud of owner.
Rights of creditor in possession.

Advantages of negotiability.

THE inconveniences incident to the transfer of incorporeal moveable rights by assignation, render that method of transfer inadequate to meet fully the requirements of commerce. These inconveniences lie not only in the somewhat burdensome nature of the necessary forms of assignation and intimation, but also in the disadvantages to which the assignee is subject after his right is completed; for the assignee obtains no better title than his cedent had. Accordingly, the necessities of commerce have led to the gradual recognition, by the usage of merchants and by the law of the land, of certain instruments of contract, which are transferable by mere delivery of the instrument, or by indorsement followed by delivery,[1] and which may be enforced by the transferee, without previous notice to the debtor, and without the risk of being met by defences and equities pleadable against the transferor. Documents of this kind are negotiable instruments.[2] Since mere delivery[3] of a negotiable

[1] See *infra*, note 3.

[2] For an interesting paper on the early history of negotiable instruments by Professor Jenks, see *Law Quarterly Review*, No. 37, Jan. 1893.

[3] Many negotiable instruments, *e.g.* bills payable to order, are transferred by the indorsement of the holder followed by delivery. The instrument itself thus becomes an authentic record of the successive transfers; and its value to the holder is increased by its being, as it were, guaranteed by a series of responsible sureties. Instruments for whose transfer indorsement is required as

instrument to a *bonâ fide* transferee for value is sufficient to pass the absolute benefit of the contract represented by the instrument, such documents form an effectual and ready means of furnishing a creditor with a right in security. This mode of giving and taking security is, indeed, advantageous to both parties—to the lender, for he thus receives security for his debt without trouble, risk, or expense; to the borrower, for the facility in giving security may draw after it facility in receiving credit.

Distinguishing privileges of negotiable instruments: (1) Transferable by delivery.

A chief characteristic of negotiable instruments is that they are transferable by delivery, *i.e.* the legal title to the property secured by such an instrument passes from one man to another by the delivery of the instrument.[1] In the ordinary case of a non-negotiable instrument, the document is merely evidence of the debt, and the legal title to the debt is quite separable from, and independent of, the document. Accordingly, in such a case, it is not necessary, in order to transfer the debt, that the document should be delivered to the assignee; for an assignation, completed by intimation, is effectual to carry the debt, whatever may become of the voucher. So the debt itself may be attached by arrestment, in whose hands soever the bond or instrument proving the debt may happen to be.[2] In negotiable instruments, on the other hand, the right secured thereby is recognised by law as necessarily going with the instrument by which it is evidenced. The obligation, in short, is incorporated with, and embodied in, the voucher.[3] The right is thus so far assimilated to a corporeal moveable, of which the transference is completed by delivery; and, like a corporeal moveable, a right embodied in a negotiable instrument may be competently and effectually pledged.[4] The possessor of the instrument is presumed to be the true owner; and the benefit of the contract being attached to the ownership of the document, the transferee by delivery of the document, who takes in good faith and for value, has a title to enforce payment of the debt from the party liable, though the latter knows nothing of him or his holding.

(2) The holder's title is independent of his predecessor's title, and free from exceptions good against the transferor.

The assignee of an ordinary incorporeal moveable right obtains no better right than his cedent had. He must prove his pre-

well as delivery are commonly described as negotiable; but instruments, in which the contracts or engagements therein contained can be transferred by simple delivery of the instrument,—such as bills or notes payable to bearer, or indorsed in blank,—are negotiable in a fuller sense of the word; and it is with documents of this latter class that we are mainly concerned in this chapter.

[1] See *supra*, p. 544, note 3.

[2] Bell, *Com.* ii. 24.

[3] Bell, *Prin.* s. 1460.

[4] Bell, *Com.* ii 23; *vide infra*, p. 594 *et seq.*

decessor's title, and the debtor is entitled to plead against him any defence which he could have urged against the cedent. The holder of a negotiable instrument, on the other hand, provided he has honestly acquired it, is not prejudiced by defects in the title of his predecessor, nor does he hold subject to such defences as would be good against the transferor.

As regards defects in a predecessor's title, the general rule of law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained. To this general rule there is an exception in the case of negotiable instruments. Any person in possession of such an instrument may convey a good title to it, even when he himself has no title, and is acting in fraud of the true owner; for if he passes it over to one who receives for value, in good faith and without knowledge of the want of title in the transferor, a good title is made by such transfer to the new holder.[1] It is, in short, a distinctive mark of instruments which are negotiable in the full sense, that the property in them can be passed irrespective of the act of the true owner.

As regards liability to defences and exceptions good against the transferor, the *bonâ fide* onerous holder of a negotiable instrument is absolutely entitled to implement of the exact terms of the obligation by the party liable in the instrument, according to its precise tenor. He need make no inquiry into the relations subsisting between the party issuing the instrument of contract and preceding holders of the instrument, as to whether, for example, the former has any counter-claim against the latter; nor has he any concern with the original contract, out of which the instrument arose; for he takes the instrument free from exceptions pleadable against any of his predecessors in title, and can claim payment of the whole amount secured on the face of the document. Thus, to take a strong instance, where the contract originates in a man putting his name to a piece of stamped paper, which, after he has lost or parted with it, is, without his authority, filled up as a bill; the signatory is responsible, in respect of what is thus filled up, to any *bonâ fide* onerous holder

[1] *Vide* per Lord Herschell in *London Joint Stock Bank* v. *Simmons* [1892], App. Ca. 201, at p. 217. So, by 24 & 25 Vic. c. 96, s. 100, negotiable securities are excepted from the general rule as to the restoration of stolen property on the conviction of the thief.

of the bill.[1] The doctrine, that the issuer of a negotiable instrument cannot refuse to a *bonâ fide* holder for value fulfilment of the obligation therein contained, and cannot set up any claim of retention or other exception which might interfere with the exact performance of the obligation according to the terms of the instrument, has been said to be based on the principle of personal bar, or, as it is called in England, estoppel.[2] Upon the same principle, the successive owners of the instrument are also estopped or barred, by their knowledge of the usage prevalent with respect to it in the market, and the purport of the document itself,—it being, *ex hypothesi*, available to bearer,—from preventing it from receiving effect in the hands of a *bonâ fide* holder for value, even though they have been fraudulently dispossessed.[3]

(3) In England capable of being sued on by the holder in his own name.

In England it is, further, a distinguishing characteristic of a negotiable instrument, that it is capable of being sued on by the holder in his own name. When a chose in action is assigned, the action must be brought by the assignee, not in his own name, but in the name of the original contractee, equity compelling the contractee, if he has assigned the contract, to allow his name to be used for this purpose on an indemnity against costs.[4] In England, in other words, it is only when an instrument is clothed with the attribute of negotiability that the right of action passes by delivery of the instrument. Accordingly, in English law the question whether the transferee of an instrument has a right to sue on it in his own name is highly important in determining whether the instrument is negotiable; for if, by a transfer of the document, nothing pass but a right to sue on it in the name of of the transferor or original party to it, the document is not, properly speaking, negotiable.[5] In Scotland, on the other hand,

[1] See opinions of Byles, J., and Cockburn, C.J., in *Swan* v. *N. B. Australasia Co.*, 1863, 32 L. J. Ex. 273.

[2] This is the view expressed by Byles, J., the greatest authority on this subject, in *Swan, ut supra.* Upon whatever principle the doctrine may be based,—and it is really contrary to ordinary legal principles,—it is recognised simply for the reason that any other doctrine would involve endless inconvenience in trade.

[3] *Goodwin* v. *Robarts*, 1875, L. R. 10 Ex. 337; see per Cockburn, C.J., at 353. Speaking of these estoppels, Byles, J., observed: "Great as is the injustice which such estoppels may inflict, the argument of inconvenience is so strong, that it is necessary that they should exist"—per Byles, J., in *Swan* v. *N. B. Australasia Co.*, 1863, 32 L. J. Ex. 273, at 278.

[4] See, *e.g.*, per Blackburn, J., in *Crouch* v. *Crédit Foncier of England*, 1873, L. R. 8 Q. B. 374, at p. 380.

[5] See notes on *Miller* v. *Race*, 1758, 1 Burr. 452; 1 Smith's Lead. Cas. 10th ed., 447, at 456. Even in England there are cases where the transferee of a document has a right to

the assignee of any right, or bond, or document of debt, whether negotiable or not, may have a title to sue in his own name. In Scotland, accordingly, the fact that the transferee of a document of debt can sue in his own name, is not in any way a distinguishing characteristic of negotiable instruments. It forms, in short, no criterion between documents which are negotiable, and documents which are merely assignable.

Documents which, as lacking one of the two former attributes, fall short of full negotiability, *e.g.* bills of lading, dock warrants, etc.

Putting aside the last-mentioned feature, as not being in Scotland peculiar to negotiable instruments, there remain the two previously mentioned features, which constitute with us the distinguishing marks of fully negotiable instruments. Both requisites must concur—the instrument must, by the usage and custom of merchants, pass from one man to another by delivery, and the holder of it for the time being, if he is a *bonâ fide* holder for value, must be recognised by law as having a good title, notwithstanding any defect in title in the person from whom he took it.[1] If either of these requisites is wanting, the document is not, properly speaking, a negotiable instrument. A contractual document may be such, for example, that, by virtue of its delivery, all the rights of the transferor are transferred to, and can be enforced by, the transferee against the original contracting party; but it may yet fall short of being completely negotiable, because the transferee acquires by the delivery no better title than his transferor had. Owing to their lack of this latter attribute, many documents which, by usage and Statute law, have acquired some of the incidents of negotiability, and which are sometimes called negotiable, fall short of full negotiability. Thus a bill of lading, indorsed to a holder for value, transfers to the assignee not only the property in the goods, but all rights of action and all liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself.[2] In one respect the holder has even a better title than the consignee possessed, for he is relieved from liability to the vendor's right of stoppage *in transitu*, which might have been

sue in his own name, and yet the document is not fully negotiable. Thus the holder of an overdue bill or note may confer on the transferee the right to sue on it in his own name, but he conveys no better title than he had himself. *Vide, infra*, p. 572. The passing of the property by delivery of the instrument, and the right of the transferee to sue in his own name, though "very much connected, are not identical," per Blackburn, J., in *Crouch* v. *Crédit Foncier of England*, 1873, L. R. 8 Q. B. 374, at p. 381.

[1] Cf. definition by Bowen, L.J., in *Simmons* v. *London Joint Stock Bank* [1891], 1 Ch. 270, at 294.

[2] 18 & 19 Vict. c. 111, ss. 1 and 2.

exercised against the original consignee.[1] Nevertheless, a bill of lading is not, properly speaking, a negotiable instrument,[2] for the transferee, though relieved from one of the liabilities of the transferor, does not acquire proprietary rights independently of the transferor's title. Thus a bill of lading stolen gives no rights even to a *bonâ fide* indorsee. Its transfer gives no better title than was possessed by the transferor, and the contractual rights conferred by Statute are expressly conferred subject to equities.[3] Similarly, though, by the Factors Acts, other documents of title, such as dock warrants, warehouse-keepers' certificates, and warrants or orders for the delivery of goods, are given some of the incidents of negotiability, they do not possess all.[4] In short, it does not follow that an instrument is negotiable, because it is transferable by delivery. All negotiable instruments are transferable by delivery; but all instruments, which are transferable by delivery, are not necessarily negotiable.

Negotiability may depend on the state of the instrument—illustrations.

The negotiability of an instrument and the manner in which the property in it can be effectually transferred frequently depend upon the state of the instrument. Instruments which in one state are negotiable may, by an alteration of this state, cease to be so. Thus, for example, in the case of bills, notes, or cheques, if the instrument is payable to bearer, or is indorsed in blank, the property in it can be transferred by simple delivery, *i.e.* the instrument is negotiable in the fullest sense of the term. On the other hand, if the instrument be drawn to order or indorsed to a named indorsee, the property in it can pass only by indorsement together with delivery; and delivery, without indorsement, is not effectual to pass the property, *i.e.* the instrument is not negotiable by simple delivery. For example, where a cheque, drawn to the order of a payee, was delivered for value to A., but not indorsed by the payee, it was held, on it being shown that the payee had obtained the cheque through fraud, and that A. had notice of the fraud before he had actually got the indorsement of the payee, that the instrument was not in such a state, when A. received it without notice of the fraud, as to be a negotiable instrument; and, the instrument not being negotiable, A. could have no better

[1] *Lickbarrow* v. *Mason*, 1787, 2 T. R. 63; 1 Smith's Lead. Cas., 10th ed., 674.

[2] *Gurney* v. *Behrend*, 1854, 3 El. & Bl. 622.

[3] See Factors Acts, 52 & 53 Vict. c. 45; 53 & 54 Vict. c. 40. See also Sale of Goods Act, 1893, s. 25.

[4] Cf. *M'Ewan & Co.* v. *Smith*, 1849, 6 Bell's App. Cas. 340.

title than the transferor had—in other words, he had no title at all.[1] Finally, a bill, note, or cheque may be in such a state as to render it not negotiable in any sense. Thus a bill may be rendered not negotiable by a special or restrictive indorsement; or a cheque, by crossing, with the words "not negotiable"; or an instrument executed in blank, by filling in a particular name. The modes of putting an end to the negotiable character of various instruments are considered when dealing in detail with the various classes of negotiable instruments.[2]

Modes in which instruments acquire negotiability.

Instruments acquire the privilege of negotiability either (1) by express statutory provision, or (2) by the custom of merchants, recognised by the Courts. Also (3) there are cases where documents, which are not strictly negotiable, nevertheless come in certain circumstances to have practically the effect of negotiable instruments, through the operation of the principle of estoppel or personal bar.

Negotiability by Statute.

The negotiability of bills of exchange, long recognised by the law merchant, is now regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). This Statute also regulates promissory notes, whose negotiability had, however, previously received statutory recognition by 12 Geo. III. c. 72. The negotiability of cheques and dividend warrants is also recognised by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). East India bonds are made negotiable by 51 Geo. III. c. 4.

Negotiability by custom, recognised by the Courts.

Certain instruments of contract, known to the law merchant, have the quality of negotiability attached to them by the custom of merchants, recognised by the Courts. In determining whether an instrument is negotiable under this head, the elements to be looked at are (1) the nature and tenor of the instrument, and (2) the custom of merchants in regard to it.

Elements to be regarded in the latter case: (1) Nature of the instrument.

The character and tenor of the instrument itself are necessarily of the first importance. The instrument must be of such a nature, and in such a state, as to represent that the property in it, and all rights under it, will pass by delivery of the instrument; and, further, it must contain nothing inconsistent with the right of any *bonâ fide* holder to claim exact fulfilment of its terms from the party by whom it was issued. No special form of words is necessary to impart negotiability. The instrument may be, and frequently is, executed in blank, or it may express that it is payable to bearer; but these are not the only forms or words which are consistent with the quality of nego-

[1] *Whistler* v. *Forster*, 1863, 14 C. B. (N. S.) 248.

[2] Cp. *e.g. infra*, p. 571 *et seq.*

tiability.[1] Whatever be the form of words, it is necessary, in order that a document be negotiable, that it distinctly oblige the issuers to pay to anyone who presents it. The mere fact that there is in the document a clause, which absolves the issuers from subsequent liability if they do, in point of fact, pay to a person who presents the instrument, does not suffice to make the instrument payable to bearer.[2] If the wording of the instrument is such as to exclude the idea that the title passes by delivery, or if it contains anything inconsistent with the character of negotiability, no usage of trade can render it negotiable.[3] "If the right of suing on an instrument should not appear upon the face of it to be extended beyond one particular individual, no usage of trade, however extensive, would be allowed by the Courts (at least in the case of an English instrument) to confer upon it the character and incidents of negotiability."[4] Thus postal orders are not negotiable in form, being payable to the signed receipt of a named payee; and a regulation that they may be paid through bankers, though the receipt is not signed, does not make them of the nature of documents payable to bearer, so as to admit them within the category of negotiable instruments.[5] So while such documents as scrip certificates[6] and Exchequer bills[7] are negotiable while the blanks are not filled up, yet when a name is inserted in a scrip certificate or Exchequer bill, it ceases to pass by mere delivery, and so ceases to be negotiable.

Again, the tenor of the document must be such that the mere delivery of the instrument, without any further act, passes a com-

[1] In determining the nature of a document, the intention of the parties is always an important element—see per Esher, M. R., in *Mortgage Insur. Corpor.* v. *Com. of Inland Revenue*, 1888, L. R. 21 Q. B. D. 352, at 355.

[2] *In re Natal Invest. Co.*, 1868, L. R. 3 Ch. App. 355. The form of instrument in this case is also useful in showing the possible effect of preceding words in neutralising the force of a clause making the instrument payable "to the holder for the time being."

[3] Cf. *Partridge* v. *Bank of England*, 1846, 9 Q. B. 396, where the dividend warrant was payable to a named person only. Formerly, in England, even bills and notes, payable to a particular person, were non-negotiable, but this was altered by Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, s. 8 (1) (4)). In Scotland a bill or note payable to a particular person was always negotiable. See the observations of Blackburn, J., in *Crouch* v. *Crédit Foncier of England*, 1873, L. R. 8 Q. B. 374.

[4] See notes on *Miller* v. *Race*, 1758, 1 Smith's Lead. Cas., 10th ed., p. 447.

[5] *Fine Art Society* v. *Union Bank of London*, 1886, L. R. 17 Q. B. D. 705.

[6] *Rumball* v. *Metropolitan Bank*, 1877, L. R. 2 Q. B. D. 194; *Goodwin* v. *Robarts*, 1875, L. R. 10 Ex. 337; and 1876, L. R. 1 A. C. 476.

[7] *Wookey* v. *Pole*, 1820, 4 Barn. & Ald. 1; *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787.

plete title to the property. If the terms of the document show that the delivery of the document is not intended by itself to invest the transferee with the full legal title to the property, but that some further act, such as registration, is required to perfect the transferee's right, the document, though proved to pass by delivery, will not be a negotiable instrument in the contemplation of law. Thus where, by the terms of certain share certificates in an American railway, it appeared that the property represented by the certificates was intended to pass by transfer in the books of the company, and not by mere delivery of the certificates, it was held that the certificates were not negotiable instruments, although it was proved that, in the state in which they then were, the usage of English bankers and dealers in public securities was to transfer them by mere delivery, and to deal with them like bonds payable to bearer.[1] This explains the failure of the numerous attempts to induce the Courts to hold that transfers of shares executed by the transferor in blank as regards the transferee, and accompanied by the transferor's share certificates, are negotiable. The Courts have invariably taken the view that, as share certificates with blank transfers contain no representation that they will pass from hand to hand by delivery only, and show no intention on the part of the party issuing them to give a complete title to anyone into whose hands they may come, but, on the contrary, contemplate a complete transfer only by registration of the transferee in the books of the company, these documents are not negotiable.[2] Evidence of a certain usage among merchants to treat such documents as negotiable,[3] or an admission that they are negotiable abroad,[4] is of no avail; the fact that, by the terms of the documents themselves, the delivery does not invest the transferee with the full legal title to the shares, without some further act, prevents them from being negotiable in this country.[5]

(2) General usage of merchants in this country in regard to it.

The second element to be considered is the usage of merchants in regard to the instrument; for, though an instrument may contain nothing on the face of it inconsistent with its being negotiable, it will not possess the quality of negotiability unless it is shown to

[1] *London and County Banking Co. Lim.* v. *London and River Plate Bank Lim.* 1887, L. R. 20 Q. B. D. 232.

[2] *France* v. *Clark*, 1881, 26 Ch. Div. 257; *Colonial Bank* v. *Cady and Williams*, 1890, L. R. 15 App. Ca. 267.

[3] *Colonial Bank* v. *Hepworth*, 1887, L. R. 36 Ch. Div. 36.

[4] *Williams* v. *Colonial Bank*, 1888, 38 Ch. Div. 388; 1890, 15 App. Cas. 267.

[5] As to the effect of the deposit of a blank transfer with share certificates, *vide supra*, p. 512 *et seq.*

be accustomably transferable among merchants in Britain in the same manner as cash. Whether it does or does not pass from hand to hand by the usage of trade is a question of fact. Thus where the question arose whether certain documents called *bordereaux* and *coupons*, purporting to entitle the bearer to portions of the Neapolitan public debt, were negotiable instruments, the question whether they usually passed from hand to hand in this country, like money, was held to have been properly submitted to a jury: and the finding of the jury, that they were not thus usually transferable here, was held conclusive to show that they were not negotiable instruments.[1] Even though the document, in addition to containing nothing inconsistent with negotiability, is shown to be negotiable by the law of a foreign country, this does not make it a negotiable instrument here, unless there is evidence that it is negotiable by the custom of merchants in this country.[2] The question whether a foreign document is negotiable depends, not on the usage with regard to it abroad, but on the usage with regard to it among merchants in this country. Thus in a leading case,[3] where a question arose whether certain Prussian bonds were negotiable, the English Courts, on evidence being given that the bonds passed from hand to hand among merchants in this country, held that the negotiable quality of the bonds was established. The evidence of usage in England was held to render evidence as to the law of Prussia on the subject unnecessary.[4]

Where a document has not previously been recognised by the Courts as negotiable,[5] the question whether it is accustomably transferable by delivery in Great Britain is simply one of fact, to be determined on the evidence of witnesses in this country whose business would make it likely that they should know the custom

[1] *Lang* v. *Smyth*, 1831, 7 Bing. 284. The ascertainment of facts by a jury is much more common in England than in Scotland.

[2] *Picker* v. *London and County Banking Co.*, 1887, 18 Q. B. D. 515 (bond issued by the Prussian Government); *Williams* v. *Colonial Bank*, 1888, 38 Ch. Div. 388.

[3] *Gorgier* v. *Mieville*, 3 B. & C. 45.

[4] See on this subject, *infra*, p. 591; cf. per Romer, J., in *Alcock* v. *Smith* [1892], 1 Ch. 238, at 255.

[5] Where a document has been recognised by the English Courts as negotiable, there is no doubt that it would be accepted as negotiable in Scotland, without the necessity of proving mercantile usage. "In a question of the merchant law, when any point of practice or any rule of trade is established by the law of England, especially in modern times, and where the reason of the rule is the same in both parts of the island, there is the very strongest presumption that the practice or rule will prevail in Scotland also, unless the contrary be clearly established," per Lord Gifford in *Brown* v. *M'Connell*, 1876, 3 R. 788.

of trade in regard to such documents.[1] Naturally it is not infrequently difficult to say when the usage is sufficiently established.[2] The custom, in order to be established, must be general and not local or prevalent only in a particular market or particular section of the commercial world.[3] The mere fact that certain documents are treated as negotiable in a certain class of the commercial community does not prove that they are documents which the commercial world in general treats as negotiable, or which are negotiable by the law merchant. For example, where the practice to treat dividend warrants as negotiable was applicable only to the warrants of a particular bank, it was not treated as a general mercantile usage.[4] But it is not necessary to show a custom in relation to instruments of a particular company, if it is shown that instruments of a like nature issued by other companies are negotiable.[5]

These two elements suffice in the case of foreign instruments.

When these two elements concur,—that is, when a document purports to be transferable by delivery, or, at least, contains nothing inconsistent with its being transferable by delivery, and when there is proof that, by the general usage of merchants, it is transferred by delivery only,—it is probable that the Courts would now recognise the document as a negotiable instrument. This would certainly be the case if the document was of foreign origin, as many of such documents are. *Gorgier* v. *Mieville*[6] and other more recent cases, such as *Goodwin* v. *Robarts*,[7] *Simmons* v. *London Joint Stock Bank*,[8] and *Bentinck* v. *London Joint Stock Bank*,[9]—all of them cases of foreign documents,—conclusively show that—at least in the case of documents of foreign origin—the nature of the documents and the usage of merchants are the only two elements to be looked to in determining whether negotiability is established.

Opinion per Blackburn, J., in *Crouch* v. *Crédit Foncier*, that these two elements are not enough in the case of instruments issued in this country.

The more difficult question remains, whether the concurrence to these two elements is sufficient to render a document issued

[1] The evidence of lawyers in such a case is not the proper evidence. See observations of Esher, M. R., in *Picker* v. *London and County Banking Co.*, 1887, L. R. 18 Q. B. D. 515, at p. 517.

[2] Cf. *ex parte Turquand*, 1885, 14 Q. B. D. 636, at 645.

[3] See observations by Bowen, L.J., in *Easten* v. *London Joint Stock Bank*, 1886, L. R. 34 C. D. 95, at p. 113.

[4] *Partridge* v. *Bank of England*, 1846, 9 Q. B. 396.

[5] *Venables* v. *Baring Bros. & Co.* [1892], 3 Ch. 527, 540.

[6] 1824, 3 B. &. C. 45—Prussian bonds.

[7] 1875, L. R. 10 Ex. 337, and 1876, 1 App. Ca. 476—scrip of loans to foreign Governments.

[8] [1892] App. Ca. 201—cedulas, *i.e.* foreign bonds with coupons attached, payable to bearer.

[9] [1893] 2 Ch. Div. 120—American railway mortgage bonds.

in this country negotiable? It has been laid down by high authority, that an English instrument, which contains nothing inconsistent with its negotiability, and which is proved to pass from hand to hand by delivery,[1] will, nevertheless, not be recognised by law as negotiable, unless the quality of negotiability be annexed to it by the ancient law merchant, as distinguished from a mere custom of trade.[2] In the case referred to, the plaintiff had purchased, for value and without notice, a debenture, issued by the defendants, an English company, from a person who had stolen it. The debentures, which were under the seal of the company, and countersigned by two directors and the secretary, promised, subject to certain conditions indorsed thereon, which deprived them of the character of a promissory note, to pay to the bearer £100, and also certain interest and bonuses; and it was admitted that they were accustomably transferable by delivery. Blackburn, J., in delivering the judgment of the Court, carefully distinguished the document, as being an English instrument made in England, from documents issued in a foreign country. He laid it down that it is beyond the competency of parties to a contract made in this country to confer on a document, by express words or stipulation, the incident of negotiability, and that, where an incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, it cannot be annexed by the tacit stipulation arising from usage. Such an incident as negotiability can be annexed only by the ancient law merchant, which forms part of the law, and of which the Courts take notice. Upon this principle, the Court held that the custom to treat the debentures as negotiable, being a recent custom and not the law merchant, did not avail to attach to them the quality of negotiability. Similarly, in *Dixon* v. *Bovill*,[3] a Scotch case, a question arose as to the negotiability of an iron warrant in this form: "I will deliver 1000 tons of iron when required, after 18th September next, to the party lodging this document with me." The Lord Chancellor (Cranworth), in giving his opinion that the instrument was not negotiable, observed in one place: "The effect of such a document, if valid, is to give a floating right of action to any person who may become possessed of it. Now, I am prepared to

[1] The proof of usage in *Crouch* v. *Crédit Foncier of England*, 1873, L. R. 8 Q. B., 374, was not satisfactory according to Blackburn, J., at p. 380; but the usage was admitted.

[2] *Crouch* v. *Crédit Foncier of England*, 1873, L. R. 8 Q. B. 374.

[3] 1856, 3 Macq. 1. See also *Thomson* v. *Dominy*, 1845, 14 M. & W. 403.

say that this cannot be tolerated by the law either of Scotland or England";[1] and, in another place: "I have no hesitation in saying that, independently of the law merchant and of positive Statute, within neither of which classes do these scrip notes range themselves, the law does not, either in Scotland or England, enable any man, by a written engagement, to give a floating right of action at the suit of anyone into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title."[2]

According, then, to the doctrines enunciated in these cases, an instrument issued in this country, and having its nature, incidents, and effects regulated by the law of this country, cannot be relied on as negotiable, unless its negotiability has either been expressly sanctioned by some Statute or has been recognised by a decision of the Courts. When once it has been judicially decided that an instrument is negotiable, no evidence of usage is admissible to show that the instrument is not negotiable, *i.e.* to show that the instrument does not possess the quality which the law ascribes to it.[3] The English instruments which have been recognised as negotiable by Statute or legal decision include the following:—bills of exchange; promissory notes; bank notes; Exchequer bills;[4] East India bonds;[5] dividend warrants;[6] share warrants issued under the Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27–36;[7] stock certificates to bearer under the National Debt Act (33 & 34 Vict. c. 71), s. 26, or the Local Authorities Loans (Scotland) Acts, 1891 and 1893, or the

[1] Per Cranworth, L.C., in *Bovill* v. *Dixon*, 1856, 3 Macq., 1 at p. 13.

[2] Per Cranworth, L.C., in *Bovill* v. *Dixon*, 1856, 3 Macq. 1, at p. 16. On its facts this case has not much relevancy, for the instrument was not payable to bearer, and embodied a *jus in re*, not a *jus in personam*. Also, it was not actually decided that the instrument was not good, and there was an absence of proof of general mercantile usage respecting the documents in question. The unwillingness on the part of the Courts, as shown by these earlier opinions and decisions, to recognise documents as negotiable, recalls the conflict between the English Courts and mercantile usage regarding the negotiability of promissory notes. For a long period the English Courts steadfastly refused to recognise promissory notes as negotiable, till the London merchants settled the difficulty by securing the intervention of the Legislature, 3 & 4 Anne, c. 9.

[3] This was long ago laid down very clearly by Lord Mansfield in *Edie* v. *East India Co.*, 1761, 2 Burrows, 1216, at 1222; and in *Grant* v. *Vaughan*, 1764, 3 Burrows, 1516.

[4] *Wookey* v. *Pole*, 1820, 4 B. & A. 1.

[5] 51 Geo. III. c. 64, s. 4.

[6] Bills of Exchange Act, 1882, s. 8, subs. 4; also s. 95.

[7] *Little* v. *London Joint Stock Bank*, reported along with *Simmons* v. *London Joint Stock Bank* [1891], 1 Ch. 270; [1892], A. C. 201.

Local Authorities Loans (England) Act, 1875, or under local Acts (*e.g.* the City of Edinburgh Annuity Bonds, the negotiability of which was sanctioned by the Edinburgh and Leith Agreement Act, 1 & 2 Vict. c. 55);[1] scrip certificates of an English company.[2]

The doctrine of Blackburn, J., in *Crouch* v. *Crédit Foncier*, has been questioned.

The authority of the doctrine laid down by Blackburn, J., in *Crouch* v. *Crédit Foncier*, and by Lord Cranworth in *Bovill* v. *Dixon*, as to what is necessary to make an instrument, issued in this country, negotiable, has undoubtedly been seriously shaken by the observations of judges in later cases, and by the tendency of recent decisions. Thus in *Goodwin* v. *Robarts*,[3] Cockburn, C.J., while thinking that the judgment in *Crouch* v. *Crédit Foncier* might be supported on the ground that in that case there was substantially no proof whatever of general usage,[4] observed: "We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called the ancient law merchant."[5] He further pointed out that the distinction between general usage, which is recent, and the law merchant—the distinction on which the judgment in *Crouch* v. *Crédit Foncier* was based—is founded on the mistaken view that the law merchant is fixed and stereotyped; whereas it is being constantly expanded and adapted to meet the requirements of commerce. The law merchant with reference to bills of exchange and other negotiable securities is itself of comparatively recent origin, and is neither more nor less than the usage of merchants, ratified by the Courts, which, upon such usage being proved before them, have adopted them as settled law, with a view to the interests of trade.[6] The course of business among merchants, in

[1] See *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12.

[2] *Rumball* v. *Metropolitan Bank*, 1877, L. R. 2 Q. B. D. 194.

[3] 1875, L. R. 10 Ex. 337; affd. 1876, L. R. 1 App. Ca. 476.

[4] The usage in *Crouch* was, however, admitted.

[5] Per Cockburn, C.J., in *Goodwin* v. *Robarts*, 1875, L. R. 10 Ex. 337, at p. 356. To some extent this statement was *obiter*, for the documents before the Court were of foreign origin. Lord Selborne, in the House of Lords, *Goodwin* v. *Robarts*, 1876, 1 A. C. 476, laid stress on this fact.

[6] See remarks of Cockburn, C.J., in *Goodwin* v. *Robarts*, 1875, L. R. 10 Ex. 337. Lord Blackburn, who delivered the judgment of the Court in *Crouch* v. *Crédit Foncier*, has himself pointed out, in his Treatise on *Sale*, that there is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land (Blackburn on *Sale*, 1st ed., p. 207). That being so, it follows that the distinction between recent mercantile usage and the law merchant, on which the Court proceeded in *Crouch* v. *Crédit Foncier*, 1873, L. R. 8 Q. B. 376, must necessarily be equally obscure and difficult of application.

the words of Bowen, L.J., walks in front of the law merchant, or goes a little in advance of it, and it is hard to draw a line of demarcation at the point where the one ends and the other begins. The whole tendency of recent decisions, accordingly, has been at variance with the principle of distinguishing, as was done in *Crouch* v. *Crédit Foncier*, between general mercantile usage, which happens to be recent, and the law merchant, and has been in accordance with the views expressed in *Goodwin* v. *Robarts*.[1] The opinions also expressed by eminent judges in recent cases,—for example, those of the Court of Appeal in *Picker* v. *London & County Banking Co.*,[2] and those of the House of Lords in *Simmons* v. *London Joint Stock Bank*,[3]—go to show that a general custom among merchants to treat documents as negotiable, would now be recognised by the law as rendering these documents, even though issued in England, negotiable instruments. The law, in short, is not now so jealous as it was in past times, of recognising the negotiability of instruments which the commercial world recognises as negotiable, simply because they are not in the classified category of negotiable instruments. The tendency on the part of the Courts is to follow and give effect to general mercantile usage, and, provided the tenor of the documents themselves is consistent with a complete title to them passing by delivery, to accept more readily as negotiable such documents as are proved to be transferable by delivery according to the general usage of merchants.

Minor characteristics of negotiable instruments: they embody rights *in personam*, not rights *in re*.

All documents which have been recognised as strictly within the category of negotiable instruments, possess this characteristic: they embody rights *in personam*, *i.e.* obligations prestable against a particular person; they do not confer rights *in re*, *i.e.* titles to specific things. This is pointed out by Sir Wm. Anson as one of the marks distinguishing properly negotiable instruments from documents like bills of lading.[4] At the same time, the right conveyed by a negotiable instrument

[1] *Rumball* v. *Metropolitan Bank*, 1877, L. R. 2 Q. B. D. 194 (scrip certificates of an English company); and *Baker* v. *Nottingham Banking Co.*, 1891, 60 L. J. Q. B. 592.

[2] 1887, L. R. 18 Q. B. D. 515.

[3] [1892], App. Ca. 201.

[4] Anson on *Contracts*, 7th ed., 240; see also *Bovill* v. *Dixon*, 1856, 3 Macq. 1, and *Connal & Co.* v. *Loder*, 1868, 6 Macp. 1095, where it was held that an iron warrant, blank indorsed, did not pass by simple indorsation, but only by indorsation and intimation. Documents conveying rights *in re* may be assignable free from equities, and become practically negotiable through the operation of the doctrine of personal bar. See *infra*, p. 566, and *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 1877, L. R. 5 Ch. D. 205.

is not necessarily a contract to pay money; it may be a contract to deliver other negotiable securities representing money. Thus in *Goodwin* v. *Robarts*,[1] where the documents whose negotiability was in question were scrip, promising to give the bearer, after all the instalments were paid, a bond for the amount paid, it was strongly urged that the scrip, being promises to give bonds and not promises to pay money, could not be negotiable; but the Court refused to give effect to the contention. A document, however, which contains a promise to pay money merely as part of a larger contract containing other stipulations, is not properly negotiable.[2]

—their payment must not be dependent on a condition.

Again, in a negotiable instrument the promise to pay or perform must be absolute; it must not depend on a contingency. Thus in *Crouch* v. *Crédit Foncier*,[3] the fact that the debentures were issued subject to conditions indorsed thereon, stipulating that a certain number of the bonds were to be drawn for in a specified manner at intervals, was held to be inconsistent with their being negotiable. "It would perplex commercial transactions if paper securities of this kind were issued into the world, encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty."[4] At the same time, the mere fact that an instrument has annexed to it certain limitations and conditions which modify its character does not necessarily prevent it being negotiable. Thus in the case of the bonds of an American railway company, which contained certain provisions for the benefit of the bearer of the bonds, it was held that, while it was a question how far such limitations and provisions for the benefit of the bearer could pass with the bonds, the negotiable character of the bonds depended upon the bonds themselves.[5] In short, unless there is on the face of such a bond something which shows that there is attached throughout a limitation essential to it, which cannot pass, the negotiability of the bond, if otherwise established, stands unaffected, notwithstanding that the bondholder may not be able to enforce the collateral undertakings contained therein.

Limits to the issue of negotiable instruments by corporations and companies.

Certain rules of law have the effect of setting limits to the multiplication of negotiable instruments. Thus the

[1] 1876, 1 App. Ca. 476.

[2] See opinions in *Mortgage Insur. Corpor.* v. *Commissioners of Inland Revenue*, 1888, L. R. 21 Q. B. D. 352.

[3] 1873, L. R. 8 Q. B. 374.

[4] Per Kenyon, C.J., in *Carlos* v. *Fancourt*, 1794, 5 T. R. 482.

[5] *Venables* v. *Baring Bros. & Co.* [1892], 3 Ch. 527. See per Kekewich, J.

issue of such documents by corporations and companies is restricted. In England, it is doubtful whether documents, which, though payable to bearer, are under the seal of a corporation, can be negotiable at common law; for such documents are *primâ facie* covenants, and not promises.[1] Since, in England, the general rule is that the contracts of corporations must be made under their common seal, it follows that, except in the case of instruments within the Bills of Exchange Act, corporations cannot be bound by negotiable instruments in the ordinary form.[2] In Scotland, since corporations may contract by the signatures of their office-bearers or agents, duly appointed for that purpose, and signing *per procurationem*, there is no technical difficulty in corporations being bound by negotiable instruments.[3] Apart altogether, however, from the formal difficulty of an instrument under seal being negotiable by the law merchant, it is a general rule that a non-trading corporation or company cannot, through its agents or managers, bind itself by issuing negotiable instruments, unless the power to do so is conferred on it expressly or by clear implication in its constitution, as set forth in its charter, special Act, articles of association, or the like.[4] A power to accept bills of exchange or issue negotiable instruments is not given to a company by the Companies Act, 1862, as an incident of its incorporation.[5] A corporation or joint stock company, in other words, cannot bind itself by issuing negotiable instruments, unless the terms of the memorandum of association, or other instrument, under which the corporation or company is constituted, authorise, upon a fair construction, the issue of such instruments, or unless the issue of such instruments is directly within the scope of its

[1] Compare in this matter the opinion of Blackburn, J., in *Crouch* v. *Crédit Foncier*, 1873, L. R. 8 Q. B. 374, at p. 382, with the opinions *In re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758. In both cases debentures, purporting to be negotiable, were issued under the company's seal. See Bills of Exchange Act, s. 91 (2).

[2] Bills of Exchange Act, s. 91 (2). See Pollock on *Contract*, 6th ed., 124.

[3] See *Bowie* v. *Wilson*, 1695, and other cases, in *Morr. Dict.*, 2511 *et seq.* Even in England corporations may now in many cases contract and bind themselves through the instrumentality of their agents. Under sec. 91 (2) of the Bills of Exchange Act, a corporation may seal, instead of signing, acceptances, indorsements, and the like.

[4] Powers to issue negotiable instruments may at any time, of course, be conferred on a corporation by a later Statute, *e.g.* City of Edinburgh Annuity Bonds, sanctioned by Edinburgh and Leith Agreement Act, 1 & 2 Vict. c. 55, ss. 44 and 45.

[5] *Re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758; *Peruvian Rwy. Co.* v. *Thames and Mersey Marine Insurance Co.*, 1867, L. R. 2 Ch. App. 617.

business, and necessary to the carrying on of the trade in which it is engaged. Thus, in the case of trading and financial companies and corporations, the power to issue negotiable instruments may be implied from the general character of the business.[1] Even, however, in the case of companies which are in some degree of the nature of trading concerns, such as mining, gas, waterworks, and railway companies, it has been held that there is *primâ facie* no such power.[2] At the same time, where the issuing of negotiable instruments is in the line of the company's business, the Courts will readily imply power from general words in the articles;[3] and both in Scotland and England there is a strong tendency to hold the power to be implied where its exercise is naturally incident to the company's business. Inquiry as to whether the corporation or company has a legal right to execute and issue negotiable instruments is of the first importance; for if it exceed its powers, its act is a nullity, and no holder of the instrument, though he has taken it entirely in good faith, can enforce the contract.[4] In certain circumstances, indeed, the doctrine of estoppel, or personal bar, may practically validate, in the hands of a *bonâ fide* holder, a negotiable instrument which has been informally or invalidly issued.[5]

Other points to be inquired into, in taking a negotiable instrument issued by a company.

In addition to ascertaining that the corporation or company has power to bind itself by issuing negotiable instruments, a

[1] As to the power of directors of a banking company to give negotiable instuments for borrowed money, so as to bind the shareholders, see *MacLae* v. *Sutherland*, 1854, 3 El. & Bl. 1; *Bank of Australasia* v. *Breillat*, 1847, 6 Moore's P. C. Cases, 152.

[2] *Bateman* v. *Mid-Wales Rwy. Co.*, 1866, L. R. 1 C. P. 499, and other cases there referred to. Railway companies are expressly forbidden to issue negotiable instruments without statutory authority of (7 & 8 Vict. c. 85, s. 19).

[3] *In re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758—the case of debentures issued by a company in whose articles there was no express mention of negotiable instruments; *MacLae* v. *Sutherland*, 1854, 3 El. & Bl. 1—where promissory notes with coupons attached were issued.

[4] *Bateman* v. *Mid-Wales Rwy. Co.*, 1866, L. R. 1 C. P. 499. As to the powers of Local Authorities in Scotland, see Local Government (Scotland) Act, 1894, s. 44 (6), and the Local Authorities Loans (Scotland) Acts, 1891 and 1893 (54 & 55 Vict. c. 34, and 56 & 57 Vict. c. 8), respectively. In the United States the Supreme Court has held that, at common law, local authorities having the usual powers of administration and local taxation, have not any implied power to issue negotiable securities (*Police Jury* v. *Britton*, 1872, 15 Wallace (Sup. Ct., U.S.), 566, 572. The same Court was equally divided on the question whether municipal corporations are entitled so to do.

[5] See *infra*, p. 568. *Webb* v. *Herne Bay Commissioners*, 1870, L. R. 5 Q. B. 642; *Merchants of the Staple* v. *Bank of England*, 1887, 21 Q. B. D. 160.

party proposing to take such instruments should ascertain (1) whether the signature of the corporation or company is attached in such form as to bind it under its constitution,[1] and (2) whether the persons who sign the instruments on behalf of the corporation or company have authority to do so. If the charter or Statute prescribes the forms to be followed, they must be followed; and if it prescribes what agents have power to sign for the company or corporation, no other can sign. In both cases, however, substantial compliance with the charter or Statute would probably suffice. Generally speaking, the managers or agents of associations, whether incorporated or unincorporated, have no power to bind the association or its members by signing and issuing negotiable instruments in the name of the association, unless such power is shown to be within their particular authority, either by express words or necessary implication.[2]

Where office-bearers of a corporation, or the manager, directors, or secretary of a company, sign negotiable instruments with a view of binding the corporation or the company, it is advisable, in their own interest, that they state clearly on the face of the instrument that they sign merely as office-bearers or agents; otherwise they may be held personally liable.[3] Even where directors sign expressly for and on behalf of a company, they may incur personal liability, on the ground that their signature involved a false representation of the powers of the company to issue such instruments. Thus where directors of a company, incorporated under private Acts of Parliament, which conferred no power to issue negotiable instruments, nevertheless issued such instruments on behalf of the company, it was held that this was a representation of the power of the company to do so, and that the directors were personally responsible to persons who, having no notice of the terms of the Acts, acted upon the false representation by taking

[1] See Companies Act, 1862 (25 & 26 Vict. c. 89, s. 47).

[2] *Brown* v. *Byers*, 1847, 16 M. & W. 252. *Re Peruvian Railways Co.*, 1867, L. R. 2 Ch. App. 617. As to the authority of agents in this matter, see *Colvin* v. *Dixon*, 1867, 5 M. 603; *Hamilton* v. *Dixon*, 1873, 1 R. 72 (in which case the agent issuing the document had the most ample powers within the line of the company's business, but had no specific authority to issue the document in question). Cf. *Turnbull* v. *M'Kie*, 1822, 1 S. 353, and *Ross, Skolfield, & Co.* v. *State Line Steamship Co.*, 1875, 3 R. 134. As to the authority of a manager abroad, *Re Cunningham & Co. Lim.*, 1887, L. R. 36 Ch. D. 532. As to powers of *de facto* directors, *Mahony* v. *East Holyford Co.*, 1875, L. R. 7 H. L. 869.

[3] *Telford* v. *James*, 1824, 2 Sh. App. 219; *Eaton, Hammond, & Co.* v. *M'Gregor's Executors*, 1837, 15 S. 1012; *Dutton* v. *Marsh*, 1871, L. R. 6 Q. B. 361.

the instruments issued.[1] So though a person who, without authority, signs the name of another to a bill, either simply or by procuration, is not, as a rule,[2] liable on the instrument, he may, in virtue of his implied representation, be bound to compensate a holder of the bill.[3] Of course, if the principal be a fictitious or non-existing person, the signer is liable on the instrument.[4] Also, where a director indorsed on certain certificates of debenture stock a representation that the stock represented thereby was within the limit of the company's statutory powers of borrowing, it was held, in a question with a party who had taken the certificates as security of a loan, that the director was liable in damages for the money advanced.[5]

Quasi-negotiability through the operation of personal bar or estoppel.

The rules restricting the negotiability of certain documents, either on the ground of the form of the document, or the nature of the right it embodies, or the illegality of its issue, are greatly modified, and the privileges of negotiability are practically much extended, through the operation of the doctrine of personal bar or estoppel. The effect of this doctrine is that, even where an instrument is not, properly speaking, negotiable, yet if it professes on the face of it to be negotiable by delivery, and is, in fact, passed from hand to hand, or if any other incident of negotiability is stipulated in the terms of the instrument, both the issuer of the instrument and each holder of it may be barred, by the representation on the face of it, from disputing the title of, or setting up a claim as against, a person who has *bonâ fide* and for value taken the instrument by way of sale or pledge. A party, in short, may by his acts or representations bar himself from setting up a defence which would otherwise be available; and in that way a non-negotiable instrument may, as regards him, become practically negotiable.[6] The doctrine of estoppel is in this respect identical with the doctrine of personal bar in Scots law.[7] As explained by Lord Kinnear, in the passage referred to, two

[1] *West London Commercial Bank* v. *Kitson*, 1884, L. R. 13 Q. B. D. 360.

[2] There is an exception in the special case provided for in the Companies Act, 1862, s. 42.

[3] *Polhill* v. *Walter*, 1832, 3 B. & A. 114.

[4] *Ross* v. *Young and Others*, 1831, 9 S. 275. Bills of Exchange Act (1882), s. 7 (3); *Bank of England* v. *Vagliano* [1891], App. Cas. 107.

[5] *Whitehaven Joint Stock Banking Co.* v. *Reed*, 1886, 54 L. T. 360.

[6] *Goodwin* v. *Robarts*, 1876, 1 App. Ca. 476, per Lord Ch. Cairns; *Rumball* v. *Metropolitan Bank*, 1877, 2 Q. B. D. 194; see also, per Lord Herschell, in *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Ca. 267, at 283; and per Bowen, L.J., in *Easten* v. *London Joint Stock Bank*, 1886, 34 Ch. D. 95, at 113.

[7] Per Lord Kinnear, in *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, at 610. Cp. per Lord Kyllachy in *Clavering, Son, & Co.* v. *Goodwins, Jardine, & Co.*, 1891, 18 R. 652, at 657.

things must be established in order to raise the plea: the party against whom it is taken must have made representations, by words or conduct, concerning existing facts, with the intention of inducing another to act in the belief that these representations were true; and the party raising the plea must, in fact, have contracted or altered his position in reliance on the truth of the representations.

The effect of this doctrine in conferring the incidents of negotiability is clearly explained in *Goodwin* v. *Robarts* by Lord Cairns, who pointed out that, apart from the question whether the foreign scrip was, strictly speaking, negotiable, there was a prior question which in itself sufficed to dispose of the case. "The plaintiff bought in the market scrip which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign Government. . . . The scrip itself would be a representation to anyone taking it—a representation which the appellant must be taken to have made, or to have been a party to—that, if this scrip itself were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed for the moment that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign Government; still the appellant is in the position of a person who had made a representation on the face of his scrip, that it would pass with a good title to anyone taking it in good faith and for value, and who had put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representations so made. I am of opinion that, on doctrines well established, the appellant cannot be allowed to defeat the title which the respondents have thus acquired."[1]

Personal bar operates not only in a question with its issuers, but also in a question with sucessive holders.

This case is important, as showing that it is not only the issuers of instruments purporting to be negotiable who are barred by the representation on the instruments from impeaching the title of a person who has acted thereon,[2] but that the holders for the time

[1] Per Lord Ch. Cairns, in *Goodwin* v. *Robarts*, 1876, L. R. 1 App. Ca. 476.

[2] *In re Imperial Land Co., ex parte Colborne*, 1871, L. R. 11 Eq. 478 (debenture bonds payable to bearer, issued by a company). See also *In re Agra & Masterman's Bank*, 2 Ch. App. 391.

being of such instruments may also be treated as adopting the representation, and so be barred from denying their negotiable quality. A similar exposition and application of the doctrine is contained in the judgment by the Court of Appeal in *Easten* v. *London Joint Stock Bank*.[1] In that case a doubt existed whether certain bonds of foreign companies were strictly negotiable, since they were under seal; but the Court held that Lord Sheffield, a holder of the bonds, by placing in the hands of his agent for disposal, and with the intention that they should be transferred, bonds of that sort, purporting to be negotiable, had chosen to treat them as negotiable, and was barred from denying their negotiability in a question with a bank, into whose hands they had come as security for a loan. "If the negotiability of these bonds by estoppel,[2] so to speak, arises, that disposes of all difficulty that would arise owing to the seal, because it is no longer a question whether they are strictly speaking negotiable, but whether Lord Sheffield has chosen to treat them as such." [3] Upon this principle the Court of Appeal held that, as between Lord Sheffield and the bank, since the bank had taken the bonds according to the general usage and in the ordinary way of business, the bonds had become negotiable by estoppel, and Lord Sheffield was precluded from saying that the legal title to them was not in the bank.[4] The effect of the doctrine illustrated in these cases, is that certain incidents of negotiability may be practically annexed to documents by their form, or by their containing special stipulations, so that both the party issuing them in this shape, and the parties who pass them from hand to hand, are bound by these representations in a question with persons who take the documents and deal with them on the faith of these representations.

[1] 1886, L. R. 34 Ch. Div. 95.

[2] The phrase negotiability by estoppel has been objected to, perhaps justly. Where an instrument is said to be negotiable by estoppel, what is meant is, that the holder of it has a title to enforce it on the ground of estoppel.

[3] Per Bowen, L.J., in *Easten* v. *London Joint Stock Bank*, 1886, 34 Ch. Div. 95, at p. 113.

[4] The decision of the Court of Appeal in this case was overturned in the House of Lords, *sub. nom. Earl of Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Ca. 333. The decision of the House of Lords, however, turned entirely on their view that the bank did not take the bonds without notice and in good faith, since, owing to special circumstances, they must have known that the pledgor was exceeding his right. The principles stated in the text, as laid down by the Court of Appeal, regarding the negotiability of the bonds as between Lord Sheffield and the bank, far from being impeached, were expressly affirmed. See explanations of the House of Lords decision in *Earl of Sheffield* in *London Joint Stock Bank* v. *Simmons*, [1892] App. Cas. 201.

Application of the doctrine of personal bar in rendering documents transferable, free from defences or equities.

Accordingly, it is often immaterial whether or not a document is technically recognised as negotiable. If an instrument purports on its face to be negotiable, and is treated as transferable by delivery in the ordinary course of business, a creditor, to whom it is offered in security of advances, need not inquire whether the instrument is strictly speaking negotiable; for if he takes it in good faith and without notice in the ordinary course of business, his claim under the instrument is not subject to defences or equities good against an ordinary assignee. Thus where it was shown that iron trade warrants for goods "deliverable (f.o.b.) to A. B. or their assigns by indorsement hereon," were treated as passing free from vendor's lien, it was held, in a question between the company who issued the warrants and a party to whom they had been pledged and indorsed, that, though the warrants were not negotiable, the pledgees were entitled to the goods free of vendor's lien.[1] "If you give a person a document, knowing he can use it in a particular way, and intending he shall use it in that particular way, by obtaining money upon it, you cannot afterwards be allowed to say, as against persons from whom he has obtained money, that the person is not to have the benefit thereof."[2] The fact that an instrument, *e.g.* a debenture, is issued payable to bearer, amounts to a representation, which binds the party making it, so that anyone who has acted on the faith of it can exact performance of the obligation. Thus a transferee by mere delivery of such an instrument for value, *e.g.* a person who advances money on it, can rank in the winding-up of the company for the full amount due on the instrument, without reference to any equities between the company and the party to whom the instrument was orginally issued.[3] The judgments in both the cases referred to proceeded on the ground that the terms of the instrument showed the intention of the parties to be, that the bearer should be entitled to the benefit of the contract in the instrument, and, therefore, that the company were estopped from claiming equities. So a party with whom debentures to bearer have been deposited by way of mortgage, is in England entitled to petition in his own name for the winding-up of the com-

[1] *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. Div. 205.

[2] Per Jessel, M. R., in *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, L. R. 5 Ch. D. 205, at p. 217. Cp. per Lord Kyllachy in *Clavering, Son, & Co.* v. *Goodwins, Jardine, & Co.*, 1891, 18 R. 652, at 657.

[3] *Re Blakely Ordnance Co.*, 1867, L. R. 3 Ch. App. 154; *Imperial Land Co., ex parte Colborne*, 1871, L. R. 11 Eq. 478.

pany.[1] In short, where a party issues debentures, or instruments of that nature, in such a form as to hold out a distinct promise, informing all the world that he will pay to the order of the persons named "or bearer," the issuer is barred, in a question with a *bonâ fide* holder who has been induced to take the instrument by the form in which it was issued, from subsequently setting up any claims on which he, the issuer, might have insisted against the original contractee.[2] Some difficulty has been caused by the decision of Lord Cairns in *Re Natal Investment Co.*[3] There it was held that debentures issued by a company payable to "A., his executors, or assigns, or the holder for the time being of this debenture bond," were, even in the hands of an onerous holder, subject to equities between A. and the company. This decision, however, proceeded entirely upon a construction of the actual wording of the instrument, taken with the particular facts of the case and the circumstances under which the debentures were issued; it did not affect the doctrine that, if one issues an instrument whose form fairly purports that it is assignable free from equities, the issuer cannot defeat the claim of a transferee for value by maintaining defences and exceptions which he might have against the original holder.[4]

The same principle applies in the case of a letter of credit. The granter of such a document is bound by the representation on the face of it to perform his obligation, without regard to equities existing between himself and the payee, to all persons who have advanced money or discounted bills on the faith of it.[5] In the case referred to it was laid down that the general rule, that a chose in action is assignable only subject to the equities existing between the original parties to the contract, must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.[6] While particular parties may in this way be

[1] *Re Olathe Silver Mining Co.*, 1884, 27 Ch. Div. 278.

[2] The forms of instruments which may serve thus to personally bar the issuers from insisting on equities are various:—*In re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758—debenture bonds payable to A. or order, and indorsed by A. for value; *Higgs* v. *Northern Assam Tea Co.*, 1869, L. R. 4 Ex. 387—debentures payable to "A., his executors, administrators, or asisgns"; *In re Imperial Land Co., ex parte Colborne*, 1871, L. R. 11 Eq. 478—debenture bonds payable to bearer, and sold in the open market.

[3] 1868, L. R. 3 Ch. App. 355.

[4] See explanations of the decision in *Re Natal Investment Co., Re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758, at p. 762.

[5] *In re Agra & Masterman's Bank, ex parte Asiatic Banking Corporation*, 1867, L. R. 2 Ch. App. 391.

[6] *In re Agra & Masterman's Bank*, 1867, L. R. 2 Ch. App. 391, at 397.

barred from denying certain qualities of negotiability to documents like debentures and letters of credit, yet, at the same time, these instruments may not be negotiable to the effect, for example, of enabling a *bonâ fide* holder for value to acquire a good title, although claiming under a person who took by a fraud upon the original contractee. Thus, in the case of a debenture payable to bearer, the Court, while expressing the opinion that the form of the instrument showed that the defendants did contract with the person to whom they originally issued the instrument, to pay the money to the bearer of the instrument, yet held that a *bonâ fide* holder for value, deriving title from a person who had stolen the debenture, could not recover upon it.[1]

Application of the doctrine of personal bar in validating debentures or informally invalidly issued.

The general rule is that a corporation or company which issues negotiable instruments, which it has no power to issue, incurs no liability.[2] Thus negotiable instruments issued under seal by a corporation, *e.g.* a railway company, whose constitution does not give it power to do so, have been held void.[3] The doctrine of personal bar or estoppel, however, applies to corporations as well as to natural persons; so that if there are circumstances which affect the company or corporation with the knowledge that instruments, *e.g.* debentures, issued by them have been transferred to *bonâ fide* onerous transferees, the company or corporation, if by any act or conduct they recognise them as valid, will be barred from subsequently disputing the validity of the instruments in a question with the transferee, though there be no doubt that the instruments were in the first instance invalid.[4] Thus where certain commissioners, incorporated by Statute, who were empowered to borrow money and issue assignable debentures, issued debentures (form not given) purporting to have been executed pursuant to the powers contained in the Statute, they were held barred from alleging against an innocent assignee for value, that the debentures had been issued illegally, in contravention of the statutory powers.[5] Again, in *Romford Canal Co.*,[6] power to borrow was given on a resolution being passed at a meeting of the company, under the Companies Clauses Act, 1845. In pursuance of a resolution, which, being passed at a meeting at which

[1] *Crouch* v. *Crédit Foncier of England*, 1873, L. R. 8 Q. B. 374.

[2] *Re Peruvian Railways Co.*, 1867, L. R. 2 Ch. App. 617.

[3] *Bateman* v. *Mid-Wales Rwy. Co.*, 1866, L. R. 1 C. P. 499.

[4] The circumstances giving rise to such personal bar are illustrated in such cases as *Re South Essex Estuary Co., ex parte Chorley*, 1870, L. R. 11 Eq. 157; *Carey's Claim*, 1873, W. N. 17; *Hercules Insurance Co.* (*Brunton's Case*), 1874, L. R. 19 Eq. 302.

[5] *Webb* v. *Herne Bay Commissioners*, 1870, L. R. 5 Q. B. 642.

[6] 1883, 24 Ch. D. 85.

there was not a quorum, was invalid, debentures were issued to a contractor who knew of the invalidity. Some were transferred for value, without notice, to C., the transfer being registered; and others were deposited with D., without notice of the irregularity. It was held that, in a question with C., the company were barred from pleading the irregularity which might have been set up against the person to whom the debentures were issued, and that D., who took as an equitable assignee, could similarly prove against the company for the amount he had advanced, without reference to the irregularity in the issue. In this case Kay, J., reviewing the previous cases, summed up the law as follows:—"Where a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite esse acta*. If such security be legally transferable, such an irregularity, and, *a fortiori*, any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice; nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity."[1] So where the corporate seal has been improperly affixed to a document by the official who keeps the seal, the corporation may be barred by the conduct of its governing body from disputing its liability; but mere negligence will not bar them, unless this negligence is the direct and proximate cause of the liability being incurred.[2] It is to be observed that, though the company itself may be precluded from disputing the validity of debentures or other such documents in the hands of *bonâ fide* transferees, it may be competent for the other holders of the debentures of the company, which rank *pari passu* with the invalid securities, to dispute their validity.[3]

Various documents, negotiable or non-negotiable.

As documents which are not negotiable may in some circumstances, by the operation of the doctrine of personal bar, become to certain effects negotiable, so instruments, which in their ordinary state are negotiable, may be altered in form or put into another state, so that they cease to be negotiable. The conditions under which different instruments are, or are not, negotiable are most conveniently treated in considering the different classes of instruments.

[1] *Re Romford Canal Co.*, 1883, L. R. 24 Ch. D. 85, at 92.

[2] *Merchants of the Staple* v. *Bank of England*, 1887, 21 Q. B. D. 160, and other cases there mentioned.

[3] *Mowatt* v. *Castle Steel Co.*, 1886, 34 Ch. D. 58.

Bills and notes.

Bills of exchange and promissory notes, whether payable to order or to bearer, are, as a rule, fully negotiable. A person who takes such instruments by indorsement and delivery, or, where they are payable to bearer, by delivery, if he is a *bonâ fide* holder for value, obtains a good title notwithstanding any defect of title in the party, whether indorser or transferor, from whom he took, and can exact payment free from defences good against his predecessors. Bills and notes are frequently indorsed and delivered, or, if payable to bearer, are deposited in security of an advance—indeed, this may be said to be done every time that a bill or note is discounted. Where a bill is pledged or taken as a collateral security, the creditor holding the bill is liable to the owner of the bill if he does not use due diligence in presenting the bill for payment, and take the proper proceedings on dishonour.[1] The law of bills of exchange and promissory notes, whether in a negotiable or non-negotiable state, is now regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).[2]

Negotiation of bills.

"A negotiable bill may be payable either to order or to bearer.[3] A bill is payable to bearer which is expressed to be so payable, or on which the only, or last, indorsement is an indorsement in blank.[4] A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable."[5] "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."[6] A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. A bill payable to bearer is negotiated by delivery. A bill payable to order is negotiated by the indorsement of the holder completed by delivery."[7] "An indorsement may be made in blank or special. It may also contain terms making it restrictive."[8] "An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. A special indorsement specifies the person to whom, or to whose order, the bill is to be payable."[9]

[1] *Peacock* v. *Pursell*, 1863, 32 L. J. C. P. 266.

[2] The law of bills has been so frequently treated in treatises of high repute, that it is unnecessary here to do more than indicate a few of the main points more particularly relevant.

[3] 45 & 46 Vict. c. 61, s. 8 (2).

[4] *Ib.* s. 8 (3).

[5] *Ib.* s. 8 (4). See *Decroix* v. *Meyer*, 1890, 25 Q. B. D. 343; affd. *Meyer* v. *Decroix* (H. L.) [1891], App. Ca. 520.

[6] 45 & 46 Vict. c. 61, s. 7 (3). *Bank of England* v. *Vagliano* [1891], App. Ca. 107.

[7] *Ib.* s. 31.

[8] *Ib.* s. 32 (6).

[9] *Ib.* s. 34 (1) (2).

Transfer of bills by delivery.

"Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery.' A transferor by delivery is not liable on the instrument. A transferor by delivery who negotiates a bill, thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless."[1] If the bill transferred by delivery is dishonoured, the transferee must use reasonable diligence in giving notice of dishonour, and in endeavouring to obtain payment; otherwise he will not be able to hold the transferor by delivery liable for the debt in respect of which the bill was transferred.[2] Also, if there is a defect in the bill,[3] the transferee by delivery, on discovering the defect, must repudiate the transaction with reasonable diligence.[4]

Circumstances in which bills and notes become non-negotiable: (*a*) Contain words prohibiting transfer.

The circumstances in which bills and notes become non-negotiable are regulated by the Bills of Exchange Act. "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable."[5] At the same time, it is very doubtful whether it is possible to draw a bill expressed to be payable to bearer or to order, and yet make it not transferable; and certainly this can only be done—if it can be done at all—by plain words prohibiting transfer, or indicating an intention that it should not be transferable.[6]

(*b*) Restrictively indorsed.

Again, a bill ceases to be negotiable when it is restrictively indorsed. "An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D. only,' or 'Pay D. for the account of X.,' or 'Pay D. or order for collection.'"[7] "A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so."[8] "Where a restrictive indorsement authorises further transfer, all subsequent indorsees take

[1] *Ib.* s. 58.

[2] *Rogers* v. *Langford*, 1833, 1 Cr. & M. 637.

[3] *Robson* v. *Oliver* (1847), 10 Q.B. 704.

[4] *Pooley* v. *Brown*, 1862, 31 L. J. C. P. 134.

[5] 45 & 46 Vict. c. 61, s. 8 (1).

[6] *National Bank* v. *Silke* [1891], 1 Q. B. 435.

[7] *Ib.* s. 35 (1).

[8] *Ib.* s. 35 (2).

the bill with the same rights, and subject to the same liabilities, as the first indorsee under the restrictive indorsement."[1]

(*c*) After discharge in due course.

A bill or note also ceases to be negotiable when it is discharged by payment or otherwise.[2] "A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. Payment in due course means payment made at or after the maturity of the bill to the holder thereof, in good faith and without notice that his title is defective."[3] A bill or note paid before it is due, which afterwards is indorsed over, is, however, a valid security in the hands of a *bonâ fide* indorsee.[4] "Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged."[5] "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged."[6]

(*d*) When overdue.

Again, when a bill becomes overdue it loses its full negotiability. "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."[7] A bill payable otherwise than on demand is overdue after the expiration of the last day of grace. "A bill payable on demand is deemed to be overdue, within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."[8] In determining what is a reasonable time, regard must be had to the nature of the instrument. A promissory note payable on demand, and given with the intention that it be used as a continuing security, cannot be treated as overdue merely because it is indorsed a number of years after its date.[9] So where the payee of a promissory note payable on demand, which had been granted as a security for a debt, after realising a sum equal to the amount of the debt by the transfer of a mortgage, which he held as a further security for the same debt, subsequently indorsed the promissory note, which remained in his hands, to the plaintiff for value, the plaintiff having no knowledge of the

[1] *Ib.* s. 35 (3).
[2] *Ib.* s. 36 (1).
[3] *Ib.* s. 59.
[4] *Lazarus* v. *Cowie*, 1842, 3 Q. B. 459; *Glasscock* v. *Balls*, 1889, 24 Q. B. D. 13—the case of a promissory note payable on demand, and given in security. As to payment by the drawer or an indorser, see sec. 59 (2).
[5] *Ib.* s. 59 (3).
[6] *Ib.* s. 61.
[7] *Ib.* s. 36 (2). *Holmes* v. *Kidd*, 1858, 3 H. & N. 891.
[8] *Ib.* s. 36 (3).
[9] *Brooks* v. *Mitchell*, 1841, 9 M. & W. 15.

circumstances, it was held that the note, not having been paid or returned to the maker, was still current at the time of the indorsement, and that the plaintiff, as a *bonâ fide* indorsee for value, was entitled to recover upon it.[1] In the case of bills given in security for the balance of accounts, and afterwards indorsed over when they have become overdue, it appears that, in an action by the indorsee against the party originally liable, the state of the account may be gone into.[2] A right of compensation on the part of the acceptor of a bill against the drawer is not a defect in title affecting it at its maturity under sec. 36 (2) of the Bills of Exchange Act,—in other words, it is not an equity which attaches to the bill; so that an indorsee or transferee for value of a bill,—whether the bill was given for value or not,—after it is overdue or dishonoured, has a right to recover, in spite of such mutual claims between the immediate parties.[3] A claim of compensation is merely personal, and arises outside the transaction in the bill; whereas equities, which attach to a bill, spring from the original transaction out of which the bill arose. Similarly, the mere fact that the bill is an accommodation bill is not a defect of title which attaches to the bill;[4] but if there be an agreement, express or implied, not to negotiate an accommodation bill after maturity, such an agreement constitutes, it seems, an equity attaching to the bill.[5] The rule that an indorsee, taking bills and notes after maturity, takes them upon the credit of, and can stand in no better position than, his indorser, does not apply to cheques. The negotiation of an overdue cheque does not affect the holder with notice of defective title in the person from whom he took it; the delay in presentment is merely a fact which has to be considered upon the question of such notice arising.[6]

Cheques, negotiable and not negotiable.

A cheque is a bill of exchange drawn on a banker, payable on demand; and the provisions of the Bills of Exchange Act, applicable to bills of exchange payable on demand, apply to cheques. Accordingly, cheques are negotiated by delivery or by indorsement and delivery in the same manner as bills, and with similar liabilities.[7] A cheque may be crossed generally or specially by the drawer or by the holder.[8] The legal effects of such crossing are

[1] *Glasscock* v. *Balls*, 1889, 24 Q. B. D. 13.

[2] Per Baron Parke, in *Oulds* v. *Harrison*, 1854, 10 Ex. 572.

[3] *Re Overend, Gurney, & Co., ex parte Swan*, 1868, L. R. 6 Eq. 344.

[4] *Ib.*; also *Sturtevant* v. *Ford*, 1842, 4 Man. & Gr. 101.

[5] *Parr* v. *Jewell*, 1855, 16 C. B. 684 Ex. Ch.

[6] *London and County Bank* v. *Groome*, 1881, L. R. 8 Q. B. D. 288.

[7] See *M'Lean* v. *Clydesdale Bank*, 1883, 11 R. (H. L.) 1.

[8] Bills of Exchange Act, 1882, s. 77.

now regulated by the provisions of the Bills of Exchange Act, 1882, ss. 78–80. These provisions in no way interfere with the full negotiability of crossed cheques, unless the crossing includes the words "not negotiable."[1] On the other hand, the crossing of a cheque with the words "not negotiable," which words may be inserted by the drawer or by any holder, puts a limit to the negotiable quality of the cheque. "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had."[2] The words "not negotiable" are, it appears, the only words which are sufficient to make a cheque payable to order or bearer not negotiable.[3] A cheque crossed "not negotiable" is still transferable, but transferees are deprived of the protection which, in the ordinary case, is afforded to the holders of negotiable paper.[4]

Bank notes.

Bank notes are, of course, negotiable, the property in them passing like that in cash by delivery.[5] Possession in itself being sufficient evidence of title, any holder of a bank note is *primâ facie* entitled to immediate payment from the bank. So, even in the case of a stolen note, anyone into whose hands it may have come in ordinary course has a good title to the property.[6] The transferor warrants the genuineness of the notes,—that is, he is answerable for the notes being such as they purport to be,[7] and is responsible if they turn out to have been forged or rendered worthless owing to some material alteration.[8] On the other hand, the transferor does not warrant, and is not answerable for, the solvency of the bank. The transferee takes the risk of the bank's failure; and, if the bank turns out to be insolvent, the transferor is not liable on the instrument to the transferee.[9]

[1] *M'Lean* v. *Clydesdale Bank*, 1883, 11 R. (H. L.) 1.

[2] Bills of Exchange Act, 1882, s. 81.

[3] *National Bank* v. *Silke* [1891], 1 Q. B. 435, per Lindley, L. J.

[4] *Fisher* v. *Roberts*, 1890, T. L. R., p. 354, C. A.

[5] Bank notes are not—neither those of any Scotch bank nor those of the Bank of England—legal tender in Scotland. The issue of bank notes in Scotland is regulated by 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 38; 42 & 43 Vict. c. 76.

[6] *Miller* v. *Race*, 1758, 1 Burr. 452.

[7] *Jones* v. *Ryde*, 5 Taunt. 484; *Woodland* v. *Fear*, 1857, L. J. 26 Q. B. 202.

[8] *Suffell* v. *Bank of England*, 1882, L. R. 9 Q. B. D. 555; *Leeds and County Bank Lim.* v. *Walker*, 1883, 11 Q. B. D. 84. The rule is the same for coin, *i.e.* the transferor warrants that the coin is genuine, and not counterfeit.

[9] Bills of Exchange Act, 1882, s. 58 (2). A transferee who wishes the transferor of bank notes to be responsible, in case he does not obtain cash for them, should require the latter to indorse the note—see Thomson on *Bills* (ed. Wilson), 123; *Haldane* v. *Speirs*, 1872, 10 Macp. 537, at 540.

I. O. U.'s or memoranda of indebtedness.

An I. O. U. is a document in which the writer states, in his own handwriting and under his own signature, that he has received so much money, and gives that document to the lender to hold as his writ.[1] In its usual form the document contains simply the date, the letters I. O. U., the amount, and the debtor's signature.[2] It is not necessary either that it be dated or that it be addressed to a specified person.[3] It is a mere acknowledgment of debt, and, like any other memorandum of indebtedness, it is, in the hands of the lender, evidence of the debt,[4] although it is not sufficient and *per se* conclusive to instruct that the debt is outstanding, unless it is supported by extraneous evidence.[5] A memorandum of indebtedness is distinguished by its form from an acknowledgment of money received in discharge of a debt, and does not require a stamp.[6] So, too, an I. O. U. or other memorandum of indebtedness is distinguished from a promissory note, in that it does not contain a promise or express obligation on the part of the granter to pay on a given day. It is true that the acknowledgment of debt implies an obligation to pay;[7] but unless the promise to pay is expressed in words, the document is not a promissory note, and need not be stamped.[8] I. O. U.'s and similar memoranda of debt are not in any sense negotiable. The holder of such a document sues on the debt, using the document merely as evidence; while the holder of a note sues on the instrument, and not on the debt. So the delivery of the document does not transfer the title to the debt. The debt can only be transferred by intimated assignation, the assignee taking subject to all defects in the transferor's title.

Deposit receipts.

Closely akin to such memoranda of indebtedness are the deposit receipts granted by bankers for sums of money received upon deposit. A deposit receipt is an acknowledgment of debt which imports an obligation on the bank to pay the amount contained in

[1] Per Lord Pres. Inglis in *Haldane* v. *Speirs*, 1872, 10 Macp. 537, at 541.

[2] Menzies, *Conveyancing*, p. 97.

[3] *Brunton* v. *Bone*, 1858, 1 Scot. Law Journal, 58; *Fereneze Spinning Co.*, 1858, 1 Scot. Law Journal, 93.

[4] *Haldane* v. *Speirs*, 1872, 10 Macp. 537; *Welsh's Trs.* v. *Forbes*, 1885, 12 R. 851. The debt, if proved, will carry interest—*Cunninghame* v. *Boswell*, 1868, 6 Macp. 890.

[5] See opinion of Lord Young in *Neilson's Trs.* v. *Neilson's Trs.*, 1883, 11 R. 119.

[6] *M'Pherson* v. *Munro*, 1854, 16 D. 612; *Welsh's Trs.* v. *Forbes*, 1885, 12 R. 851. The distinction is sometimes difficult to draw—*Elder* v. *Thomson, Elder, & Burn*, 1850, 12 D. 994. An acknowledgment that money has been received is *primâ facie* evidence of payment of an antecedent debt, and not of the loan of money—see per Lord Pres. Inglis in *Haldane* v. *Speirs*, 1872, 10 Macp. 537, at 541.

[7] *Allan* v. *Murray*, 1837, 15 S. 1130.

[8] *Neilson's Trs.* v. *Neilson's Trs.*, 1883, 11 R. 119.

the receipt when the depositor demands it. Such a receipt may be made payable in a variety of ways. Most commonly it is payable simply to A., in which case it is discharged by the indorsation of A. or his executors. Frequently the receipt is in the joint names of two or more parties, as to "A. or B., payable to either or the survivor," in which case it is discharged by the indorsation either of A. or B., while both are alive; or of the survivor, on the death of one of them; or, on the death of both, of the executor of the last survivor. Again, it may be payable to "A. and B.," in which case it is discharged by the indorsation of both; or, if one be dead, of the survivor and the executor of the deceased; or, if both be dead, by their respective executors. It is usual to stipulate on the receipt, that when the money is drawn the receipt must be returned, with the requisite signature or signatures on the back; and as this stipulation forms part of the contract between the bank and the depositor, the bank cannot be forced to pay unless the stipulation is conformed to. The bank is accountable to the depositor, and is chargeable with knowledge of his signature. Accordingly, where a bank paid the sum in a deposit receipt, on a forged signature, to a third party—even though that third party was the known agent of the depositor—it was found liable in repetition of the sum.[1] The bank, however, is quite safe if it pays the money in terms of the contract under which it was deposited; for a payment according to the terms of the receipt necessarily operates a discharge to the bank.[2] At the same time, the terms of a deposit receipt, though an exceedingly important element in determining the property in the money represented by the receipt, are not conclusive;[3] and parole evidence of the relation of the parties and of the whole circumstances is always admissible, to fix who is the real owner of the money deposited.[4]

A deposit receipt in its ordinary form is not a negotiable instrument.[5] The property in the money deposited is not transferred by merely passing the document from hand to hand.[6] Even

[1] *Forbes' Exrs.* v. *Western Bank*, 1854, 16 D. 807.

[2] See per Lord Rutherfurd Clark in *Struthers' Patent Diamond Co.* v. *Clydesdale Bank*, 1886, 13 R. 434, at 442.

[3] *Jamieson* v. *M'Leod*, 1880, 7 R. 1131; *Connell's Trs.* v. *Connell's Trs.*, 1886, 13 R. 1175. In this respect deposit receipts differ from stock certificates, bonds, and certificates of debt issued by public companies. See also *M'Donald* v. *M'Donald*, 1889, 16 R. 758.

[4] See cases in last note; also *Thomson's Exrs.* v. *Thomson*, 1882, 9 R. 911; *Crosbie's Tr.* v. *Wright*, 1880, 7 R. 823.

[5] The form of a receipt, indeed, may be such as to make the instrument a promissory note.

[6] *M'Nicol* v. *M'Dougall*, 1889, 17 R. 25.

where the delivery of the document is accompanied by indorsation, the property represented by it does not pass to the indorsee unless it is shown that such was the intention of the parties.[1] Since a receipt is not negotiable, and a mere indorsation is not equivalent to an assignation, the indorsation and delivery of the document imply, at most, a mandate to the indorsee to uplift the contents. As regards the bank, the indorsation of the depositor's name, even when made in blank, would entitle the bank to pay to the person in possession, and to hold the indorsed receipt as a discharge. Further, it is probable that the doctrine laid down by Bell in his *Commentaries*,[2] that book debts may be conveyed by indorsement to the effect of authorising the assignee to bring an action—the indorsement in such a case being held as a mandate or letter directing payment to one's factor or servant—would apply to the debts represented by deposit receipts, so that the possession of an indorsed receipt would entitle the indorsee to sue the bank in his own name. In a question, however, between the depositor, or his creditors, or representatives, and the transferee, the indorsation and delivery of the document will not in themselves, at least where the transaction is gratuitous, vest the right in the receipt or its contents in the transferee for his own behoof, unless there is evidence of donation. The indorsation and delivery being in themselves, at most, a mandate to the transferee to uplift the contents of the receipt, the mandant can at any time interpose and stop the cashing of the document by revoking the mandate implied by the indorsation, and, on his bankruptcy, his creditors could compel him to do so.[3] Further, the mandate expires at the death of the mandant, so that the indorsee or mandatary is not entitled to execute it after the depositor's death.[4] Where, however, the receipt has been indorsed and delivered for onerous causes, in pursuance of a contract between the parties,—for example, as a security for an advance, —the mandate to draw will be effectual to secure the transferee, who

[1] *Barstow* v. *Inglis & Hay*, 1857, 20 D. 230, in which case the indorsee of a deposit receipt, who had uplifted the money after the death of the indorser, was compelled, at the instance of the indorser's executor, to repay to him the money uplifted. See also opinions per Lords Young and Lee in *M'Nicol* v. *M'Dougall*, 1889, 17 R. 25; *Sharp* v. *Paton*, 1883, 10 R. 1000, where a deposit receipt, indorsed in blank by the depositor and handed to a relative before his death, was held not to constitute a donation.

[2] Bell, *Com.* ii. 19; *Laurie* v. *Perrie Ogilvie*, 6 Feb. 1810, 15 F. C. 561.

[3] See per Lord Young in *M'Nicol* v. *M'Dougall*, 1889, 17 R. 25.

[4] *Henderson* v. *M'Culloch*, 1839, 1 D. 927; *Heron* v. *M'Geoch*, 1851, 14 D. 25; *Barstow* v. *Inglis*, 1857, 20 D. 230, at 232.

is in possession of the receipt, since no one else can draw the money without being in possession of the document. Further, in the case supposed, where the mandatary has made an advance on the security of the receipt, it is a mandate to draw for the mandatary's own behoof. In this case, he is a mandatary *in rem suam*, and it is not in the power either of the mandant, or his creditors on his bankruptcy, to revoke such a mandate.[1] While the position of an onerous indorsee for value in possession of the instrument may in this way be so far secured, nevertheless the only effectual mode of transferring to a third party the debt represented by a deposit receipt is by something equivalent to an assignation in his favour, intimated to the bank. This assignation may either be written on the receipt or contained in a separate document, and the assignee takes subject to all defences and equities pleadable against his cedent.

Debentures.

The term "debenture" is ambiguous, and is employed to denote many different forms of obligation.[2] Any money obligation which is issued by a company, and purports upon the face of it to be a "debenture," may be stamped as a debenture, though its form is such that it might quite as readily be chargeable under some other stamp definition.[3] "You may," said Lindley, L.J., in the case referred to, "have mortgage debentures; you may have debentures which are bonds; you may have a debenture which is nothing more than an acknowledgment of indebtedness." Advances against debentures can in every case be effectually secured by the holder of the debenture granting an assignation of the debt represented by it, followed by an intimation of the assignation to the company issuing the debenture.

The question of the negotiability of a debenture depends largely on the form of the instrument. The forms of debentures now generally in use are (*a*) registered debentures, (*b*) debentures to bearer, and (*c*) debentures to bearer capable of registration.

Registered debentures.

Debentures for whose transfer registration is necessary can clearly in no circumstances be negotiable instruments.[4]

[1] *Struthers* v. *Commercial Bank*, 1842, 4 D. 460. See the observations of Lord Fullerton and the Lord President. The document in this case was a letter of credit.

[2] See Buckley on *Companies*, 6th ed., 159. Also per Lindley, L.J., in *British India Steam Navig. Co.* v. *Commissioners of Inland Revenue*, 1881, L. R. 7 Q. B. D. 165, at 172.

[3] *British India Steam Navig. Co.* v. *Commissioners of Inland Revenue*, 1881, L. R. 7 Q. B. D. 165.

[4] *Supra*, p. 552. Transfers on sale of registered debentures are liable, under sec. 13 of Customs and Inland Revenue Act, 1888, to a stamp duty of 10s. per cent. on the price—*Texas Land and Cattle Co.* v. *Commissioners of Inland Revenue*, 1888, 16 R. 69.

Debentures to bearer.

Debentures to bearer and debenture stock certificates to bearer have not yet been definitely recognised by the Courts as strictly falling within the category of negotiable instruments, unless they are in substance promissory notes within the meaning of sec. 83 of the Bills of Exchange Act, in which case, even where they are under seal, they will be negotiable as promissory notes.[1] Where, as is generally the case, a debenture to bearer contains provisions which prevent it falling within the definition of a promissory note, the question whether it is, or is not, a negotiable instrument must be determined by reference to the form and terms of the instrument, the usage of merchants regarding it, and the facts of the particular case. It appears that among London bankers there is now a general custom to treat debentures which are in terms payable to bearer as negotiable, and that they pass from hand to hand accordingly.[2] It is safer, however, so long as the negotiability of such instruments is not definitely established, that lenders, in making advances on the security of instruments of this kind, should take an assignation from the debenture-holder, and intimate it to the company issuing the debenture. At the same time, though debentures, even when payable to bearer, have not been recognised as strictly speaking negotiable, yet, as has been pointed out,[3] they may be practically endowed with certain characteristics of negotiable instruments through the operation of the doctrine of estoppel, or personal bar. The fact, for example, that the instrument is payable to bearer is a representation which, in a question with a transferee by delivery, binds both the company issuing the instrument and any holder who has transferred it by delivery.[4] So in framing debentures it is usual to insert statements and stipulations that the instrument shall be transferable free from equities,[5] that the company will pay the

[1] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, s. 91 (2)).

[2] See Palmer, *Company Precedents*, 6th ed., 620.

[3] *Supra*, p. 566 *et seq.*

[4] *Re Blakely Ordnance Co.*, 1867, L. R. 3 Ch. App. 154 ; *Re General Estates Co., ex parte City Bank*, 1868, L. R. 3 Ch. App. 758, at 762.

[5] Such a statement is a statement of fact, and so the doctrine of personal bar applies—*Re Romford Canal*, 1883, 24 Ch. D. 85. A statement of fact, such as that "this debenture is transferable by delivery," is none the less a statement of fact although it involves a conclusion of law. "When you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact," *i.e.* may give rise to personal bar (per Jessel, M. R., *Eaglesfield* v. *Marquis of Londonderry*, 1875, 4 Ch. D. 693, at p. 702). It is common in debentures payable to bearer to provide that the holder may at any time write his name across the document. The effect of this is to put a stop to the quasi-negotiability of the instrument, and make it payable to the person whose name is so written.

bearer without requiring him to produce a written assignation, and so on. Representations of this sort, being representations of fact made with the intention that they shall be acted on, have the effect of barring both the issuer and holder of the instrument from denying their truth as against any person acting on them.[1] In the case of debenture stock certificates payable to bearer, the stipulations designed to ensure the negotiability, as far as possible, of these certificates, are embodied in the deed constituting the stock, so that the certificates themselves are in the simplest possible form, and contain merely a reference to the principal deed. The holders of the certificates are bound by the provisions of the deed constituting the stock; and where, as is usual, every effort is made in this instrument to make the certificates as completely negotiable as possible, the effect is that the certificates, even where they are not (as they probably are in most cases) negotiable by the custom of merchants, become quasi-negotiable by personal bar.

Debentures in blank.

Debentures and certificates of debenture stock may be issued with a blank left for the name of the holder. Such instruments, while invalid as legal instruments, are nevertheless held in England to be effectual in equity to constitute a charge on the property of the company.[2] So in a recent case, where a company delivered to certain lenders sealed debentures, blank in the name of the obligee, it was held that the debentures in question, though void as legal instruments, gave their holders a good equitable claim, and entitled them to rank along with the other debenture-holders up to the amount of their debt.[3] It has been held by the Supreme Court of the United States, that bonds issued in blank by a company are negotiable and payable to bearer, any holder having the power to fill up the blank with his own name, or make them payable to himself or order.[4] In Scotland, by the Act 1696,

[1] The cases illustrating the application of this doctrine to debentures are treated *supra*, p. 566 *et seq.* The effect of a stipulation that anyone who acquires the debenture in *bonâ fide* and for valuable consideration shall get a good title, in spite of any defect in the title of his predecessors, is more doubtful—cf. *Crouch* v. *Crédit Foncier*, 1873, L. R. 8 Q. B. 374. It appears, however, that even this may be effectual, at least against the company issuing it, on the ground of personal bar—*Re Agra and Masterman's Bank*, 1867, L. R. 2 Ch. App. 391; *Rumball* v. *Metropolitan Bank*, 1877, 2 Q. B. D. 194.

[2] *Re Strand Music Hall*, 1865, 3 De G. J. & S. 147, in which case mortgage bonds, constituting a first charge on the property of the company, but blank in the name of the payee, were deposited by the company with a lender in security of a loan.

[3] *In re Queensland Land and Coal Co.* [1894], 3 Ch. 181.

[4] *White* v. *Vermont and Mass. Rwy. Co.*, 1858, 21 Howard, 575.

c. 25, "bonds, assignations, dispositions, and other deeds," blank in the name of the person in whose favour they are conceived, are null.[1] The notes of trading companies are, however, expressly excepted by the Act; and, as regards debentures, much would depend upon the form of the debenture, which might be nothing more than an acknowledgment of debt, and so valid.

Debentures to bearer, capable of registration.

Not infrequently debentures are issued payable to bearer, but capable of being registered at any time. The advantage of this form of debenture is that, while the instruments are transferable by delivery so long as they are unregistered, a holder can at any time put a stop to such negotiability as they possess and obtain full protection, by registration.

Coupons.

The interest on debentures payable to bearer is usually made payable on the presentation of annexed coupons.[2] Coupons are a convenient means of enabling the debenture-holder to collect interest, being commonly forwarded for collection through a banker. Before the interest is paid, they are evidence of title to demand the interest; and, after the interest is paid, they serve the purpose of vouchers or receipts. By means of coupons, moreover, the holder is enabled to anticipate his interest; for the coupons, being negotiable,[3] may be negotiated before their maturity, or discounted, or pledged in security of advances. It has been held by the Supreme Court of the United States, that coupons, if not paid when due, themselves bear interest from the date of maturity till they are paid. "Being written contracts for the payment of money, and negotiable because payable to bearer, and passing from hand to hand like other negotiable instruments, it is quite apparent on general principles that they should draw interest after it is unjustly neglected or refused."[4] Under the Stamp Act, 1870, s. 48, and Schedule, *voce* Bill of Exchange, as well as by the later Stamp Act of 1891 (54 & 55 Vict. c. 39), which superseded it, any "coupon or warrant for interest attached

[1] As to the Act of 1696, c. 25, see Bell, *Lect.* i. 239, etc.; Ersk. iii. 1. 32; iii. 2. 6. *Vide supra*, p. 515 *et seq.*

[2] Coupons to bearer are sometimes also attached to debentures to registered holder. In the United States, coupon bonds are issued by the Federal Government, by States, and by many municipalities and railway companies. These are largely held in this country. As to the issue of promissory notes with coupons attached, see *Maclae* v. *Sutherland*, 1854, 3 E. & B. 1. See also *infra*, p. 589.

[3] Stamp Act, 1870, s. 48. *Australian Morgage Co.* v. *Commissioners of Inland Revenue*, 1888, 16 R. 64. In *Lang* v. *Smyth*, 1831, 7 Bing. 284, as explained in *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. 337, at p. 356, and in *Picker* v. *London and County Bank* (1887), 18 Q. B. D. 515, bonds were held not negotiable apart from the coupons.

[4] *Arents* v. *Commonwealth*, 1863, 18 Grat. 750.

to or issued with any security" is exempted from the 1d. stamp duty exigible upon bills of exchange payable on demand. It was held that this exemption did not cover interest coupons which were pasted upon the original debenture, on its being renewed by minute for a further term of years after its original term of endurance had expired, but that they fell to be stamped with a 1d. stamp.[1] By the Finance Act, 1894, s. 40, however, it is provided that a coupon for interest on a marketable security, as defined by the Stamp Act, 1891, being one of a set of coupons, whether issued with the security or subsequently issued in a sheet, shall not be chargeable with any stamp duty.[2]

Stock certificates to bearer, with coupons, under the Local Authorities Loans (Scotland) Acts, 1891 and 1893.

By the Local Authorities Loans (Scotland) Act, 1891, s. 41, local authorities may issue to stockholders stock certificates to bearer, that is to say, certificates of title to the stock entitling the bearer to the stock therein specified, and transferable by delivery, with coupons entitling the bearer of the coupons to the dividends on the stock. The stock represented by such stock certificates to bearer is charged on the same securities, and is subject to the same powers of redemption and other powers, and—save as regards the mode of transfer and of payment of dividends thereon, and save so far as a stock certificate to bearer is a negotiable instrument—is subject to the same incidents in all respects as if that stock had continued to be registered in the stock register as transferable in books or by deed (s. 41 (13)).[3] The form of stock certificate with coupons to bearer under this Act is given in Schedule K attached to the Act. The term local authority, as used in this Act, means any county council, town council, or any other authority whatever having power to levy a rate, including public statutory commissioners or trustees having power to levy a rate.[4] Similarly, by the provisions of the Local Authorities Loans Act, 1875, applicable to England, the issue of stock certificates to bearer is authorised. Besides, there exist many local Acts authorising the creation of debenture stock, county stock, corporation stock, municipal stock, and so on, and providing for the issue, in connection therewith, of stock certificates to bearer.[5]

[1] *Australasian Mortgage Co.* v. *Commissioners of Inland Revenue*, 1888, 16 R. 64. The same decision was given by the English Courts in *Rothschild* v. *Commissioners of Inland Revenue*, L. R. [1894] 2 Q. B. 142.

[2] 57 & 58 Vict. c. 30, s. 40.

[3] For the other rules regulating the issue of such stock certificates, with coupons to bearer, see 54 & 55 Vict. c. 34, s. 41. Cp. also the Local Loans Act, 1875 (38 & 39 Vict. c. 83, s. 5), applicable to England.

[4] Cf. 54 & 55 Vict. c. 34, s. 4, and 56 & 57 Vict. c. 8, s. 5.

[5] Stock certificates to bearer are subject to the same stamp duty as share warrants issued under the provisions

Stock certificates, with coupons to bearer, under the National Debt Act, 1870.

In the National Debt Act, 1870 (33 & 34 Vict. c. 71), by which Statute the earlier Acts as to the funded debt are consolidated, it is provided by sec. 26: "A stockholder may obtain a stock certificate, that is, a certificate of title to his stock, or any part thereof, with coupons annexed, entitling the bearer of the coupons to the dividends on the stock." By sec. 32, a stock certificate, unless a name is inscribed therein, shall entitle the bearer to the stock therein described, and shall be tranferable by delivery. When a stock certificate is outstanding, the stock represented by the certificate ceases to be capable of transfer in the books of the bank. The bearer of such a stock certificate, by inserting in it the name of some person, may convert it into a "nominal" certificate, which is not then transferable.

Exchequer bills, Treasury bills, etc.

Exchequer bills, which form the principal part of the unfunded debt of Great Britain, are negotiable instruments. These instruments were originally issued under the Act 48 Geo. III. c. 1, but are now regulated by 29 & 30 Vict. c. 25. Their negotiability was established in *Wookey* v. *Pole*.[1] In that case an exchequer bill, payable "to —— or order," was improperly pledged with a bank in security of advances by an agent, in whose hands it had been placed for sale. On the bankruptcy of the agent, the Court held that the property in such an exchequer bill passed by delivery like that in bank notes and bills of exchange indorsed in blank, and therefore that the owner could not recover against the bank. So where the question arose whether a bank had a lien over exchequer bills deposited with them, the Court had no doubt that banker's lien extended as much to such instruments as to other negotiable securities passing by delivery, though, in the circumstances of the particular case, the exchequer bills having been delivered to the bank merely for the purpose of receiving the interest and exchanging them for new ones, the lien was held not to apply.[2] Exchequer bonds, which are also regulated by 29 & 30 Vict. c. 25, are payable to bearer simply. A portion of the unfunded debt is now constituted by Treasury bills, which were introduced by 40 & 41 Vict. c. 2.

Dividend warrants.

In *Partridge* v. *Bank of England*,[3] it was held that a dividend warrant payable to A., without the addition of the words "order" or "bearer," was not negotiable, although it

of the Companies Act, 1867. See Stamp Act, 1891, Sched. I., sub-tit. Share Warrant. As to negotiability and stamping of share warrants, see pp. 593, 594, and note.

[1] 1820, 4 Barn. & Ald. 1.

[2] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787. See per Lord Campbell at p. 805

[3] 1846, 9 Q. B. 396.

bore A.'s receipt, and was in practice treated by bankers as negotiable. This case, however, was doubted in *Goodwin* v. *Robarts*;[1] and, under the Bills of Exchange Act, 1882, instruments within the Act are negotiable unless they contain words prohibiting transfer, and it appears that dividend warrants are within the Act.[2] A dividend warrant, indeed, in its usual form, is practically an ordinary cheque; and by the Bills of Exchange Act, 1882, s. 95, the statutory provisions as to crossed cheques apply to a warrant for payment of dividend.[3] By sec. 97 (3) of the Bills of Exchange Act, 1882, it is provided that nothing in the Act shall affect "the validity of any usage relating to dividend warrants, or the indorsement thereof,"—a provision intended to protect the practice, where a dividend warrant is payable to the order of two or more persons, of paying it on the indorsement of any one of them.[4]

Post-office orders.

Unsigned post-office orders are not negotiable by delivery. The post-office regulations with regard to these instruments provide, indeed, that, when presented for payment by a banker, they shall be payable without the signature of the payee, provided they bear the stamp of the banker. The effect of this regulation, however, is not to make these instruments transferable by delivery among all persons having banking accounts, but merely to make the stamp of the banker a substitute for the signature to the receipt of the original payee.[5] In the case referred to, the plaintiffs and the plaintiffs' secretary both banked with the Union Bank. The secretary paid into his own account certain post-office orders belonging to the plaintiffs, which the Union Bank subsequently cashed. "The bank received the post-office orders innocently; but they received them, not for the plaintiffs, but for the secretary, who, in so paying them into his own account, was acting without authority." Accordingly, the defendants were held liable.

Letters of credit.

A letter of credit is a document in which the granter requests that money be paid, or credit be given, to a particular person, in whose favour it is drawn, upon the credit of the granter. It is called a general letter of credit, when the request to advance money or give credit to the person named in it is addressed to all persons in general, or, in other words, to anyone to whom it

[1] 1875, L. R. 10 Ex. 337, at 354.

[2] Bills of Exchange Act, 1882, ss. 8, 95, and 97 (3).

[3] As to these provisions, see *supra*, p. 573; also 45 & 46 Vict. c. 61, ss. 76–82.

[4] Chalmers on *Bills*, 5th ed., p. 322.

[5] *Fine Art Society* v. *Union Bank of London*, 1886, 17 Q. B. D. 705, see at 713.

may be shown.[1] It is called a special letter of credit, when the request is addressed to particular persons by name, or to a particular class of persons, for example, the correspondents of some bank. To some extent letters of credit partake of the nature of guarantees; but frequently they amount to direct and independent obligations.[2] As explained by Bell in his *Commentaries*, where the letter is purchased by the person wishing for the foreign credit, or is granted in consequence of a cheque on his cash account, or procured on the credit of securities lodged with the person who grants it, or in payment of money due by him to the payee, the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant.[3]

Special.

A special letter of credit, as above defined, is available only to the person in whose favour it is drawn; and, accordingly, an instrument in this form is not negotiable.[4] At the same time, such a special letter of credit may be indorsed and delivered by the payee to a third party, and the indorsation and delivery constitute an authority to the third party to draw upon the persons to whom the letter of credit is addressed. Since the instrument is not negotiable, the transferee takes it subject to any equities pleadable against the payee; but the indorsation and delivery, if for value, are effectual to transfer the rights of the payee in the letter, such as they are. Further, the mandate contained in such indorsement and delivery is not cut down by the supervening bankruptcy of the payee. Thus where a special letter of credit was blank indorsed by the payee, and delivered to a bank for value received, and the payee subsequently became bankrupt, it was held, in a competition between the transferee of the letter and the trustee in the sequestration of the payee, that the former was entitled to uplift its contents preferably to the trustee.[5] Where the letter is addressed to definite persons, the granter is not answerable for payments made by a third party, other than the addressees, who thrusts himself forward and pays to the payee.

General.

On the other hand, in a general letter of credit, where the granter undertakes generally to honour bills, or repay advances, made to the payee, any person whatsoever, who takes bills or makes

[1] *British Linen Co.* v. *Caledonian Insurance Co.*, 1861, 4 Macq. 107; *In re Agra and Masterman's Bank, ex parte Asiatic Corporation*, 1867, L. R. 2 Ch. App. 391.

[2] See *infra*, p. 662.

[3] Bell, *Com.* i. 389.

[4] *Struthers* v. *Commercial Bank*, 1842, 4 D. 460; *Orr & Barber* v. *Union Bank of Scotland*, 1854, 1 Macq. 513.

[5] *Struthers* v. *Commercial Bank of Scotland*, 1842, 4 D. 460.

advances upon the faith of the letter, can enforce the liability of the granter of the letter. As soon as the general offer in the letter is acted on by anyone, a contract is completed between this party and the granter of the letter, so that the effect is the same as if the letter had been specially addressed to him. Further, any person cashing a draft in pursuance of such a general letter of credit, or taking and paying for bills upon the faith of it, in conformity with its terms and requirements, is not affected by equities which might be pleaded by the granter of the letter against the person in whose favour it was granted.[1] To this extent a general letter of credit is of the nature of a negotiable instrument. Thus, too, so-called marginal letters of credit, which are in the form of a bill, or bills, of exchange addressed to bankers, the sum and date being left blank, with a note in the margin requesting the person to whom the bill may be presented to cash the bill, or bills, of exchange which are alongside of the note, to the extent of the sum named, are really negotiable; a *bonâ fide* holder for value is unaffected by private agreements between the granter and the grantee, and, in the absence of notice, can enforce the contract against the granter.[2]

The granter of a letter of credit is not, however, answerable unless the conditions implied or expressed in the letter are strictly complied with. So if a letter of credit requests the persons to whom it is addressed to "honour the drafts of A., and charge the same to the account of B.," the persons to whom the letter is addressed have an implied duty to see that the signatures to the drafts are genuine, and are not entitled to assume that the person presenting the letter is necessarily the person entitled to the drafts. If, failing in this duty, they pay on a forged draft, the loss is their own. Moreover, in such a case, as between the granter and the grantee of the letter, at least where the letter is granted for a sum paid down, the granter must pay back the money to the grantee, and the fact that the letter of credit has come into his possession will not save him.[3] So also if there are expressed in the letter conditions precedent to the drawing of the bill, they must be exactly complied with.[4] A qualification frequently inserted, is that drafts under the letter of credit

[1] *In re Agra and Masterman's Bank, ex parte Asiatic Banking Corporation*, 1867, L. R. 2 Ch. App. 391.

[2] *Bauner* v. *Johnstone*, 1871, L. R. 5 H. L. 157. The form of a marginal letter of credit may be found in *Maitland* v. *Chartered Mercantile Bank*, 1869, 38 L. J. Ch. 363.

[3] *Orr & Barber* v. *Union Bank of Scotland*, 1854, 1 Macq. 513.

[4] *Union Bank of Canada* v. *Cole*, 1877, 47 L. J. C. P. 100.

are only to be cashed when drawn for the price of goods, and when presented with the bills of lading and other shipping documents relative to these goods. In letters of this sort, which are known as "document" credits, bankers and others, who cash drafts or make payments to the payee without requiring the necessary documents, exceed their mandate, and cannot claim repayment from the granter of the letter of credit. Even where the letter of credit is not expressed as a document credit, yet if the bankers to whom it is presented know that it is really of that nature, they are bound to act on that knowledge; and if they disregard it, they cannot enforce the contract against the granter.[1]

Circular notes.

Circular notes are a particular form of letters of credit, used mainly by travellers. They are issued generally for definite sums, and are cashed directly, without the intervention of drafts, on presentation to any of the agents or correspondents of the granter, whose names are usually stated in the instrument. Such notes are issued against a payment of money corresponding to their amount; and the issue is, as a rule, accompanied with a letter of indication, in which are stated the terms upon which the traveller is entitled to draw on the issuer of the notes, and to which he appends his signature, to guard against forgery. The sum in the letter is payable only if the grantee of the letter choose to use it. To certain effects such instruments are negotiable. Thus in *Conflans Quarry Co.* v. *Parker*,[2] in which case the law and practice respecting this class of instruments were fully discussed, certain circular notes, which, along with a letter of indication, had been remitted by post to the plaintiff by his agent, were lost in the course of transmission. The plaintiff claimed repayment from the issuing bank of the sum paid by him for the notes, and tendered the letter of indication, which had arrived safely. The Court, however, held that there was no obligation on the issuing bankers to refund *simpliciter*, but that they were entitled to debit his account with the amount of the notes, unless they were offered proper indemnity. The judgment proceeded on the ground that there was a possibility that the bank might be called upon to pay the notes, for they might get into the hands of some dishonest person, who would get them cashed by some of the indicated correspondents of the bank, who would thereupon have recourse against the bank. "The possession

[1] *Maitland* v. *Chartered Mercantile Bank of India, London, and China*, 1865, 2 H. and M. 440.

[2] 1867, L. R. 3 C. P. 1. Forms of a circular note, and corresponding letter of indication, may be found in this case.

of the letter of indication does not preclude this. The correspondent who cashes a circular note ought to, and commonly does, for his own protection, look at the letter of indication, for the purpose of identifying the holder of the circular note; but his doing so is not made a condition precedent. If he cashes the circular note for the person mentioned in the letter of indication, he has recourse against the banker, although, from civility, overconfidence, or mere omission, he may not have asked for the letter of indication. And, on the other hand, if, after the letter of indication has been properly filled in by the rightful owner with his signature, a foreign correspondent cashes a circular note for a thief, who has succeeded in stealing the letter of indication and circular note, and in forging the name of the holder, no care in looking at the letter of indication can eke out a right to recover against the banker, as upon a payment to the right person."[1]

For the purpose of the Stamp Acts, letters of credit are included under "bills of exchange,"[2] and must be stamped; but letters of credit drawn in the United Kingdom, authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom, are exempted.[3]

Foreign instruments; bonds of foreign and colonial Governments.

As has been pointed out, a distinction is taken, in regard to what is necessary to establish negotiability, between documents of foreign origin and instruments whose nature, incidents, and effects are defined and regulated by British law.[4] As regards foreign instruments, the Courts of this country, in determining whether such instruments are negotiable, are guided solely by the tenor of the instrument, and by the usage of the markets of this country in respect to it. Dealings in foreign securities of various sorts, many of them purporting to be negotiable, have in recent years become very common in this country, and a considerable number of questions regarding the legal rights of parties under such instruments have been the subject of legal decision. Almost the earliest case was *Glyn* v. *Baker*,[5] in 1811, in reference to East India bonds. The plaintiff and defendant in that case had lodged their respective East India bonds with the same bankers, who misappropriated the defendant's bonds, and, on his demand, delivered to him in their stead the bonds belonging to the plaintiff, which were payable to

[1] *Per curiam* in *Conflans Quarry Co.* v. *Parker*, 1867, L. R. 3 C. P. 1. See also *Waterson* v. *Edinburgh and Glasgow Bank*, 1858, 20 D. 642.

[2] 54 & 55 Vict. c. 39, s. 32.

[3] 54 & 55 Vict. c. 39, Sched. I., *voce* Bills of Exchange, Exemp. 4.

[4] *Vide supra*, p. 554 *et seq.*

[5] 1811, 13 East, 509.

the same payee, and blank indorsed by him. The defendant, not knowing that the bonds handed to him were not his own, sold them; but the Court held that the bonds were not negotiable, and that the plaintiff might recover the proceeds of the bonds from the defendant.[1] The first case in which a foreign instrument, properly speaking, was recognised as negotiable in England was *Gorgier* v. *Mieville*,[2] in 1824; and upon this decision the whole doctrine of the negotiability of foreign securities, subsequently developed, mainly rests. In *Gorgier* v. *Mieville*, Prussian Government bonds, by which the King of Prussia bound himself to pay to any person who should, for the time being, be the holder of the bond, and which were proved to be treated as negotiable in the London money market,[3] were wrongfully pledged by the plaintiff's agent. The Court held that the bonds were negotiable, and that the plaintiff could not recover them from the pledgee, who had acted in good faith. This case, which has been frequently approved, was distinguished from *Glyn* v. *Baker*, on the ground that the bonds were practically in terms payable to bearer, and were proved at the trial to be accustomably transferable by delivery.[4] *Lang* v. *Smyth*,[5] in 1831, had reference to Neapolitan bonds, with coupons attached to them, which latter referred to a certificate.[6] Certain of the coupons belonging to the plaintiff were fraudulently pledged apart from the certificate by an agent of the plaintiff with the defendant, who took them *bonâ fide*. In an action by the plaintiff to recover the amount received by the defendant on the coupons, it was held to have been rightly left to a jury to say whether the coupons without the certificate "passed from hand to hand like money." The jury found in the negative, and the plaintiff accordingly was successful; but if the usage had been found the other way, the Court would no doubt have upheld the negotiability of the instruments.[7]

[1] Immediately on this decision the Act 51 Geo. III. c. 64, was passed, making the bonds of the East India Company negotiable.

[2] 1824, 3 B. & C. 45.

[3] The report does not say how long the usage in the English markets to treat these bonds as negotiable had lasted. It is certain, however, that the Court could not have required proof of immemorial usage, as kings of Prussia only came into existence in 1699.

[4] See per Abbot, C. J., in *Gorgier* v. *Mieville*, 1824, 3 B. & C. 45, at 47.

[5] 1831, 7 Bing. 284.

[6] The certificate gave the holder the option of converting his bonds into funded debt; the interest was paid to the holder of the coupon without production of the certificate, but the bonds were, it appeared, not in use to be sold in the market without the certificate.

[7] See observations on this case per Cockburn, C.J., in *Goodwin* v. *Robarts*, 1875, L. R. 10 Ex., at p. 356. Cf. also *Attorney-General* v. *Bouwens*. 1838, 4 M. & W. 171, in which Russian, Danish, and Dutch bonds were treated as negotiable; and

Scrip of foreign bonds; bonds of foreign companies.

The doctrine of the negotiability by usage of the bonds of foreign Governments having been established, the same principle was next applied to the scrip for the bonds of foreign Governments. In *Goodwin* v. *Robarts*[1] the instruments whose negotiability was in question were scrip issued by the Russian and Hungarian Governments, promising to give to the bearer, after all instalments were paid, a bond for the amount, with interest. It was stated in the special case submitted to the House of Lords that the scrip of such loans to foreign Governments was largely dealt in by bankers and money-dealers in England, and that for over fifty years it had been the usage among such bankers and money-dealers to buy and sell such scrip, to advance money upon the security of it, and to pass the scrip, upon such dealings, by mere delivery as a negotiable instrument; which usage had always been recognised by the foreign Governments or their agents delivering the bonds, when issued, to the bearers of the scrip. On these facts it was held that the scrip was negotiable, and that an owner who had left some of it in the hands of his broker, who had fraudulently deposited it with a banker as security for a loan to himself, could not recover either the scrip itself or its value from the banker, the latter being a *bonâ fide* holder for value. The judgment in the House of Lords was based partly on the principle of *Gorgier* v. *Mieville*[2] and partly on the principle of estoppel.[3] The decision in *Goodwin* v. *Robarts* has been followed in *Simmons* v. *London Joint Stock Bank*,[4] where the instruments were cedulas, or foreign bonds with coupons attached; and in other cases.[5] Finally, the doctrine of the negotiability of foreign instruments by the usage of the merchants of this country has been applied to instruments issued by foreign companies.[6]

Heseltine v. *Siggers*, 1848, 1 Ex. 856, where Spanish bonds had their negotiability recognised.

[1] 1875, L. R. 10 Ex. 337; 1876, L. R. 1 App. Cas. 476.

[2] 1824, 3 B. & C. 45, *vide supra*, p. 589.

[3] *Vide supra*, p. 564. Lord Selborne carefully confined his judgment to securities of foreign origin. In *Rumball* v. *Metropolitan Bank*, 1877, 2 Q. B. D. 194, the principle was applied in the case of scrip of English origin.

[4] [1892] App. Cas. 201.

[5] *London and County Bank* v. *London and River Plate Bank*, 1889, 21 Q. B. D. 535. In *Symons* v. *Mulkern*, 1882, 30 W. R. 875, bonds for French Rentes, payable to bearer, were recognised to be negotiable securities.

[6] *Bentinck* v. *London Joint Stock Bank* [1893], 2 Ch. 120; see also *Sheffield* v. *London Joint Stock Bank*, 1888, L. R. 13 App. Cas. 333, in which case, as the decision is explained in *Simmons* v. *London Joint Stock Bank* [1892], App. Cas. 201, the negotiability of the instruments (bonds of American railways) was not questioned.

Two elements required to establish the negotiability of a foreign instrument.

Accordingly, it may be taken as now conclusively settled that the negotiability of documents of foreign origin will be recognised by the Courts of this country where the following two requisites are established:—(1) that the nature of the instrument indicates an intention that the property in it shall pass to a transferee by delivery, without further act, or, at least, that its tenor contains nothing inconsistent with such intention;[1] and (2) that, by the general usage of bankers and other dealers in securities in this country, the instrument is accustomably transferable in this country by delivery, without further act.[2] If these two elements concur, the negotiability of a foreign instrument is recognised by the Courts of this country, even though the instrument is not negotiable in the country in which it was issued. On the other hand, an instrument that is negotiable by the law of a foreign country, as a bond issued by the Prussian Government, which was negotiable in the fullest sense in Prussia, will not be a negotiable instrument by the law of England—so as, for instance, to give a *bonâ fide* holder for value a good title against an owner of the instrument, from whom it has been stolen—in the absence of any evidence of a custom of merchants in this country to treat it as negotiable.[3] "If," observed Lord Esher in the case referred to, "all that can be proved is that by the law or custom in Prussia the instrument is negotiable, then the answer is, that an English Court and English merchants are not bound by a law or custom of trade in Prussia. To prove that an instrument is negotiable in the sense required, there must be something to make it so by English law." All questions, in short, as to the rights of the transferor and transferee of a document of title to a debt, which, though of foreign origin, is dealt with in this country, including the question whether the document is negotiable, are determined according to the law of this country, following the usage of merchants in this country; so that evidence of usage in the foreign country of origin is unnecessary.[4]

[1] For example, in *London and County Banking Co. Lim.* v. *London and River Plate Bank Lim.*, 1887, L. R. 20 Q. B. D. 232, the instruments (share certificates in an American railway company) indicated an intention that they should pass by transfer only, and not by mere delivery. Therefore, though it was proved that, by the usage of English bankers, the certificates signed in blank were transferable by mere delivery, and were dealt with like bonds payable to bearer, yet they were held not to be negotiable.

[2] As to what usage it is necessary to prove, *vide supra*, p. 552 *et seq.*

[3] *Picker* v. *London and County Banking Co. Lim.*, 1887, 18 Q. B. D. 515.

[4] *Gorgier* v. *Mieville*, 1824, 3 B. & C. 45; *Williams* v. *Colonial Bank*, 1888,

Liability of foreign Governments to bond-holders.

In connection with bonds given by foreign Governments to secure the payment of loans, it is important to determine what is the liability of the foreign Government and its agents in this country. The matter was before the Court of Appeal in England in a case[1] where the holder of bonds, issued by the Peruvian Government through agents in England, in which the general revenue of the Republic, and in particular the proceeds of the guano imported by the Republic into the United Kingdom were pledged, sued the English agents to have it declared that he and the other bond-holders had a claim upon the proceeds of the guano in priority to certain other claimants. It was held that, the guano being the property of a foreign Government, the Court had no jurisdiction to attach it, and that no action could be maintained against the Peruvian Government or their English agents. "The municipal law of this country," observed Jessel, M. R., "does not enable the tribunals of this country to exercise any jurisdiction over foreign Governments as such. . . . These so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the Government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign Government, or even by the ordinary

38 Ch. Div. 388; 1890, 15 App. Cas. 267; *Lee* v. *Abdy*, 1886, 17 Q. B. D. 309; *Alcock* v. *Smith* [1892], 1 Ch. 238, at 255. Instances of foreign instruments which have been recognised by the Courts as negotiable in this country are:—Neapolitan bonds, with coupons to bearer [*Lang* v. *Smyth*, 1831, 7 Bing. 284]; bonds of King of Prussia [*Gorgier* v. *Mieville*, 1824, 3 B. & C. 45]; scrip of Russian Government for bonds payable to bearer, and Austro-Hungarian scrip [*Goodwin* v. *Robarts*, 1876, 1 App. Cas. 476]; Unified Egyptian bonds, Egyptian Preference bonds, and New South Wales bonds [*London and County Bank* v. *London and River Plate Bank*, 1889, 21 Q. B. D. 535]; cedulas or bonds of the Buenos Ayres Land Mortgage Bank [*Simmons* v. *London Joint Stock Bank* [1892], App. Cas. 201]; bonds of various American railways [*National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740]; Baltimore and Potomac Railway bonds, and Delaware and Hudson Railway bonds [*Easton* v. *London Joint Stock Bank*, 1887, L. R. 34 Ch. Div. 95]; bonds of New York, Pennsylvania, and Ohio Railroad Co. [*Bentinck* v. *London Joint Stock Bank* [1893], 2 Ch. 120]; bonds for French Rentes [*Symons* v. *Mulkern*, 1882, 30 W. R. 875]. The following instruments of foreign origin have been held *not* to be negotiable in this country:—Certificates of shares in the Pennsylvania Railway Co. [*London and County Banking Co.* v. *London and River Plate Bank*, 1887, 20 Q. B. D. 232]; certificates of shares in New York Central Railway Co., with a blank power of transfer [*Cady & Williams* v. *Colonial Bank*, 1890, L. R. 15 App. Cas. 267; see per Lord Herschell, at 285]; Prussian Consolidated bonds [*Picker* v. *London and County Banking Co.*, 1887, 18 Q. B. D. 515].

[1] *Twycross* v. *Dreyfus*, 1877, L. R. 5 C. D. 605.

tribunals of the country which issued them, without the consent of the Government of that country. That being so, it appears to me that the bond in question confers no right of action on the plaintiff." So James, L.J., observed in the same case: "You cannot sue the Peruvian Government; and it would be a monstrous usurpation of jurisdiction to endeavour to sue a foreign Government indirectly, by making its agents in this country defendants, and then saying, 'You have got the money of the Government, and you ought to apply that.' It really would be indirectly endeavouring to make the foreign Government responsible to the jurisdiction of this Court."[1] Similarly where a foreign Government grants a concession, on the faith of which a company is formed, and a loan raised, and bondholders constituted, if the foreign Government choose afterwards to revoke the concession, its right to do so cannot afterwards be questioned in any legal proceedings in this country.[2] The bonds or obligations of foreign Governments, in short, only import promises by the foreign Governments, which cannot be sued on.

Scrip. Scrip issued in this country by the agent of a foreign Government was recognised as negotiable in *Goodwin* v. *Robarts*.[3] In that case the form of the scrip, so far as material, was as follows:— "Received the sum of £20, being the first instalment of 20 per cent. upon £100 stock; and on payment of the remaining instalments the bearer will be entitled to receive a definitive bond for £100." Following this decision, scrip certificates in an English company, certifying that the bearer would be entitled to be registered as the holder of shares, were, on proof that such scrip certificates were in use to be transferred by mere delivery, held to be negotiable.[4]

Share warrants. The statutory provisions relating to the creation of share warrants are contained in the Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27–36. Sec. 27 provides that a company limited by shares, if authorised so to do by its regulations, may, with respect to any share which is fully paid up, or with respect to stock, issue a warrant stating that the bearer of the warrant is

[1] As to the non-liability of an English agent who has signed scrip issued by a foreign Government, see also *Goodwin v. Robarts*, 1875, L. R. 10 Ex. 337, at 344.

[2] *National Bolivian Navigation Co.* v. *Wilson*, 1880, 5 App. Cas. 176.

[3] 1875, L. R. 10 Ex. 337; 1876, 1 App. Cas. 476.

[4] *Rumball* v. *Metropolitan Bank*, 1877, 2 Q. B. D. 194. This is the only case in which such instruments, issued by an English company, have been held to be negotiable. Compare *Easton* v. *London Joint Stock Bank*, 1886, 34 Ch. Div. 95, 1888, 13 App. Cas. 333.

entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares or stock included in such warrant. By sec. 28 it is enacted that a share warrant shall entitle the bearer of such warrant to the shares or stock specified in it, and such shares or stock may be transferred by the delivery of the share warrant.[1] In virtue of the statutory provisions, the lawful bearer of a share warrant is entitled to the shares; and if a company issue a share warrant to a person who is not entitled, the company will be barred from denying the right of any purchaser from him. At the same time, it is not quite clear whether such share warrants are fully negotiable in the complete sense of the word. The point was before the English Courts in *Little* v. *London Joint Stock Bank*,[2] in which case Little was the owner of certain shares of £10 each in the Rio Tinto Co. Lim., an English company, which, as regards the shares held by Little, had issued warrants, stating that the bearer was entitled to the shares therein specified, under the above-mentioned provisions of the Companies Act, 1867. It was admitted in this case that these share warrants were transferable by delivery, and passed from hand to hand on the London Stock Exchange, and the decision of the Court of Appeal certainly proceeded on the assumption that the share warrants were negotiable. Bowen, L.J., however, in the course of his judgment expressed grave doubts whether the share warrants in question were "entitled to the description of completely negotiable instruments within the known commercial and legal definition of that term."

Share certificates with blank transfers.

Share certificates with blank transfers are not negotiable instruments. As, however, the rights arising under these documents are fully treated in dealing with the manner of constituting a right in security over shares, it is unnecessary to discuss the subject in this place.[3]

Pledge of negotiable instruments.

When once it is decided that an instrument is negotiable, it is, as we have seen, competent and practicable to make the debt, which the instrument embodies, the subject of pledge.[4] Such an instrument, further, affords a very convenient mode of providing

[1] Share warrants are subject to a stamp duty of an amount equal to three times the amount of the *ad valorem* stamp duty, which would be chargeable on a deed transferring the shares or stock specified in the warrant, if the consideration of the transfer were the nominal value of shares or stock—Stamp Act, 1891, Sched. I, sub-tit. Share Warrant.

[2] Reported and argued along with *Simmons* v. *London Joint Stock Bank* [1891], 1 Ch. 270.

[3] See p. 514.

[4] Bell, *Com.* ii. 23.

and acquiring security for a debt; for all that is necessary to constitute the security is that the document be handed over to the creditor, and that he take it in good faith, or, in other words, have at the time no notice of any defect in the title of the person from whom he receives it. Even if it should subsequently turn out that the pledgor was not the true owner of the instrument, a pledgee, who takes the instrument in good faith, nevertheless acquires a valid title, and can retain it for the debt for which it was pledged against the true owner.[1]

Bona fides only is necessary to secure a good title to the pledgee.

In every case, then, in which a contest arises between a pledgee of a negotiable instrument, who seeks to retain it as security for a debt, and the true owner of the instrument, in fraud of whom it has been delivered, the single question at issue is, whether the circumstances under which the document passed to the pledgee afford evidence of *mala fides* on his part, or show that he had notice of a defect of title in the person from whom he took the instrument. This question of good or bad faith is a simple question of fact, to be determined in each case by a consideration of the circumstances. Difficult questions not infrequently arise as to the effect of negligence on the part of a pledgee who has taken a negotiable instrument under circumstances which would have excited the suspicions of a prudent and careful man. It is now, however, well settled that negligence and carelessness, even though they are gross, do not in themselves prevent the pledgee of a negotiable instrument from acquiring a good title. "Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine."[2] A negotiable instrument, in other words, will be deemed to have been taken in good faith where it is in fact taken honestly, whether it is done negligently or not.[3] So Byles, J., in distinguishing deeds from negotiable instruments, lays it down, referring to the latter: "Honest acquisition confers title . . . . However gross the holder's negligence, if it stops short of fraud, he has a title."[4]

Effect of negligence on the part of the pledgee.

The burden of proof lies on the person who assails the right claimed by the party in possession. In order, then, to deprive of his title a pledgee of a negotiable instrument, whether the debt for which he holds it be large or small, it must be shown that he was actually affected with notice that there was something wrong at

Neglect to use means of knowledge at his disposal.

[1] *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740; *London Joint Stock Bank* v. *Simmons* [1892], App. Cas. 201.

[2] Per Lord Denman in *Goodman* v. *Harvey*, 1836, 4 A. & E. 870.

[3] See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, s. 90).

[4] Per Byles, J., in *Swan* v. *North British Australian Co.*, 1863, 2 H. & C. 175, at 184.

the time the instrument came into his possession; and it is not sufficient to show that, when he took it, he had means at his disposal which would have enabled him to detect the bad title of his transferor, of which means he neglected to avail himself.[1] Thus in a recent English case, certain negotiable bonds of an American railway company were stolen from the counting-house of the London agents of the company, and the theft was immediately advertised. Some years afterwards, the bonds were deposited by a customer with a Paris banker in security of an advance. In an action brought by the pledgee, the Paris banker, against the railway company and their London agents, from whom the bonds were stolen, to establish his title to the bonds and compel payment of the interest thereon, it was held that, since the bonds were negotiable instruments, the pledgee, notwithstanding that his failure to detect the bad title of the transferor was due to his neglect of means of knowledge at his disposal in the advertisements, had nevertheless not obtained the bonds under such circumstances as to disentitle him to claim as a *bonâ fide* holder for value.[2]

Negligence may be evidence of bad faith.

At the same time, negligence or failure on the part of a transferee to avail himself of the means of knowledge at his disposal, when taken in connection with surrounding circumstances, may be evidence of bad faith, or, in other words, may be an important element in proving that he had actual notice of the fraud or defective title of the person from whom he took the instrument. So it is important to inquire into the value of the consideration given for the instrument by the person who claims to hold in *bonâ fide*. An obvious disproportion between the value of the instrument and the amount given for it may supply cogent evidence of dishonesty on the part of the person taking the instrument. As was pointed out by Lord Blackburn,[3] if a man, knowing that there is something wrong, takes a negotiable instrument, he takes it at his peril, though he should not have notice what the particular wrong was; and evidence of carelessness or blindness may, with other circumstances, be good evidence upon the question whether he did know there was something wrong in it. "If he was honestly blundering and careless, and so took a bill of exchange or bank note when he ought not to have taken it, still he is entitled to recover. But if the facts and cir-

[1] *Raphael* v. *Bank of England*, 1855, 17 C. B. 161; *Jones* v. *Gordon*, 1877, 2 App. Cas. 616, at 629.

[2] *Venables* v. *Baring Bros. & Co.* [1892] 3 Ch. D. 527.

[3] In *Jones* v. *Gordon*, 1877, 2 App. Cas. 616, at 629.

cumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer, but because he thought in his own secret mind—I suspect there is something wrong, and, if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty."[1]

Pledge of negotiable instruments by an agent, in fraud of the true owner: —where there is no ground of suspicion that the agent is exceeding his power.

The application of these principles has been illustrated in several recent cases where negotiable instruments have been pledged with banks by agents in fraud of the true owners. Since any holder of a negotiable instrument has power to give a title to any person honestly acquiring it, the fact that the agent, who handed over the instrument, did so in fraud of the true owner, has no relevancy in impeaching the title of the pledgee, unless it is coupled with bad faith on the part of the latter. The only case in which negotiable securities pledged by an agent, in fraud of his principal, can be recovered by the principal without payment of the sum for which they were pledged, is where it can be shown, directly or by inference from the facts proved, that the pledgee knew that the pledge was made in violation of the agent's duty. Even though a pledgee, knowing that the person from whom he receives the securities is an agent, takes them without inquiring whether the agent has the authority of his principal, this does not prevent him getting a good title, although the agent has, as a matter of fact, been acting in fraud of the true owner. In a recent English case a broker, in fraud of the owner, pledged negotiable instruments (Argentine cedula bonds), together with other documents, with a bank, as a security *en bloc* for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. It was held, on the broker absconding, that the bank was entitled to retain and realise the securities, since there were, as a matter of fact, no circumstances to create suspicion in their minds at the time of taking the instruments.[2] "It is surely of the very essence of a negotiable instrument," said Lord Herschell, "that you may treat the person in possession

[1] Per Lord Blackburn in *Jones* v. *Gordon*, 1877, 2 App. Cas. 616, at 629.

[2] *London Joint Stock Bank* v. *Simmons* [1892], App. Cas. 201; see also *Bentinck* v. *London Joint Stock Bank* [1893], 2 Ch. 120.

of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority."[1] It was further pointed out that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker, the only consideration likely to engage the latter's attention is, whether the security is sufficient to justify the advance required. That being so, unless there is anything to arouse his suspicion, the law does not lay upon him the obligation of making inquiry into the title of the person whom he finds in possession of such securities.[2] So in a recent Scotch case, the Court had no doubt that a stockbroker, who was in possession of negotiable securities belonging to a client, had apparent authority to impledge these securities with a bank, either separately or in a lump, for any sums which he desired to borrow; and further, they had no doubt that a knowledge on the part of the bank that the securities in question belonged to clients, though the loans were in the broker's own name, did not impose any duty on the bank to distrust the apparent limits of the stockbroker's authority, or put the bank on its inquiry.[3]

—where there is ground of suspicion that the agent is exceeding his power.

On the other hand, if there is anything in the nature of the agent's business, or in the course of previous dealings between the bank and the agent, calculated to arouse the bank's suspicion that there is something wrong with the transaction, or if they are cognisant of facts which might reasonably lead to a doubt whether the person purporting to transfer the instruments is justified in entering on the contemplated transaction, then the bank will not

[1] Per Lord Herschell in *London Joint Stock Bank* v. *Simmons* [1892], App. Cas. 201, at 217.

[2] See opinion of Lord Herschell in *London Joint Stock Bank* v. *Simmons*, at p. 223.

[3] *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740; see particularly the opinion of Lord Kyllachy in the Outer House. The rule is the same in regard to money in the possession of a broker or other agent. If an agent, having the apparent ownership of money, pays it away in the ordinary course of business for onerous considerations,—pays it, for example, into his private bank account, which has been long overdrawn,—the transaction, though fraudulent as between the agent and his employer, will bind the latter, unless he can show that the recipient of the money did not transact in good faith with the agent. Even knowledge on the part of the bank, that the money was the proceeds of a sale of shares belonging to a third party, does not put them in *malâ fide*: they can retain the money and apply it in reduction of the overdraft—*Thomson* v. *Clydesdale Bank*, 1893, 20 R. (H. L.) 59; see per Lord Watson, at p. 61. As to right of retention for debts of principal, see *infra*, pp. 604, 605.

be acting in good faith if they take the instruments, shutting their eyes to the facts, and putting their suspicions aside without inquiry.[1] A bank or any other creditor who takes documents in such circumstances takes them at his peril, *et utitur jure auctoris*, even where the documents are negotiable instruments. Thus where a money-lender pledged with a bank, in security of his entire indebtedness and up to the full value of the instruments, certain negotiable instruments which had been pledged with him in security of a loan of much smaller amount, the House of Lords, on the bankruptcy of the money-lender, held that the bank could not insist on retaining them for the larger sum for which they were pledged to the bank, but that the true owner could redeem them on paying to the bank the sum for which they were originally pledged to the money-lender.[2] The judgment proceeded on the ground that the bank knew, or had means of knowing, that the money-lender held the securities in question only as a pledgee for a limited advance, and that in pledging them to the bank up to their full value, he exceeded any authority he had to deal with them. That being so, the bank was put on its inquiry, which means that in law it was deemed to know the facts which it would have ascertained if it had made inquiry.[3] For, as was pointed out by Willes, J., following the opinion of Parke, B., in a previous case, "notice and knowledge means, not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes — as suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded."[4] At the same time, the doctrine of constructive notice of the defective title of a transferor is not part of the law of negotiable instruments; and the case of *Sheffield*, even as explained in *Simmons*, seems to go further than any other case in the direction of recognising that knowledge may in certain circumstances be inferred from the nature of the transferor's business, and the course of dealing between the transferor and transferee.

[1] See opinions in House of Lords in *London Joint Stock Bank* v. *Simmons* [1892], App. Cas. 201, and in *Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333.

[2] *Earl of Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333, reported *sub. nom. Easton* v. *London Joint Stock Bank*, in L. R. 34 Ch. Div. 95.

[3] See explanation of the decision in *Sheffield's* case in *London Joint Stock Bank* v. *Simmons* [1892], App. Cas. 201; see also *Cooke* v. *Eshelby*, 1887, 12 App. Cas. 271.

[4] See per Willes, J., in *Raphael* v. *Bank of England*, 1855, 17 C. B. 161, at 174.

Cases in which the instrument itself affords grounds of suspicion.

The document itself, if for any reason its condition is such as to excite suspicion, may convey a warning; so that the transferee can acquire no better title than the person from whom he took it had. Thus the transferee of a bill which is not complete and regular on the face of it, or which is overdue at the time of the transfer, is not a holder in due course.[1] So if a holder takes a blank acceptance, or a bill wanting in any material particular, he takes it at his peril.[2] Again, if there are marks of cancellation on the instrument,[3] or if signs of alteration or erasure are apparent on it, anyone taking the instrument takes it with marks of suspicion on its face, which ought to have induced him to refuse it, or at least to carefully inquire into the circumstances under which the alteration, erasure, or cancellation was made.[4] On the other hand, where the alteration is not apparent, so that the instrument itself conveys no warning, the person taking it may be a holder in due course, and can enforce payment of it according to its original tenor. Even a holder in due course will not, however, be able to enforce payment of the instrument, as altered, unless it is shown that the alteration was rendered possible and non-apparent by the negligence of the acceptor or other party liable on the bill, in which case this party will be barred by his negligence from setting up the subsequent alteration of the bill as a defence to an action on the bill. In *Young* v. *Grote*,[5] a cheque was filled up for £50 in such a way as to allow of its being easily altered. The cheque, as drawn, was handed to a clerk of the drawer to be cashed. The clerk altered the cheque, so as to make it appear to be drawn for £350, and, on its being presented to the bank, was paid as such. It was found as a fact, that the bank had not been guilty of negligence in cashing the cheque for £350, and that the careless way in which the cheque had been drawn afforded the opportunity for making the alteration. In a question between the bank and the customer as to which of them should bear the

[1] Bills of Exchange Act, 1882, s. 29.

[2] *Awde* v. *Dixon*, 1851, 6 Exch. 869.

[3] Cf. *Scholey* v. *Ramsbottom*, 1810, 2 Camp. 485, with *Ingham* v. *Primrose*, 1859, 7 C. B. (N. S.) 82. In the latter case the bill was torn in pieces by the drawer, but the pieces were so joined together as to convey no notice of the cancellation to a stranger. See also *Redmayne* v. *Burton*, 1860, 2 L. T. (N. S.) 324.

[4] See Bills of Exchange Act, 1882, s. 64 (1); *Young* v. *Grote*, 1827, 12 Moore, 484, 4 Bing. 253; *Hall* v. *Fuller*, 5 B. & C. 790, where the instrument was altered and made payable for a larger sum. See also *Orr and Barber* v. *Union Bank*, 1852, 14 D. 395, revd. 1 Macq. 513; and *Caledonian Insur. Co.* v. *British Linen Co.*, 1859, 21 D. 1197; 1861, 4 Macq. 107.

[5] 1827, 4 Bing. 253, 12 Moore, 484.

loss of the £300, it was held that, in the circumstances, the loss must fall on the customer. The whole law on this subject has been recently considered by the English Courts in *Scholfield* v. *Earl of Londesborough*.[1] There a bill for £500 was, after acceptance, fraudulently altered by the drawer into a bill for £3500. The stamp upon the bill was sufficient to cover the larger amount, and the bill, when accepted, had spaces on the face of it, in which the words and figures necessary for the alteration were afterwards written by the drawer. In an action by a holder for value against the acceptor to recover the full amount of the bill, it was held that the acceptor of the bill was not under a duty to take precautions against fraudulent alterations in the bill after acceptance, and was guilty of no negligence. Accordingly, the holder of the bill was found entitled to enforce payment only of the amount of the bill as it was at the date of acceptance, viz. £500.[2]

The law on this subject as regards negotiable instruments other than bills has been expounded in a recent American case. Certain negotiable bonds, payable to order, and bearing the indorsement in blank of the payee, were stolen. The thief erased the indorsements, and offered the bonds for sale to the defender, representing himself as being the person named in them as payee, and being identified as such by a person known to the defender. The erasure of the indorsements was so made as not readily to attract attention, and the defender purchased the bonds in good faith, and for market value, the seller indorsing the bonds with the name of the payee. It was held, nevertheless, that the erasure ought to have put the purchaser on his guard, and that he acquired no title as against the owner.[3] "He did not take the paper fair and regular upon its face. He did not rely upon anything that appeared upon the bonds, and was not deceived or misled by them. But he relied upon the representations of the thief, and was deceived by them. Against such deception the laws applicable to negotiable paper were not intended to guard. It is their purpose to facilitate the circulation of paper, fair and regular upon its face, and to protect the *bonâ fide* purchasers of such paper."[4]

[1] [1894], 2 Q. B. 660; 1895, 1 Q. B. 536; [1896], App. Cas. 514.

[2] *Scholfield* v. *Earl of Londesborough* [1895], 1 Q. B. 536; [1896], App. Cas. 514.

[3] *Colson* v. *Arnot*, 1874, 57 N. Y. Rep. 253, reported in 15 Am. Rep. 496; see also *Angle* v. *N.-W. Insur. Co.* [1875], 2 Otto. Sup. Ct. U. S. 330, at 342.

[4] Per Earl, C., in *Colson* v. *Arnot*, 1874, 15 Am. Rep. 496, at 499.

Right of a creditor in possession of negotiable instrument to retain it for debts due to him by the owner.

This right excluded (*a*) expressly, by a contrary agreement, or by proof that the instruments lodged were for a specific purpose.

A banker, or indeed any other creditor,[1] has a general right to retain all negotiable securities belonging to a debtor, which are lawfully in his possession and subject to his control, for securing any balance on general account due to him by the debtor, unless this right has been excluded by agreement, express or implied. A special agreement between the parties, or proof that the instruments are lodged for a specific purpose, of course excludes the creditor's right of retention.[2] Where there is a memorandum of the arrangement between the parties, it is decisive in defining the terms upon which the instruments were lodged;[3] but the special agreement, or the specific purpose, must in every case be clearly ascertained, otherwise the general rule will apply.[4] A mere receipt, granted by the creditor at the time when the negotiable instruments were lodged with him, does not necessarily express the full arrangement between the parties relative to the instruments, and need not be taken as conclusively determining the terms on which the instruments were handed over. The contract of deposit being a consensual contract, the whole correspondence and communings between the parties are to be considered in determining the nature of the arrangement between them. Thus where certain negotiable bonds were deposited from time to time by a customer with a bank, receipts being granted by the bank bearing that the bonds were held "for safe keeping on your account, and subject to your order," it was held, in an action for delivery of the bonds by the trustee on the customer's sequestrated estate, that the terms of the receipts were not conclusive in instructing a special agreement which would exclude the bank's right of retaining the bonds. From a parole proof of the circumstances under which the deposits were made, it appeared that advances had been made by the bank to the customer concurrently with the making of the several deposits, and that the bank's agent had requested that the instruments be deposited in order to cover these advances.[5] Again, where a cash credit had been granted by a bank to a firm, and subsequently, on the death

[1] What is known as banker's lien appears, at least as regards negotiable instruments, to be simply the right of retention of common law. See per Lord Pres. Inglis in *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12, at p. 16.

[2] *Farrar & Rooth* v. *N. B. Banking Co.*, 1850, 12 D. 1190; *Allan* v. *Allan & Co.*, 1831, 9 S. 519; *Borthwick* v. *Bremner*, 1833, 11 S. 716, and 12 S. 121; *Leese* v. *Martin*, 1873, L. R. 17 Eq. 224.

[3] *Shaw* v. *Foster*, 1872, L. R. 5 H. L. 321.

[4] *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12.

[5] *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12.

of one of the partners of the firm, the credit was restricted in amount, and certain negotiable instruments were deposited by one of the partners of the firm to secure the balance due on the credit, it was held, upon the sequestration of the firm, that the bank was entitled to retain the negotiable instruments deposited by the partner in question, not only for the balance due to the bank on the cash-credit account, but also for other debts due on discount account by the firm to the bank. The judgment of the Court was based entirely upon the terms of the cash-credit bond, under which the bank was empowered "at any time to place to the debit of the said account any sum or debt owing" to it by the firm. That being so, the Court held that, by the contract between the parties, the bank was entitled at any time to put its claim on the discount account into the cash account; and that the fact that the negotiable instruments were deposited against the balance due on the cash account did not make it a deposit for the specific debt due on the cash credit, so as to preclude the bank from adding the sum due on the discount account to the debit balance on the cash account, and retaining the securities for the whole sum due.[1]

Right of retention excluded (*b*) impliedly, by a knowledge on the part of the creditor that the negotiable instruments are the property of a third party, or that the person lodging them is a trustee.

Again, a creditor's general right to retain unappropriated negotiable instruments in security of a balance due on general account, may be impliedly excluded, if it is shown that the creditor knew that the negotiable instruments were the property of a third party, other than the person by whom they were lodged, or was aware that the individual by whom they were lodged had possession of them simply as a trustee.[2] Where a person is in possession of negotiable instruments merely in a representative character, such possession does not give him a title of property in the instruments as against the true owner. If, for example, an agent or trustee becomes bankrupt with such instruments in his possession, his general creditors would have no claim on them. On the contrary, on the persons to whom the instruments really belonged proving their title, the instruments would, on petition to the Lord Ordinary under sec. 104 of the Bankruptcy Act, 1856, be struck out of the sequestration.[3] Similarly, if an individual creditor of the agent or trustee attempted to attach the documents by diligence, he would necessarily fail. "In all cases of factory, where the property remitted by the principal,

[1] *Alston's Tr.* v. *Royal Bank of Scotland*, 1893, 20 R. 887.

[2] *Ex parte Kingston*, 1871, L. R. 6 Ch. App. 632.

[3] 19 & 20 Vict. c. 79, s. 104; *M'Adam* v. *Martin's Trs.*, 1872, 11 Macp. 33.

or acquired for him by his order, is found distinguishable in the hands of the factor, and capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor, who has become a bankrupt, have no right to the specific property."[1] So in England, where a stockbroker, who has sold stock for his clients, becomes bankrupt, while the proceeds of the sale are extant and traceable in his possession, the client has a preference in bankruptcy in respect of these proceeds as against the broker's general creditors;[2] but it is otherwise where the broker has paid the money away in the ordinary course of business for onerous considerations.[3]

In a recent case, it has been held that a bank has no right to retain money—and negotiable securities are in this respect as money—deposited with it by the testamentary trustees and executors of a deceased person, *eo nomine*, against a debt due by the deceased to the bank.[4] A distinction was taken between such testamentary trustees and an executor proper or heir *in mobilibus*. It was held that testamentary trustees, like an executor-creditor, do not represent the deceased, but are merely administrators of the estate of the deceased for behoof of persons having claims against it. Following this decision, a plea of retention by a creditor of a deceased insolvent against a judicial factor, appointed to carry on a lapsed testamentary trust, has been held incompetent.[5] These decisions, however, seem contrary to the doctrine that an executor confirmed is not a mere trustee for the deceased's creditors but is towards the creditors simply *eadem persona cum defuncto*.[6]

Where negotiable instruments are pledged with a creditor by a person, who is known by the creditor to be an agent, this knowledge on the part of the creditor, while it does not prevent him from getting a good title to the instruments in security of the particular debt for which they were pledged, nevertheless prevents him from having the right to retain the instruments

[1] *Vide* Bell, *Com.* i. 268.

[2] *Ex parte Cook*, 1876, L. R. 4 Ch. Div. 123; *In re Hallett's Estate, Knatchbull* v. *Hallett*, 1879, L. R. 13 Ch. Div. 696.

[3] *Thomson* v. *Clydesdale Bank*, 1893, 20 R. (H. L.) 59. The principle does not apply between two brokers whose relation to each other is that of principals. *Mackenzie & Aitken* v. *Robertson*, 1886, 13 R. 494.

[4] *Gray's Trs.* v. *Royal Bank*, 1895, 23 R. 199; see *ante*, p. 382.

[5] *Hewitt* v. *Symons & MacDonald*, 1896, 3 S. L. T. 366.

[6] Ersk. iii. 4. 13; see also Stair, i. 18. 6. Cp. *Globe Insurance Co.* v. *Scott's Trs.*, 1849, 11 D. 618; 1850, 7 Bell's App. 296; *Stewart's Tr.* v. *Stewart's Exr.* 1896, 23 R. 739.

against the agent's principal for a general balance which may be due to the creditor by the agent. In other words, though the knowledge that a person in possession of negotiable instruments is an agent, does not afford a creditor, to whom he offers them in security, reason to suspect that the agent has no authority to pledge them, yet the creditor is not in these circumstances entitled to rely upon the deposit of the negotiable instruments as furnishing security for debts incurred by the agent obviously for his own, and not for his principal's, benefit. Thus where a stockbroker, who had in his possession negotiable instruments belonging to a client, pledged them in security for an advance which he had obtained from a bank on a loan account in his own name,—the bank being well aware that the broker was merely an agent, and not the principal in the transaction,—it was held, upon the broker's bankruptcy, that the bank was not entitled to retain the instruments for a general balance due on the broker's current account.[1] If the broker had, as a matter of fact, impledged the instruments under a contract, express or implied, that they should cover the overdraft on his current account, the decision, it was indicated, would have been different. In the absence, however, of such a contract, the bank could hold the instruments only for the balance due on the loan account, for which they had been pledged, and, on payment of that balance, could not withhold delivery of the instruments from their owners, on the plea of retaining them against the broker's private debts.[2] Similarly, it may be noted, the effect of a pledge of documents of title by a known agent is, under the Factors Acts, limited to the covering of the actual cash advances made in respect of the documents pledged.

Quære as to the right of a creditor, with whom negotiable instruments have been lodged by their owner to secure a particular debt, to retain them for a general balance?

Where negotiable instruments are lodged by their true owner with a creditor at the time of receiving a particular advance, and with a special view to covering that advance, but without the terms of deposit being definitely agreed on, the question arises, Whether the creditor can retain the instruments, not only against the particular debt in view when they were delivered, but against any general balance due to him by the pledgor? On the one hand, it may be urged that, since the security takes the form of an absolute title of property,—mere delivery of a negotiable instrument giving *ex facie* an absolute title,—the creditor has the right of retention common to all parties holding a title of property, as against persons claiming under a personal contract for retrocession. In this view, a creditor who holds negotiable instru-

[1] *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740.

[2] See opinions in *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740.

ments in security would, like the holder of an *ex facie* absolute disposition of property, qualified by a back-letter, be entitled to retain them, not only against the particular advance in view when they were lodged, but against all debts due to him by the debtor.[1] On the other hand, it may be urged that the creditor's right in negotiable instruments lodged with him in this way is merely a right of detention, and not a right of property. In this view, a creditor holding negotiable instruments in security is in the same position as if he held possession of a corporeal moveable subject in security, and his title is based on, and limited by, the circumstances and conditions of the particular transaction under which he obtained possession, and on the fulfilment of these conditions the instruments must be given up. Lord Low (Ordinary), in dealing with this question in *Alston's Tr.* v. *Royal Bank of Scotland*,[2] held, on the analogy of the under-mentioned authorities,[3] that where a claim of retention for a general balance is founded upon possession of a subject, the property of which is capable of being transferred by delivery, it is necessary to consider the circumstances, and the purpose for which possession was given; and that where negotiable securities are lodged with a creditor for the purpose of securing a particular debt, this constitutes a special appropriation, and has the effect of excluding the creditor's right of retaining them for a general balance due by his debtor. In England the balance of authority seems to be in favour of the view, that a bank, which has possession of negotiable instruments belonging to its debtor, has a lien over them for all debts due by the debtor to the bank, unless the debtor can show that the securities were deposited with express reference to a special advance or a particular debt. The mere fact that the securities were deposited at the time when a certain advance was made or a particular debt incurred, does not in itself preclude the bank from retaining them for other advances or debts due.[4] Much depends in every case on the course of

[1] Cf. *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

[2] 20 R. 887. His Lordship's decision was reversed in the Inner House, but the judgment of the Second Division proceeded wholly on the special terms of the contract (*vide supra*, p. 603), and the soundness of Lord Low's view of the law was not impeached.

[3] *Stewart* v. *Bisset*, 1770, M. App. Compensation, No. 2; *Harper* v. *Faulds*, Bell's *Octavo Cases*, 440; *Lawrie* v. *Denny's Tr.*, 1853, 15 D. 404; and the opinion of Lord Handyside (Ordinary) in *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

[4] *Wylde* v. *Redford*, 1863, 33 L. J. Ch. 51; *Re European Bank*, 1872, 8 Ch. App. 41; *London Chartered Bank of Australia* v. *White*, 1879, 4 App. Cas. 413.

dealing between the parties and the circumstances of the transaction.[1] The *onus*, however, appears always to lie on the debtor to show that the negotiable instruments were specifically appropriated to secure the particular debt; and if he fail to establish this, the creditor may retain them for all debts due to him by their owner. If, then, a party, who deposits negotiable instruments with a creditor, intends that the instruments in question should be specifically appropriated, he should see that evidence of the specific appropriation is preserved in the letter accompanying the deposit, or in the receipt for the documents got from the creditor. "The presumption," said Lord President Inglis, "is that custody gives a right of retention; and I think that that presumption cannot be rebutted without something express and distinct."[2]

Quære, Whether a creditor, holding a negotiable instrument in security of a debt, can realise and pay the debt out of the proceeds?

The further question arises, Whether a creditor, who holds a negotiable instrument in security of a debt, can, in the absence of agreement on the matter between himself and the debtor,[3] sell the instrument on the default of the debtor, and pay the debt out of the proceeds of such sale? The inquiry, like that dealt with in the last paragraph, is closely connected with the question, Whether the position of a creditor, who holds a negotiable instrument in security for a debt, is that of the pledgee of a corporeal moveable, or whether it is that of a person who holds an *ex facie* absolute title of property? If the position of the creditor is that of a pledgee, then on principle, though his possession of the negotiable instrument gives him the power to give a good title to a third party, yet, in a question with the debtor, he has merely a right to hold the instrument until his debt is satisfied; and he cannot with safety, even on the debtor's default, sell the instrument, and reimburse himself out of the proceeds, without the order of a judge, which may be obtained on a summary application to the Sheriff.[4] If the pledgee proceeds to sell without such judicial sanction, he deals with the subject of pledge in a manner other than is allowed by law, and thereby commits a legal wrong against the pledgor, which may ground an action of damages, if the latter can instruct any real damage.[5] On the

[1] *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12; *Jones* v. *Peppercorne*, 1858, Johnson, 430.

[2] Per Lord President Inglis in *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12, at 17.

[3] An agreement as to power of sale may be proved either by writ or witnesses—Bell, *Prin.* s. 204.

[4] Stair, i. 13. 11; Ersk. iii. 1. 33; Bell, *Prin.* s. 207.

[5] As might be the case, *e.g.*, where the market price of the security rose, after the unauthorised sale by the creditor.

other hand, if the deposit of a negotiable instrument by a debtor with a creditor in security of his debt is to be regarded as an absolute transfer of the property, subject to the debtor's reversionary interest,[1] then, on principle, upon the debtor's default, the creditor can sell the instrument and realise the proceeds, becoming a trustee for the debtor in respect of the surplus remaining after paying the debt.[2]

The right of a creditor with whom bills or notes have been pledged are dealt with briefly by Professor Bell in his *Commentaries*.[3] He points out that where a bill or note, when pledged, is indorsed in full to the pledgee, or is blank indorsed, the indorsement acts as an implied authority to the creditor, who has all the privileges of an onerous holder, to recover the money, when the pledged bill or note falls due, without requiring judicial aid. In regard to the right of a creditor to whom a bill or note has been simply delivered, without being indorsed, Professor Bell merely observes: "Sometimes a bill or note is more correctly pledged without being indorsed; and a question may be raised, What is the nature of the right acquired by the creditor? It appears to be merely the right of detaining the document, such as it is, and so of indirectly operating payment of the debt intended to be secured."[4] If the bills or notes referred to by Bell are instruments, for whose transfer indorsement as well as delivery is required, then it is clear that delivery, without indorsement, would not give the transferee a title to realise. If, on the other hand, Bell refers to instruments, like bills payable to bearer or indorsed in blank, which are transferred by mere delivery—and so are negotiable in the sense in which we have used the term in this chapter—the statement is important as implying that, in Bell's opinion, a creditor, with whom negotiable instruments have been pledged in security of a debt, has no implied power to realise the security on the default of the debtor. The rule in England, as stated in Byles on *Bills*, is that "a mere pledge of negotiable paper does not, it is conceived, confer a power of sale. For the pledgee is trustee of the rights and obligations of the holder. He cannot transfer his trust, but must preserve his remedies, and collect payment from the parties liable at maturity. His transfer,

[1] *Barber* v. *Richards*, 1851, 20 L. J. Ex. Ch. 135.

[2] If the debt is payable on a fixed day, the creditor's right to sell would emerge on the failure of the debtor to pay on that day; where no day of payment is named, the creditor would of course require to wait a reasonable time, and take proper steps to warn the debtor, by giving notice.

[3] M'L. ed., ii. 23.

[4] Bell, *Com.* (M'L. ed.), ii. 23.

though it may confer title, will not exonerate himself."[1] This limitation in the power of a pledgee of negotiable instruments is the more striking, seeing that in England a pledgee of an ordinary corporeal moveable has, upon the pledgor making default in payment at the stipulated time, a right to sell the pledge and reimburse himself without previous application to a Court.[2] It might be argued, that since in England, though a contract of pledge there implies at common law a right of sale, a pledgee of a negotiable instrument has no power of sale, *a fortiori* in Scotland, where a contract of pledge does not imply a right of sale, the pledgee of a negotiable instrument cannot have a right to sell it.

If the date of payment of the negotiable instrument, which a creditor holds in security, arrives while the instrument is in the creditor's hands, he is bound, as trustee for his debtor, to collect it at maturity. If he cannot get payment, he must, in the case of a bill, give notice of dishonour, and do such other acts as may be necessary to preserve the debtor's rights; and if he fail to do so, he is liable for the consequences.[3] In such a case, the creditor, on receiving payment, is entitled to apply the sum received towards reducing, or extinguishing, the debt due to him by the debtor, to whom the bill or other negotiable instrument belonged.[4] Further, it may be that, at least in the special case where the creditor is a bank, authority to realise a negotiable instrument held in security for debt, upon the default of the debtor, would be held to be implied from usage. Certainly banks in practice frequently realise the negotiable securities deposited with them by customers as security, when the customers make default in the payment of debts secured by such instruments.[5] In a note, indeed, in Smith's *Mercantile Law*, it is expressly stated that a banker, in virtue of his lien, has a right to realise the securities in his hands; but the correctness of

[1] Byles on *Bills*, 15th ed., p. 199. See also 2 Kent's Com. 13th ed., 582 *et seq.* So if the pledgee of a bill sue a third party, he sues as trustee for the pledgor, as regards the difference between the amount he has advanced and the amount of the bill —*Reid* v. *Furnival*, 1833, 1 Cr. & M. 538.

[2] See authorities collected in Smith, *Leading Cases*, 10th ed., i. 182, in notes on *Coggs* v. *Bernard*. This power of sale extends, in England, not only to a pledge of chattels, but to a pledge of stock or annuities—*Martin* v. *Reid*, 1862, 31 L. J. C. P. 126.

[3] *Peacock* v. *Purssell*, 1863, 32 L. J. C. P. 266. So where the instrument held in security is a bond with coupons attached, there is a duty on the bank to see the coupons presented as they fall due—*Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12.

[4] Bell, *Com.* ii. 23.

[5] Cf. *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740.

this statement seems open to serious question.[1] In Scotland a bank does not, merely in virtue of its so-called lien,—which appears to be nothing more than the right, common to every creditor at common law, to retain, in security of debts due, any unappropriated negotiable instruments, belonging to the debtor, which happen to be in its hands,[2]—have a right to realise negotiable instruments belonging to its debtors. Thus in *Robertson's Tr.* v. *Royal Bank*,[3] in which case the bank's lien, or right to retain negotiable instruments, belonging to a customer and in its possession, to secure a debt due by the customer on general account, was recognised and given effect to, it was nevertheless expressly stated by Lord M'Laren, that the bank could not have sold the securities in question.[4]

Where negotiable instruments are deposited with a creditor expressly in security for a particular debt, the power of the creditor to realise them in payment of the debt in question, if the debtor make default, is in most cases made a matter of agreement, oral or written, at the time when the instruments are delivered. Failing such agreement, a prudent creditor, having in view the unsettled state of the law on this matter, will not sell the negotiable securities in question, in order to satisfy the debt, till he receives judicial authority so to do.

[1] Smith's *Mercantile Law*, 10th ed., ii. 697. "The banker's rights under his lien," it is explained in the note in question, "resemble those of a pawnee." In England a "lien" differs from a "pawn" in that the former, in the ordinary case, gives no right to sell, but only a right to retain the subject till the debt be paid; whereas, a pawn gives a power to dispose of the subject, accounting for the surplus (see authorities collected in Smith's *Leading Cases*, 10th ed., in note to *Coggs* v. *Bernard*, vol. i. at p. 192 *et seq.*). It will be noted, however, that in England, according to the statement in Byles on *Bills* (quoted *supra*, p. 608), even a pawnee, where the subject pledged is a negotiable instrument, does not have an implied power of sale. The law on this matter, indeed, seems to be as doubtful in England as it is in Scotland.

[2] See per Lord President Inglis in *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12.

[3] 1890, 18 R. 12.

[4] Per Lord M'Laren in *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12, at p. 20.

CHAPTER XVIII

SECURITIES UNDER STATUTORY POWERS

Powers of statutory corporations.
Power to borrow.
Securities *ultra vires* of corporation.
Securities *ultra vires* of managing body.
Liability of directors on securities issued *ultra vires*.
Preference and construction of statutory securities.
Securities under Companies Clauses Acts.
Position of mortgagees and debenture-holders.
Applications for judicial factor on undertaking.

Subject of chapter.

THE rules of the common law as to what is necessary to constitute a real right in security do not apply to those cases where a particular body is authorised, by Act of Parliament, to grant securities in a special manner. The criterion of the validity and preferential right of such securities is not whether they confer a real right over a particular subject on the grantee or creditor, but whether they comply with the forms provided by the Act on which they are founded. The bodies upon whom the powers of granting securities endowed with a special statutory preference are bestowed may be divided into two classes, one consisting of local authorities, the other of companies incorporated by Act of Parliament for some public purpose, and endowed with special powers. This power to grant securities may either be bestowed in the special Act by which the local authority is established, or the company founded, or by a general Statute applicable to all local authorities, on the one hand, and by consolidating Statutes applicable to public companies on the other. It would serve no useful purpose, even were it practicable, to enumerate the various Statutes by which particular bodies have been empowered to grant securities of a special character, as in any question depending on the terms of a particular Act, reference must always be made to the Act itself. But there are certain points which may be discussed in relation to all such securities, whether granted by a local authority or by a company, and whether founded on a private Act of Parliament or upon one or other of the general Statutes. Before, however, entering upon these questions, it would seem necessary

to give a short summary of the law as to the powers of contract possessed by such statutory bodies.

Power of statutory corporation to contract.

A corporation or company established or endowed with particular powers, by an Act of Parliament, is not in the same category with ordinary corporations at common law. It is the creature of the Statute on which its existence or its powers depend, and therefore the extent and limits of its powers to contract must be found in that Statute.[1] It has no general power to do any act which is not contemplated by the particular Statute, or which cannot be held to be fairly implied from its provisions, even although that act is in itself perfectly lawful, and within the ordinary powers of a corporation at common law. And as the Legislature in establishing a company of a public character has regard not only to the individuals who undertake it, but also to the interests of those who may afterwards invest their money in it, as well as to the interests of the public, the assent of all the shareholders of a statutory company to an act which is *ultra vires*, and beyond the statutory powers, will not bind the company, which is an entity apart from the collective shareholders.[2] It is even more clear that the assent of all the members of a local authority or Board will not bind the corporate property, if the act thus assented to was beyond their statutory powers.[3] Thus a railway company established for the purpose of making a particular railway cannot apply its funds to the making of a different or a shorter railway,[4] or the establishment of a steamboat service,[5] or the purchase of the shares of another railway company.[6] And where the solicitor and the engineers of a tramway company undertook to pay the expenses of obtaining the private Act for a sum of £17,000, and alleged that the shareholders had ratified this transaction, the test put was: To what objects did the Statute entitle the company to apply their funds? It was found that these were only two: the expenses of obtaining the Act, and the construction of a tramway; and it was therefore held that the arrangement was *ultra vires* of the company, and could not be ratified even if every

[1] See Pollock on *Contracts*, 6th ed., p. 120; Chitty, *Contracts*, 13th ed., p. 294; Brice, *Ultra Vires*, 3rd ed., p. 37; Buckley, *Comp. Act*, 6th ed., p. 493.

[2] *Ashbury Carriage Co.* v. *Riche*, 1875, L. R. 7 H. L. 653.

[3] *Attorney-General* v. *Mayor, etc., of Newcastle* [1892], A. C. 568.

[4] *Cohen* v. *Wilkinson*, 1849, 18 L. J. Ch. 378; *Hodgson* v. *Earl Powis*, 1850, 12 Beav. 392.

[5] *Coleman* v. *Eastern Counties Rwy. Co.*, 1846, 10 Beav. 1, 16 L. J. Ch. 73; *Burns* v. *North British Rwy. Co.*, 1864, 36 Sc. Jur. 286.

[6] *Balfour's Trs.* v. *Edinburgh and N. B. Rwy. Co.*, 1848, 10 D. 1240; *Salomons* v. *Laing*, 1850, 19 L. J. Ch. 291.

individual shareholder had expressly assented to it; and the parties were ordained to refund so much of the £17,000 as had not been actually expended in obtaining the Act.[1] The law is clearly put by Mr. Justice Blackburn, in a judgment where, after explaining that any power given solely for the protection of the shareholders might be waived by them, he proceeds as follows:— "But the Legislature, with a view to public policy, does, sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made *malum prohibitum*, any contract to do it is illegal; and, if there is an attempt made to enforce such a contract, the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party; for *in pari delicto potior est conditio defendentis.* Though every shareholder in the company had assented to the making of a particular contract, yet if the Legislature have, not merely for the protection of the shareholders, but for the good of the public, forbidden the making of it, it is illegal, and the corporation whose shareholders have all assented to it is in no worse position for raising the defence than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor* v. *Dover and Deal Railway*,[2] set up the provisions of the Railways Acts as making his personal contract illegal."[3]

Statute impliedly prohibits acts which it does not authorise.

The general rule would seem to be that an Act of Parliament, conferring special powers on a particular corporation, impliedly prohibits acts which it does not expressly permit; that is, that a company or corporation has no power to do anything which is not sanctioned, directly or indirectly, by the Legislature.[4] This, taken with the qualification that any act which may fairly be regarded as a reasonable inference from the powers conferred will be sanctioned,[5] would seem more in accordance with recent decisions than the converse rule that a corporation may do anything which is not expressly or impliedly prohibited.[6] Thus the question

[1] *Mann* v. *Edinburgh Northern Tramway Co.*, 1891, 18 R. 1140, affd. 1892, 20 R. (H. L.) 7; see also *Clouston* v. *Edinburyh and Glasgow Rwy. Co.*, 1865, 4 Macp. 207.

[2] 1852, 18 Q. B. 618, 22 L. J. Q. B. 69.

[3] Per Blackburn, J., in *Taylor* v. *Chichester and Midhurst Rwy. Co.*, 1867, L. R. 2 Ex. at p. 356; revd. 1870, L. R. 4 H. L. 628.

[4] *Homersham* v. *Wolverhampton Works Co.*, 1851, 6 Ex. 137; *Ashbury Carriage Co.* v. *Riche*, 1875, L. R. 7 H. L. 653; *Wenlock* v. *River Dee Co.*, 1885, 10 A. C. 354 (other English cases there cited); *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140, affd. 1892, 20 R. (H. L.) 7.

[5] *Attorney-General* v. *Great Eastern Rwy. Co.*, 1880, 5 App. Cas. 473.

[6] But see opinion of Lord Wensleydale in *Scottish North-Eastern Rwy.*

whether a company or corporation has power to borrow depends, in the absence of express statutory provisions, upon whether the purposes for which it was established make it reasonable to suppose that the Legislature intended it to have that power.[1] The further rule is well-established that when the special Act expressly confers a particular power upon a company or corporation, that power forms the limit of the capacity of the corporation in that direction. Thus if borrowing powers to a certain amount are given, a restriction against borrowing more is implied.[2]

Acts *ultra vires* of governing body.

Again, a certain act may fall within the purposes for which the corporation was established, and thus may be within the power of the corporation, and yet may be *ultra vires* of the directors of a company, or the managing Board of a local authority. A contract of this kind is not void, as it would be if it were *ultra vires* of the corporation itself, but only voidable. It may therefore be ratified by the corporation; or, in certain circumstances, the corporation may be barred from questioning the acts of the directors or managers.[3] Where the other party to the contract is cognisant of the irregularity, or of the limits of the powers of the directors or managers, or where, in the case of a company, he is himself a shareholder, the corporation is not bound unless the contract is ratified, either expressly or by acquiescence. And the rule is, that such a contract will not be held binding on the corporation, unless all the members thereof either knew of it, or had the means of knowing if they had chosen to attend to the matter, and took no steps to interfere or avoid it.[4] Thus lapse of time, and acquiescence without full means of knowledge, will not be a bar to the corporation repudiating a contract made by its managing body in excess of the power intrusted to them.[5] The case is altered where the other party to the contract is a third party, who was not aware of any irregularity, and acted *bonâ fide*

Co. v. *Stewart*, 1859, 3 Macq. 382; *dicta* collected by Brice, *Ultra Vires*, p. 50; and Pollock on *Contracts*, 6th ed., App. D. The opinions in the House of Lords in *Mann* v. *Edinburgh Northern Tramways Co.*, *supra*, and of Lord Watson in *Wenlock* v. *River Dee Co.*, *supra*, at p. 362, are mainly relied on in the text.

[1] *Ashbury Carriage Co.* v. *Riche*, 1875, L. R. 7 H. L. 653; *Wenlock* v. *River Dee Co.*, 1885, 10 A. C. 354.

[2] *Wenlock* v. *River Dee Co.*, *supra*.

[3] *Re Magdalena Steam Navigation Co.*, 1860, 29 L. J. Ch. 667; *Irvine* v. *Union Bank of Australia*, 1877, 2 App. Cas. 366; *Grant* v. *United Kingdom Switchback Co.*, 1888, 40 Ch. Div. 135.

[4] *Evans* v. *Smallcombe*, 1868, L. R. 3 H. L. 249; *Phosphate of Lime Co.* v. *Green*, 1871, L. R. 7 C. P. 43.

[5] *Spackman* v. *Evans*, 1868, L. R. 3 H. L. 171.

in the reasonable belief that the directors or managers had the power which they professed to have. In such cases, as a general rule, the company is not entitled to refuse to implement a contract, which, though *ultra vires* of the directors, was *intra vires* of the company itself. The cases on this point have mostly related to the issuing of debentures or other securities, and will be dealt with in discussing particularly the power to borrow and grant securities.[1]

Limitations of borrowing power.

In applying these general principles to the power to grant statutory securities, we need not consider the exceptional case of a company or corporation having no power to borrow at all, as in that case it is obvious that no statutory securities could be issued. But a power to borrow, and to grant securities of a special character and effect, may be given, but may be limited, in respect (1) of the amount that may be borrowed, (2) of the conditions precedent to borrowing, or (3) of the manner in which money may be borrowed and securities granted.

Limitation of amount.

Where a power to borrow is limited to a certain amount, or where a certain power of borrowing is given, by which a prohibition of further borrowing is implied,[2] any money borrowed beyond that limit is *ultra vires* of the company or corporation, and will not create a binding debt. It follows that any securities granted for money so borrowed are null and void, even although they are granted in the exact terms provided by the Legislature.[3] This falls under the principle above explained, that a company or corporation, depending for its powers on a particular Statute, cannot by any means bind itself to perform any act which is a contravention of the provisions, express or implied, of that Statute. Nor does it matter that the securities in question have been issued to a party who took in entire good faith, relying on a representation that the corporation had power to grant them, or that they have been transferred to an onerous and *bonâ fide* transferee, because the question as to their validity is not one of estoppel or personal bar, but of the statutory powers of the particular corporation.[4] "It is well established that a corporate

[1] *Infra*, p. 618.

[2] *Wenlock* v. *River Dee Co.*, 1885, 10 A. C. 354.

[3] *Chambers* v. *Manchester and Liverpool Rwy. Co.*, 1864, 5 B. & S. 588; *in re Cork and Youghal Rwy. Co.*, 1869, L. R. 4 Ch. 748; *Yorkshire Rwy. Waggon Co.* v. *Maclure*, 1882, 21 Ch. Div. 309; *Chapleo* v. *New Brunswick Build. Soc.*, 1881, 6 Q. B. D. 696; *Wenlock* v. *River Dee Co.*, 1885, 10 App. Cas. 354; *in re Pooley Hall Colliery Co.*, 18 W. R. 201 (1870); *Fountaine* v. *Carmarthen Rwy. Co.*, 1868, L. R. 5 Eq. 316.

[4] See Lindley, *Company Law*, 5th ed., pp. 162–3; Pollock on *Contracts*, 6th ed., p. 128.

body cannot be estopped, by deed or otherwise, from showing that it had no power to do that which it purports to have done."[1] But a company which has exhausted its borrowing powers may nevertheless raise money on its assets by a security in the form of a sale, and an agreement for repurchase. Thus a railway company, whose borrowing powers were exhausted, sold their rolling stock to a waggon company, at the price of £17,000 (which was 70 per cent. of its value), and under an arrangement whereby they took a lease of it for five years at a rent which was calculated to repay, within that period, the £17,000 advanced, with interest at 7 per cent., and which gave them a power of repurchase at the end of the five years at a nominal price. It was held that the transaction was a security, and not a sale; but that, although it was *ultra vires* of the company to borrow money, it was within their powers to attain the same object by other means, and therefore that the waggon company were entitled to enforce the contract.[2]

Corporation may incur debt although borrowing power is exhausted.

The application of the doctrine of *ultra vires* must, however, be taken with certain qualifications. In the first place, a restriction on the power of a company or corporation to borrow money, does not mean that the corporation in question cannot incur ordinary contract debt when its borrowing powers are exhausted, or that such debt, if incurred, will not form a valid charge against the corporate effects. A company, for instance, engaged in constructing some object of public utility, is not bound to discontinue the undertaking the moment that the statutory powers of borrowing, as well as its ready money, are exhausted. It is, on the contrary, entitled to proceed on personal credit; and any debt thus incurred will be a valid obligation, even if no power of borrowing is left. And it is perfectly competent for a company in such a position to give to its creditors a bond for the amount of their debt; though such a bond would appear to be only a personal obligation, and would not confer on the holder the preference attaching to bonds issued in accordance with a statutory power to borrow.[3] In spite of some earlier cases, however, it would appear to be now settled in England, that if a company has no power to borrow, it has not the power to overdraw its banking account, and any overdraft made will not be a

[1] Per Cave, J., in *ex p. Watson*, 1888, 21 Q. B. D. 301.

[2] *Yorkshire Rwy. Waggon Co.* v. *Maclure*, 1882, 21 Ch. Div. 309; *Manchester Sheffield Rwy. Co.* v *North Central Waggon Co.*, 1888, 13 App. Cas. 554.

[3] *White* v. *Carmarthen Rwy. Co.*, 1863, 1 H. & M. 786; *Fountaine* v. *Carmarthen Rwy. Co.*, L. R. 5 Eq. 316.

binding debt.[1] This, however, was the case of a building society, without any power to borrow at all; and it is difficult to suppose that a railway company, which had exhausted its borrowing powers, could not, by an overdraft, obtain money for its every-day expenses, or that an obligation, in the form of a bond, for such an overdraft would not be an obligation binding on the company.[2]

Loan good if employed to pay existing charges.

Further, a person who has lent money to a corporation in excess of its borrowing powers may establish the loan as a debt against the corporation, if he can prove that the money he advanced was applied in meeting charges to which the corporation was already and undoubtedly liable.[3] The mere fact that the money was applied in furthering the legitimate objects of the corporation—as, for instance, in the case of a railway company, in constructing the line—will not save the lender nor make the obligation binding, as to admit such a rule would render the restriction of the borrowing powers practically nugatory, and open the road to rash enterprises which it is the object of the Legislature to prevent. But if it is employed in meeting existing charges, it forms a valid obligation, on the ground that the liabilities of the company are not thereby increased. "The test is," says Lord Selborne, "Has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principles of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that money so as in substance to make those other people pay their debts."[4] And if, on this ground, money advanced beyond the statutory limitation of the borrowing power can be constituted as a valid charge, it would seem to follow that securities granted for that advance would also be good, though the cases have dealt with the right of

[1] *Cunliffe, Brooks, & Co.* v. *Blackburn Benefit Build. Soc.*, 1884, 9 A. C. 857.

[2] Cf. *General Auction Co.* v. *Smith*, [1891], 3 Ch. 432.

[3] *Cunliffe, Brooks, & Co.* v. *Blackburn Benefit Build. Soc.*, 1882, 22 Ch. Div. 61, 1884, 9 A. C. 857; *Wenlock* v. *River Dee Co.*, 1888, 38 Ch. Div. 534; *in re Cork and Youghal Rwy. Co.* 1869, L. R. 4 Ch. 748; *re German Mining Co.*, 4 De G. M. & G. 19, 1853.

[4] Per Selborne, L.C., in *Blackburn Build. Soc.* v. *Cunliffe, Brooks, & Co.*, 1882, 22 Ch. Div. 61, at p. 71.

the lender against the company, and have not raised the question as to his right to be ranked along with other security-holders.

Borrowing power conditional.

When the power to borrow depends upon the completion of a certain portion of the undertaking, or upon a certain proportion of the capital of a company being subscribed or paid up, any borrowing before such a condition is purified is *ultra vires* of the company or corporation; and therefore securities granted in such a case are in the same position as securities granted for money borrowed in excess of the borrowing powers. It is not quite clear, however, if the company should borrow money on an undertaking to grant mortgages or debentures for it as soon as the borrowing power came into operation, whether securities granted in pursuance of such an undertaking would be good. In one case, where the borrowing powers of a railway company were suspended until a certain portion of their line should be completed, and another railway company, who were large shareholders, advanced money to enable the line to be carried on, it was held that securities granted for that advance after the borrowing power had revived, were valid obligations on the part of the company, and entitled to rank *pari passu* with other securities under the same borrowing powers.[1] In a later case, however, the general principle is put, that if at the time the advances are made they would not form a valid debt against the corporation, because at the moment the corporation had no power to borrow, then any debentures issued to the lenders after the borrowing power has come into operation, are dispositions of its property without consideration which the corporation has no power to make,[2] and it would therefore appear, on principle, that such securities would necessarily be void.

Limitation as to mode of borrowing.

Again, securities may be issued in the exercise of a power to borrow, and in accordance with a form provided by Statute, and yet the manner of their issue may render them open to question. Thus a security may be issued irregularly, where the formalities precedent to its issue have not been carried out; it may be issued improperly, if the directors or managers who grant it are exceeding their powers, as agents of the corporation, in doing so; it may be issued fraudulently, if it is granted without consideration, or in pursuance of a fraudulent scheme between the directors or managers of a corporation and the person to whom it is granted.

Bondholder not affected by irregularities in internal management of corporation.

Difficult questions may arise as to the validity of a security issued under these circumstances. Certain points are, however, clear. If the irregularity in the issue of the security merely

[1] *In re Bagnalstown and Wexford Rwy. Co.*, 1870, I. R. 4 Eq. 505.

[2] *Ex p. Watson*, 1888, 21 Q. B. D. 301.

arises from the failure of the managing body of the company or corporation to observe the formalities which are provided by the Statute as precedent to an exercise of the borrowing power, it would seem to be settled law that the security will nevertheless be valid in the hands of a third party who has taken it for value and without any notice of the irregularity. Such a third party is entitled to presume that all the internal arrangements of the corporation have been properly carried out; and the corporation cannot take advantage of any failure on their own part, or on the part of their agents, as an excuse for refusing to carry out a contract into which they have entered.[1] Thus where the directors of a railway company reissued debentures which had been paid off, without obtaining the sanction of a general meeting, as directed by sec. 39 of the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), it was held that these debentures were valid in the hands of a person who had taken them for an immediate advance, and without notice of any irregularity.[2] And where the bankers of a company received a notice signed by a person styling himself secretary, and requesting them to pay cheques signed by any two out of three named directors, they were held to be creditors of the company for money advanced on such cheques, although no directors or secretary had ever been regularly appointed.[3]

Bond good if corporation *lucratus*, though issue irregular.

Again, if money is borrowed and securities are issued improperly, or even fraudulently, by the managers of a corporation, but the corporation has had the benefit of the money thus obtained, it would seem clear that the securities will be good in the hands of a third party without notice, on the rule that a principal cannot take advantage of the unauthorised or fraudulent act of his agent, and yet repudiate the contract which is the counterpart of that advantage.[4]

Bearer securities.

If the rules of the company or corporation authorise the directors or managers to issue securities payable to bearer, or with

[1] *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830; *Royal British Bank* v. *Turquand*, 1856, 6 El. & Bl. 327; *Agar* v. *Athenæum Society*, 1858, 3 C. B. (N. S.) 725, 27 L. J. C. P. 95; *Fountaine* v. *Carmarthen Rwy. Co.*, 1868, L. R. 5 Eq. 316; *Mahony* v. *East Holyford Mining Co.*, 1875, L. R. 7 H. L. 869; *in re Romford Canal Co.* (*Carew's Claim*), 1883, 24 Ch. Div. 85; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* [1895], 1 Ch. 629. See, however, *D'Arcy* v. *Tamar Kit., etc. Rwy. Co.*, 1866, 2 Ex. 158, where a failure to carry out an express statutory provision held to render a bond invalid.

[2] *Fountaine* v. *Carmarthen Rwy. Co.*, 1868, L. R. 5 Eq. 316.

[3] *Mahony* v. *East Holyford Mining Co.*, 1875, L. R. 7 H. L. 869.

[4] *Clydesdale Bank* v. *Paul*, 1877, 4 R. 626; *Barwick* v. *London Joint Stock Bank*, 1867, L. R. 2 Ex. 259; Buckley, *Companies Acts*, 6th ed., pp. 359–60.

a clause declaring that they shall pass free from all equities between the company and the original or any intermediate holder, such securities are, on the principle of estoppel, quasi-negotiable instruments, and the company is barred from disputing the act of its agents in a question with a *bonâ fide* transferee.[1]

Securities *ultra vires* of managers or directors.

The case is more difficult when securities, not payable to bearer, are issued in circumstances which make their issue an act beyond the scope of the authority intrusted to the directors or managers of the company or corporation. It may be argued that a third party dealing with the managers of a corporation, especially when that corporation is founded on Statute, has the means of knowing, and ought to inquire, what the powers intrusted to the managers are, and that he cannot therefore be heard to say that he has contracted in ignorance of the limits of those powers.[2] But this principle has not been applied to the case of securities issued *ultra vires*, at least in a question between the corporation and a *bonâ fide* holder. In most cases, indeed, the question has been with a transferee from the original holder; and his position has been strengthened by the fact that his transfer has been registered, or otherwise recognised by the corporation. But such recognition, being a purely formal act, does not amount to ratification by the corporation of the unauthorised act of their managing body; and the right of the security-holder has been upheld, not on this ground, but on the ground that the corporation is estopped from denying the validity and authority of the acts of their agents, in a question with a third party who has contracted in reliance on that authority.[3] Thus where the commissioners of a town issued debentures to one of their own number in payment of a debt due to him, which they had no power to do, it was held that they were estopped from denying the validity of these debentures, as a charge on the corporate funds, in a question with a *bonâ fide* transferee for value.[4] And where debentures were issued irregularly by the directors of a

[1] *Blakeley Ordnance Co.*, 1867, L. R. 3 Ch. 154; *Higgs* v. *Northern Assam Tea Co.*, 1869, L. R. 4 Ex. 387. See further as to the negotiability of such instruments, *ante*, p. 566.

[2] See, as to this principle, *Ernest* v. *Nicholls*, 1857, 6 H. L. C. 401. Other cases cited by Lord Wensleydale at p. 420.

[3] *Hulett's Case*, 1862, 2 John. & H. 306; *ex p. Chorley*, 1870, L. R. 11 Eq. 157; *Webb* v. *Commissioners of Herne Bay*, 1870, L. R. 5 Q. B. 642; *in re Romford Canal Co.* (*Pocock's Claim*), 1883, 24 Ch. Div. 85; *Carey's Case*, W. N. 1873, 17.

[4] *Webb* v. *Commissioners of Herne Bay*, *supra*. In such cases the directors or managing board may be personally liable to make good the loss incurred by the company or corporation through the improper issue of debentures—*London Trust Co.* v. *Mackenzie*, 1893, 62 L. J. Ch. 870.

company incorporated under the Companies Clauses Acts, to a person who took them in the knowledge of the irregularity, it was held that they were good against the company in the hands of a party with whom they had been deposited in security of an advance, and who had no notice of anything affecting their validity.[1]

Securities issued fraudulently.

It is perhaps a stronger case where the act of the directors or managers, in issuing securities, is actually fraudulent—where, for instance, they are issued for the private benefit of the directors or managers themselves. But it would rather appear that there is no valid distinction, in a question with a third party, between an unauthorised and a fraudulent act on the part of an agent; and that in both cases the principal is barred from repudiating the act of his agent, in a question with a party not affected with notice of any fraud or want of authority on the part of the agent, and contracting with that agent in the ordinary scope of his business.[2] In one case in England it was held that debentures, fraudulently issued by the directors of a company, were not binding on the company, even although they had passed into the hands of a *bonâ fide* transferee, and the transfer had been duly registered.[3] But the decision in this case was not rested on fraud, but on the ground that as the debentures in question were not assignable at law, but only in equity, a transferee took them subject to all the equities affecting the original holder; and that, as they were undoubtedly invalid in the hands of the original holder, who was a party to the fraud, the transferee had no better title.

Question of preference of securities issued irregularly.

In all the cases noticed above, the question was with the corporation, or with some officer representing the corporation on its insolvency. It is another question whether the holders of debentures regularly issued are barred from questioning the *pari passu* preference of debentures whose issue is tainted with irregularity. It would rather appear that they are not. Thus where debentures were issued improperly, after a petition for the winding up of the company had been presented, and they were transferred to a *bonâ fide* third party, it was held that whether the company were estopped from denying their validity or not, the holders of prior debentures properly issued were not estopped from denying their right to a *pari passu* preference.[4] The principle of this decision

[1] *In re Romford Canal Co.* (*Pocock's Claim*), 1883, 24 Ch. Div. 85.

[2] Bell, *Prin.* s. 224 B., cases there cited; *North of Scotland Bank* v. *Behn, Möller, & Co.*, 1881, 8 R. 423 —per Lord Rutherfurd Clark (Lord Ordinary).

[3] *Athenæum Life Assur. Soc.* v. *Pooley*, 1858, 3 De G. & J. 294.

[4] *Mowatt* v. *Castle Steel Co.*, 1886, 34 Ch. Div. 58.

was put shortly by Cotton, L.J., as follows: "If after issuing debentures the company issued others, they could not by estoppel bind those who had previously acquired rights against them. The company might bind themselves by an admission, but a man cannot bind by his admission those who do not claim under him, but who before the admission had acquired a right."[1]

Liability of directors for securities issued *ultra vires*.

The question of the personal liability of the directors of a company for securities issued by them in excess of the borrowing powers of the company, or in excess of the powers intrusted to them, has been several times raised in England, without, however, resulting in any very settled rules of law. The directors are the agents of the company, and, as long as they act strictly within the limits of that capacity, incur no personal liability. They are not personally liable for breach of contract, if the company fail to perform a contract which they entered into solely as agents for the company, and within the limits of their authority.[2] Thus in *Wilson* v. *Lord Bury*, A. lent money to a company, and took as security a mortgage belonging to them. The directors, on behalf of the company, undertook that if this mortgage should become ineffectual within five years, it should be replaced by another. The mortgage was paid up within the five years, but was never replaced; and the company became insolvent, and unable to pay its unsecured creditors. It was held that the directors were not personally liable to A. for the loss he had sustained through the want of the security which they had undertaken, on behalf of the company, to provide.[3] Again, directors agreed to pay an account which was due by the company by issuing debentures to the creditor. The company had already issued all its debentures except some which, though not issued, were pledged to a bank under an arrangement by which the company could redeem them at any time by paying cash for them. Of these facts the creditor was aware. The company went into liquidation without carrying out the arrangement by issuing the debentures, and the assets were not sufficient to pay the unsecured creditors in full. It was held that the directors were not personally liable, as they had only entered into a contract as the agents of the company, and within the limits of their authority.[4]

[1] *Mowatt*, *supra*, 34 Ch. Div., at p. 62.

[2] Bell, *Com.* i. 542, Lord M'Laren's note; *Wilson* v. *Lord Bury*, 1880, 5 Q. B. D. 518; *Elkington & Co.* v. *Hürter* [1892], 2 Ch. 452; cf. *Beattie* v. *Lord Ebury*, 1871, L. R. 7 H. L. 102.

[3] *Wilson* v. *Lord Bury*, 1880, 5 Q. B. D. 518.

[4] *Elkington & Co.* v. *Hürter* (1892), 2 Ch. 452.

Issue of debentures is a representation that directors have authority to issue them.

The issue of a debenture is, however, a representation on the part of the directors that they have authority to issue it; and if this representation is not true, they may incur liability in damages to a person who has suffered loss by acting upon it. The general principle is laid down, that an agent is liable in damages for a misrepresentation of fact, but not for a misrepresentation of law, to a party who has suffered loss by acting on that misrepresentation.[1] But this principle does not go very far in deciding the various cases which arise, because the issue of a security without authority to do so usually involves a misrepresentation both of law and fact. Thus the question, What are the borrowing powers of a statutory company? is one of law, depending upon the construction of a particular Statute; the question whether these powers, when ascertained, have been exceeded, is one of fact. The rule, however, may serve in extreme cases. Thus if a Statute required the consent of a certain proportion of the shareholders of a company to the issue of debentures, it is conceived that their issue without the consent of that proportion would be a misrepresentation of fact, for which the directors would be liable in damages, if for any reason the debentures could not be enforced against the company. On the other hand, where the directors of a company, which had no power to borrow, wrote a letter to the bank requesting that cheques drawn in a particular manner, on account of the company, should be honoured, it was held that they had incurred no personal liability, as the letter, if it was a representation at all, was a representation of law and not of fact.[2]

A much wider rule, which has been acted upon in several cases, may be given in the words of Lord Esher: "Where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it was made, it must be taken that the person making it undertakes that it was true, and he is liable personally for the damage that has occurred."[3]

[1] *Beattie* v. *Lord Ebury*, 1871, L. R. 7 Ch. 777, and L. R. 7 H. L. 102; *Weeks* v. *Propert*, 1873, L. R. 8 C. P. 427.

[2] *Beattie* v. *Lord Ebury*, 1871, L. R. 7 H. L. 102; that is, it was a representation that the company had a power to borrow. But in *West London Commercial Bank* v. *Kitson*, 1883, 12 Q. B. D. 157, and 13 Q. B. D. 360, directors of a tramway company who accepted a bill (which the company had no power to do) were held liable to a holder in due course, on the ground that they had made a representation of the fact of their authority to accept bills.

[3] *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q. B. D. 54, at p. 60. See *Collen* v. *Wright*, 1857, 8 El. & Bl. 647;

This rule would seem to cover the case of debentures or other securities issued by a company which has no power to borrow, as the directors, though they may have the apparent authority of the company for that issue, cannot have any real authority, as it would be *ultra vires* of the company to bestow it. But on this point the English decisions are conflicting. In one case it was decided that the directors of a building society, which had no power to borrow, were personally liable for money borrowed *ultra vires* on behalf of the society.[1] In contrast to this, where the directors of a railway company issued Lloyd's bonds, which the company had no power to do, it was held that they were not personally liable.[2] Where debentures are issued in excess of the borrowing powers of the company, and where, in consequence, they are invalid, it has been held with more uniformity that the directors, by issuing them, make a representation that they have power to do so, and are therefore liable in damages to the holder.[3] Thus where a company had exhausted its power to issue debentures, and the directors paid the contractor, who was pressing for payment of his account, by issuing debentures to him, it was held that they had represented that they had power to issue them, and that, on its being held that the debentures were void as *ultra vires*, they were personally liable in damages to the contractor.[4]

Directors are not guarantors, but may be liable in damages.

It must be noted that the principle above exemplified is not that directors are personally liable as guarantors of the contract of the company, but that they are liable in damages to the person whom they have induced to act on the faith that the company would contract. It follows that if the obligation is good against the company, the directors are not personally liable to the other contracting party, even though their act was beyond the limits of their authority, because he has suffered no damage by their action. But if they issue debentures to a person who has a good ground of debt against the company, and these debentures prove invalid, they are liable to the holder for any damage he may sustain through being an unsecured, instead of a secured, creditor.[5]

Chapleo v. *Brunswick Build. Soc.*, 1881, 6 Q. B. D. 696; Bell, *Com.* i. p. 544, Lord M'Laren's note; *Cherry* v. *Colonial Bank*, 1869, L. R. 3 P. C. 24.

[1] *Richardson* v. *Williamson*, 1871, L. R. 6 Q. B. 276; see also *West London Commercial Bank* v. *Kitson*, 1883, 12 Q. B. D. 157, 13 Q. B. D. 360.

[2] *Rashdall* v. *Ford*, 1866, L. R. 2 Eq. 750; *Macgregor* v. *Dover and Deal Rwy. Co.*, 1852, 18 Q. B. 618.

[3] *Weeks* v. *Propert*, 1873, L. R. 8 C. P. 427; *Chapleo* v. *Brunswick Build. Soc.*, 1881, 6 Q. B. D. 696; *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q. B. D. 54.

[4] *Firbank's Exrs.* v. *Humphreys*, *supra*.

[5] *Ib.*

A director is not, as a rule, liable in damages, if, misled by the officials of the company in a matter in which he is entitled to rely upon them, he makes a representation which is in fact false and misleading. Thus directors have been held not to be liable in damages to a person who has been induced to take shares in the company by the issue of false and misleading balance-sheets, provided that, in issuing them, they acted in good faith, relying on the report of the officials of the company.[1] But this does not extend to save a director who is sued for damages for a misrepresentation of his own authority or powers; and therefore if the directors issue securities which are not binding on the company, they will be liable in damages, even although they acted in the honest belief that the securities were good.[2]

Measure of damages in actions against directors.

The measure of damages for which an agent in such circumstances is liable, is the loss sustained by the other party through the fact that the principal was not liable on the contract.[3] Therefore if a person advanced money, and received in return debentures which were not binding on the company, the directors would usually be liable to him in the amount of the debentures. But the directors do not promise that the company will carry out the contract, only that it will be bound by it, and therefore, should the company prove insolvent, and the assets be insufficient to pay the debenture-holders in full, the measure of damages would only be the actual value of the debentures.[4]

In order to create a preferential right, the statutory form of security must be followed.

So far we have dealt mainly with the validity of a security, issued in pursuance of a statutory power, as a personal obligation of the corporation which has granted it; the further question remains, What conditions must be complied with in order to render such a security an effectual preferential right? For this it is essential that the particular statutory form should be followed with at least substantial accuracy, because the preferential right conferred by the Statute relates only to instruments framed in the statutory form. Bonds given in a form not consonant in all essential particulars with the form provided by the Statute may be perfectly good personal obligations of the corporation, but they will be only personal obligations, and not rights in security. Thus harbour trustees were authorised by Statute to borrow money,

[1] *Addie* v. *Western Bank*, 1865, 3 Macp. 899; rev. 1867, 5 Macp. (H. L.) 80, L. R. 1 Sc. Ap. 145.

[2] *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q. B. D. 54.

[3] *Collen* v. *Wright*, 1857, 7 El. & Bl. 301, and 8 El. & Bl. 647; *Simon* v. *Patchett*, 1857, 7 El. & Bl. 568.

[4] *In re National Coffee Palace Co.*, 1883, 24 Ch. D. 367; *Firbank's Exrs.* v. *Humphreys*, *supra*.

and to grant bonds in a particular form, which were declared to be a preferable charge on the corporate funds. In process of time a certain amount of money was lent on a receipt from the treasurer of the trust, and an obligation to grant a bond when required. The corporate funds proved inadequate to meet the liabilities, and, in a special case, it was held that the holders of the treasurer's receipt and obligation were not entitled to rank as secured creditors *pari passu* with the actual bondholders, because the preference given to bondholders by the Statute applied only to those who had obtained bonds in the statutory form.[1]

General rules of construction of securities.

The special forms of statutory securities issued by a company or corporation will be best considered in reference to the general Statutes under which most of them are now issued, but the general rules of construction are applicable to all such instruments, whether issued under a general Statute or under a special private Act. The rule is, that they will be construed strictly against the corporation (at all events if it is a company established for profit), with this qualification, that their terms will be interpreted, if possible, so as not to interfere with the purposes for which the corporation was founded.

Securities construed strictly against the body which issues them.

The general rule has been justified on the ground that as a company or corporation established by Statute has usually obtained the power to issue securities of a special character on an *ex parte* statement, it will not be allowed, by any narrow and technical construction of these securities, to obtain an unfair advantage over its creditors.[2] Thus where bonds granted under the Burgh Harbours Act, 1853,[3] Schedule B, bound the burgh to repay the advance at a fixed date, and assigned the harbour rates and dues, it was held that the burgh must meet these bonds, according to their terms, out of the common good. The argument that the intention of the Legislature was that the security should be confined to the harbour rates and dues, and that the personal obligation had been inserted *per incuriam*, was repelled.[4] In another case, a statutory harbour company granted bonds under a private Act passed in 1834. These bonds assigned the harbour and works, and the rates and duties, in security of the interest, but contained no obligation for repayment of the principal, and fixed no time for repayment. A later Act was passed

[1] *Greenock Harbour Trs.*, 1888, 15 R. 343.

[2] See opinion of Lord Herschell in *Scottish Drainage and Improvement Co.* v. *Campbell*, 1889, 16 R. (H. L.) 16, at p. 17.

[3] 16 & 17 Vict. c. 93.

[4] *Royal Burgh of Renfrew* v. *Murdoch*, 1892, 19 R. 822.

in 1856, incorporating the Companies Clauses Act, 1845, and declaring that all debts were to be paid to or by the company under this Act. It was held that bondholders under the Act of 1834 were entitled to repayment of their principal, in virtue of sec. 54 of the Companies Clauses Act thus incorporated, by which, where no time of repayment is fixed, bonds are repayable, on six months' notice, after the expiry of twelve months from their date.[1] Lord Gifford was further of opinion, that in such a bond an obligation of repayment on reasonable notice was necessarily implied.[2] Again, the same rule of construction was applied in a case where a company was empowered by Statute, not to grant, but to accept, securities of a special and statutory character. The company was incorporated for the purpose of advancing money for the drainage and improvement of land. For these advances they were entitled to take a "rent-charge" on the land, and such rent-charge was declared to be recoverable by the company "by the same means and in like manner in all respects as any feu-duties, or rent, or annualrent, or other payment out of the same lands would be recoverable in Scotland." It was attempted to infer from this clause a personal liability upon a singular successor of the lands for the amount advanced. The Court refused to construe the clause in this manner, holding that the powers of statutory companies must be strictly construed, and that the proper meaning was that the rent-charge was recoverable out of the land in the same way as a feu-duty would have been.[3]

Construed so as not to defeat the objects of the Statute.

On the other hand, the rights of a creditor in a security granted under special statutory powers, and in a statutory form, must be construed with reference to the objects for which the body by which it was issued received its statutory powers. The Court will not entertain the idea that the Legislature intended a creditor to have the power of frustrating the whole undertaking by carrying off the property which is indispensable to its prosecution, unless driven to that conclusion by very unequivocal words. Thus where bonds were issued, in a statutory form, by harbour trustees, and contained a conveyance of the "harbour and works," it was held that this conveyance meant nothing, and could have no effect.[4] It was obviously not the intention of Parliament, in establishing a harbour for public purposes under a statutory body,

[1] *Haldane's Trs.* v. *Elgin and Lossiemouth Harbour Co.*, 1879, 6 R. 987.

[2] *Ib.* at p. 994.

[3] *Scottish Drainage and Improvement Co.* v. *Campbell*, 1887, 15 R. 108; affd. 1889, 16 R. (H. L.) 16.

[4] *Haldane's Trs.* v. *Elgin and Lossiemouth Harbour Co.*, 1879, 6 R. 987; *Greenock Harbour Trs.*, 1888, 15 R. 343.

and conferring on that body the power to borrow money, to enable any private creditor to defeat the whole purpose of the Act by attaching the harbour by private diligence. As a logical deduction from this reasoning, it was held that, as the conveyance of the harbour and works was a nullity, bonds which contained that conveyance were not entitled to any preference over bonds which did not.[1] Similarly, it may now be considered as settled that the permanent way of a railway cannot be attached by adjudication or by any other private diligence.[2] In the first case in which this was held, the decision went on the ground that the bondholder who was attempting to realise the railway had no power of sale in his bond, and that such a power could not be implied; but opinions were expressed that a railway, being established for public purposes, could not be attached by private diligence.[3] In another case it was held by the Lord Ordinary (Jerviswoode) that the superfluous lands held by a railway company could not be adjudged. In the Inner House it was not found necessary to decide the point; but the Lord President (Inglis) expressed the view, that in the opinion of the best lawyers the composite heritage called a railway was not liable to be attached by adjudication for debt.[4]

English rule of construction.

The same rule of construction has been applied in England to securities issued by a body established for public purposes. It has been expressed by Lord Cairns in language which has become almost classical, in a case where it was held that mortgages which assigned the undertaking of a railway company did not entitle the mortgagees to any right to the surplus lands of the railway, or to the proceeds thereof when sold. "Moneys are provided for, and various ingredients go to make up the undertaking; but the term undertaking is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that the undertaking is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing completed or to be completed: as a going concern, with internal and parliamentary

[1] *Greenock Harbour Trs., supra.*

[2] *Dundee Union Bank* v. *Dundee and Newtyle Rwy. Co.*, 1844, 6 D. 521; *Glover's Trs.* v. *City of Glasgow Rwy. Co.*, 1869, 7 Macp. 338. The rolling stock and plant of a railway company are protected from private diligence by 30 & 31 Vict. c. 126, s. 4.

[3] *Dundee Union Bank, supra.*

[4] *Glover's Trs., supra.*

powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees, by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking, either prevent its completion, or reduce it into its original elements when it has been completed." [1]

But funds of statutory body are open to diligence.

The Court, however, while exempting the indispensable property of a statutory and public body from the diligence of its creditors, has not extended the same protection to the funds which are equally necessary to its continuance. Thus it was held that the creditors of a railway company, which had become embarrassed while in course of making the line, were entitled to arrest calls in the hands of the shareholder by whom they were due.[2] This decision, however, was only arrived at by a majority of the Court; and it was strongly urged by those judges who dissented, that to allow this form of diligence would paralyse the company, and make it impossible for the line ever to be completed.

Companies Clauses Acts.

The large increase of companies established by private Acts of Parliament for the purpose of carrying out undertakings of a public nature, about the middle of the century, led to the passing of two consolidating Statutes, the Companies Clauses Act, 1845 (8 & 9 Vict. c. 17), and the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), for the purpose of consolidating the various provisions usually inserted in such private Acts. The provisions of the former Act apply to any company incorporated by Act of Parliament since the date at which it came into operation, except in so far as they are varied by the provisions of the private Act; the latter Statute only applies where it is expressly incorporated by the private Act. The whole formation and management of such companies are dealt with in these Acts, but it is proposed to confine our attention to those portions which deal with the issue

[1] *Gardner* v. *London, Chatham, and Dover Rwy. Co.*, 1867, L. R. 2 Ch. 201, at p. 217. The rule contained in this opinion has also been applied to a tramway company (*Marshall* v. *South Staffordshire Tramway Co.* [1895], 2 Ch. 36), but not in a question with a collector of rates (*Pegge* v. *Neath District Tramway Co.* [1895], 2 Ch. 508).

[2] *Hill* v. *College of Glasgow*, 1849, 12 D. 46.

of securities. Securities issued by railway companies are also regulated by the Railway Companies (Scotland) Act, 1867.

Securities under Companies Clauses Act, 1845.

By the Companies Clauses Act, 1845,[1] it is provided that where a company has by its special Act a power to borrow on mortgage or bond, it shall be lawful for it, subject to the restrictions of the special Act, to borrow from time to time such sums as shall, by the order of a general meeting of the company, be authorised to be borrowed, and to grant in security thereof mortgages or bonds, in the form of Schedule C or D of the Act.[2] When the special Act contains a restriction on the borrowing powers until a certain proportion of the capital shall have been subscribed or paid up, a certificate of the Sheriff to the effect that this condition has been complied with shall be sufficient evidence, or, where the authority of a general meeting is required for the exercise of the power to borrow, a copy of the order authorising the borrowing, certified by a director and by the secretary to be a true copy, shall be sufficient evidence of the order having been made.[3] The secretary is bound to keep a register of such mortgages and bonds, and to enter them, with number, date, and names of parties, within fourteen days of the date of granting.[4]

Form of mortgage.

By the form of mortgage in Schedule C, the undertaking, and (in case the loan is in anticipation of the capital authorised to be raised) all future calls upon the shareholders, and all tolls and sums of money arising by virtue of the special Act, with all the estate, right, title, and interest of the company in the same, are assigned to the creditor. It is declared that every mortgage deed shall have the effect of an assignation in security duly completed;[5] that the mortgagees are entitled one with another to their respective share of the tolls, sums, and premises comprised in such mortgage;[6] that they are entitled to be repaid the sums advanced, with interest, and without any priority *inter se* by reason of the date of the mortgage, or of the date of the general meeting by which it was authorised;[7] but that no mortgage, though it should include future calls, shall, unless expressly so provided, preclude the directors from receiving and applying to the purposes of the company any calls to be made by the company.[8]

Form of bond.

The form of bond given in Schedule D is simply a personal bond for repayment of the sum advanced. It is provided that the bondholders are entitled to be repaid, out of the tolls or other

[1] 8 & 9 Vict. c. 17.
[2] 1845 Act, ss. 40, 43.
[3] *Ib.* s. 42.
[4] *Ib.* s. 48.
[5] *Ib.* s. 43.
[6] *Ib.* s. 44.
[7] *Ib.*
[8] *Ib.* s. 45.

property or effects of the company, the respective sums in such bonds, without any priority *inter se* by reason of the date of the bond, or of the date of the general meeting by which its issue was authorised.[1]

Term of repayment.

The company may, if they think fit, fix a term for the repayment of the mortgages or bonds, and, in such case, they shall cause that term to be inserted in the mortgage or bond, and, on the expiration of that period, the principal sum, together with any arrears of interest, shall be payable to the mortgagee or bondholder on demand.[2] If no term of repayment is fixed, the creditor may, at the expiration of twelve months from the date of the mortgage or bond, demand payment of the principal and interest, upon giving six months' notice; and in like manner the company may at any time pay off the mortgage or bond, upon giving the same notice of six months. On the expiration of the six months' notice of repayment, interest shall cease to run, unless the company shall then fail to pay the sum due as principal and interest.[3]

Debentures under Companies Clauses Act, 1863.

The Companies Clauses Act, 1863,[4] leaves the provisions of the Act of 1845 with regard to the creation of securities untouched, but adds a new kind of security in the form of debenture stock. It is provided that where any company, whether incorporated before or after the passing of the Act, is authorised by any special Act incorporating this part of the Act, to issue debenture stock, the company, with the sanction of such proportion of the shareholders as may be provided by the special Act, or, if there is no such provision, with the sanction of three-fifths of the shareholders present, personally or by proxy, at a general meeting, may use their borrowing powers in the creation of debenture stock, on such terms, subject to such conditions, and with such privileges as the company may think fit.[5] This debenture stock shall rank in priority to all shares and stock of the company.[6] The interest thereof shall rank next to the interest of existing mortgages and bonds,[7] and the stock shall be considered as entitling the holder to the rights and powers of a mortgagee of the undertaking other than the right to require repayment of the principal sum advanced.[8] Debenture-holders, like mortgagees or bondholders, have no preference *inter se* by reason of priority of date of the debenture, or of the general meeting by which it was authorised.[9]

[1] 1845 Act, s. 47.
[2] *Ib.* s. 53.
[3] *Ib.* ss. 54, 55.
[4] 26 & 27 Vict. c. 118.
[5] 1863 Act, s. 22.
[6] *Ib.* s. 23.
[7] *Ib.* s. 24.
[8] *Ib.* s. 31.
[9] *Ib.* s. 24.

Securities under Railway Companies Act, 1867.

It is further provided by the Railway Companies (Scotland) Act, 1867 (30 & 31 Vict. c. 126), with regard to securities issued by railway companies, that all money borrowed by a company on mortgage, debenture, bond, or debenture stock, under the provisions of any Act authorising the borrowing thereof, shall have priority against the company, and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into after the passing of this Act, provided that this priority shall not affect any claim, right, or remedy against the company in respect of any rent-charge, annual feu-duty, or ground-annual granted or to be granted by them in pursuance of the Lands Clauses Consolidation (Scotland) Act, 1845, or the Lands Clauses Consolidation Acts Amendment Act, 1860, or in respect of any rent or sum reserved by, or payable under, any lease granted or made to the company by any person in pursuance of any Act relating to the company which is entitled to rank in priority to, or *pari passu* with, the interest or dividends on the mortgages, debentures, bonds, or debenture stock, nor shall anything affect any claim for land taken, used, or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof.[1]

Nature of security under Companies Clauses Acts.

Before passing to the consideration of the remedies open to the holders of securities thus granted, it may be well to consider what is the nature of the right in security conferred by a mortgage, bond, or debenture over the assets of the company. On this point the statutory provisions detailed above are exceedingly vague, except in the case of securities issued by railway companies, and there is an absence of any definite authority in Scotland on the subject. In such a state of the law, it would be dangerous to lay down rules with too great precision, but a few remarks on the nature of a mortgage, a bond, and a debenture may be given.

(1) Mortgage.

It would appear that the effect of a mortgage is to give the mortgagee a right to the property comprised in it as it may happen to exist for the time being. Though it is declared to have the effect of an assignation in security duly completed,[2] it does not, it is conceived, prevent the company from dealing with, or even disposing of, that property in the ordinary course of their business. For instance, should the business of the company require the sale of some portion of the property contained in the wide phrase "undertaking," the sale could probably be made without obtaining the consent of the mortgagees, either individually or as a body,

[1] Railways Companies (Scotland) Act, 1867, s. 23.

[2] Companies Clauses Act, 1845, s. 43.

and the property so sold would pass to the purchaser free from any charge on the part of the mortgagee.[1] A mortgage in the statutory form, though it assigns the undertaking, does not necessarily assign all the property of the company; for in an English case, where a mortgage granted by a railway company in a form practically identical was under consideration, it was held that it did not convey any right to the surplus lands belonging to the company, nor to the sums received for these lands when sold.[2] It has been held that mortgagees, who had obtained an assignation to the tolls arising out of the private Act, and were in possession through a receiver, had a preferable right over the tolls to an ordinary judgment-creditor of the company.[3] But it was observed, that in order to secure such a preference the mortgagee must be in possession.[4] The rights of most practical importance are probably the right to rank as a preferred creditor over the property of the company should it prove insolvent, and the right to make their security immediately effective, by a petition for a judicial factor in a manner to be hereafter detailed.

(2) Bond.

A bond differs from a mortgage in being, in form at least, only a personal obligation on the part of the company, and not a right in security. As it is declared that the bondholder is to be repaid his advances out of the tolls and other property of the company,[5] it might be supposed that these words mean more than that the bondholder has the right, which every personal creditor has, to be paid out of the assets of his debtor. But it has been held in England that a bondholder has no specific equitable lien over the property of the company, or any portion of it, and is merely in the position of an ordinary creditor, and would therefore be postponed to any creditor who had attached the property of the company by diligence.[6]

(3) Debenture. English law.

The nature of the right in security conferred by a debenture is even more difficult to define. Debenture is a general term which is applied to various classes of instruments or acknowledgments of debt—to those containing merely a personal obligation, and to those comprising an assignation in security; to those which contain an obligation for repayment, and to those which

[1] See *Wilmott* v. *London Celluloid Co.*, 1886, 34 Ch. D. 147, *infra*, p. 635.

[2] *Gardner* v. *London, Chatham, and Dover Rwy. Co.*, 1867, L. R. 2 Ch. 201.

[3] *Potts* v. *Warwick and Birmingham Canal Navig. Co.*, 1853, Kay, 142; *Ames* v. *Trs. of Birkenhead Docks*, 1855, 20 Beav. 332.

[4] Per Romilly, M. R., in *Ames*, *supra*, p. 342–3.

[5] Companies Clauses Act, 1845, s. 47.

[6] *Russell* v. *East Anglian Rwy. Co.*, 1850, 3 Mac. & G. 104.

contain merely an obligation for interest; to bonds which stand merely on their own terms, and to bonds which refer to an assignation or disposition in security to trustees for the holders. It has even been laid down by Chitty, J., that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture."[1] But it would appear that there are three main forms of instrument in common use in England, and known as debentures. It may (1) be a mere acknowledgment of debt under the seal of the company; or (2) an instrument acknowledging a debt, and charging the property of the company with repayment; or (3) an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any further charge upon its property.[2] The second of these forms is, or was till lately, the one in common use, and the effect of this form is fairly well settled in England. Whether it is granted by a company under the Companies Clauses Acts, or by a company registered under the Companies Acts, a debenture in this form creates a general and floating charge on the assets of the company, which will confer on the holder the position of a preferred or secured creditor in the winding-up of the company.[3] It has been defined as a charge on the assets of the company for the time being.[4] The security remains in the ordinary case a floating or dormant charge on the assets of the company until it is wound up or otherwise brought to an end, or until the debenture-holders actively intervene by a petition for the appointment of a receiver.[5] It is therefore issued subject to the power of the directors to dispose of any part of the property of the company in the ordinary course of business while it is still a going concern. Thus even where the directors, when the

[1] *Levy* v. *Abercorris Slate Co.*, 1887, 37 Ch. 260, at p. 264. The question what is a debenture is usually considered in England with regard to a provision of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43, s. 17), by which a debenture issued by a mortgage, loan, or other incorporated company is exempted from registration under the Act—see *Levy* v. *Abercorris Slate Co.*, *supra*; *Topham* v. *Greenside Firebrick Co.*, 1887, 37 Ch. D. 281; *Edmonds* v. *Blaina Furnace Co.*, 1887, 36 Ch. D. 215.

[2] See opinion of Bowen, L.J., in *English and Scottish Merc. Invest. Co.* v. *Brunton* [1892], 2 Q. B. 700, at p. 712.

[3] *In re Florence Land Co.*, 1879, 10 Ch. D. 530; *in re Panama, etc. Royal Mail Co.*, 1870, L. R. 5 Ch. 318; *in re Colonial Trusts Corpor.*, 1879, 15 Ch. D. 465.

[4] Per James, L.J., *in re Florence Land Co.*, *supra*, at p. 547.

[5] *Hodson* v. *Tea Co.*, 1880, 14 Ch. D. 859; *in re Florence Land Co.*, and *in re Colonial Trusts Corpor.*, *supra*; cf. *in re Horne & Hellard*, 1885, 29 Ch. D. 736.

company was solvent, but had little or no business left, paid away almost the whole of the assets in meeting a debt due to themselves, it was held that the debenture-holders could not object, as their right was confined to a charge on the assets of the company as they existed when it came to be wound up.[1] Where, however, the debentures assigned the whole assets of the company, and were declared to be, "until default in payment of the principal or interest, a floating charge upon the undertaking, works, and property of the company, not hindering sales or leases thereof," it was held that a purchaser of land belonging to the company was entitled to demand reasonable evidence, such as an affidavit from the secretary of the company, that no default had been made in the principal or interest due on the debentures, because, from the particular terms in which these instruments were framed, the security would become a fixed instead of a floating charge on default being made.[2] But in the ordinary case, it is within the power of the directors to mortgage as well as to sell any specific property of the company, provided that it is done in the ordinary course of business; and the holder of such a specific mortgage or charge will be preferable, over the property mortgaged to him, to the debenture-holders who have merely a general or floating charge.[3] This decision led to the adoption of the third form of debenture mentioned above, in which a clause is inserted declaring that the company shall not be at liberty to create any mortgage or charge in priority to the debentures. This has been held not to prevent the solicitor of the company from exercising a lien over the books and papers of the company in security of an account incurred after the debentures were issued.[4] And where a company issued debentures in this form, and afterwards assigned a particular subject to a creditor, who, though he had notice of the fact that debentures existed, had no notice that they contained this particular clause, it was held that he was preferable to the debenture-holders.[5]

Debentures issued in Scotland.

It is doubtful how far the results arrived at in these English cases would be applicable to the construction of a debenture issued in Scotland. The law of England recognises a debenture as a floating charge or right in security over the assets of a

[1] *Wilmott* v. *London Celluloid Co.*, 1886, 34 Ch. D. 147.

[2] *In re Horne & Hellard*, 1885, 29 Ch. D. 736.

[3] *Wheatley* v. *Silkstone and Haigh Coal Co.*, 1885, 29 Ch. D. 715.

[4] *Brunton* v. *Electrical Engineering Corpor.* [1892], 1 Ch. 434.

[5] *English and Scottish Merc. Invest. Co.* v. *Brunton* [1892], 2 Q. B. 700.

company, even though it is issued without any express statutory authority, and merely by a company registered under the Companies Acts. In Scotland, it is clear on principle, and settled by authority, that such a debenture, unless fortified by a specific and completed conveyance to trustees, or unless the company had statutory authority to grant it, would be merely a personal obligation, and not a right in security at all.[1] Therefore, while in England the question usually is, What is the fair meaning of the words employed in the debenture? in Scotland the question must be, What force has a Statute conferred on words which would by themselves form merely a personal obligation? The Companies Clauses Act, 1863, declares (sec. 31) that the debenture-holders shall have the rights of mortgagees other than the right to require repayment of the principal, *i.e.* the right to rank as preferred creditors on the general assets of the company, and the right to make their general security specific by application for a judicial factor.[2] Debentures issued in Scotland under the Companies Clauses Acts would therefore seem to constitute a security similar to that created by debentures in the second of the forms mentioned above as in use in England, that is, in the words of an English judge, "a security on the property of the company as a going concern, subject to the power of the directors to dispose of the property of the company while carrying on its business in the ordinary course."[3] But there is no provision in the Companies Clauses Act to the effect that debentures shall operate as a bar to the company creating any further charge over its property in preference to the holders, and it is clear that such a provision, not followed by any conveyance, would at common law be only a personal obligation of the company. It would therefore seem that, in Scotland, a debenture containing a clause of this nature would confer no higher right upon the holder than a debenture without it.

Debentures issued by railway companies.

Debentures issued by railway companies in Scotland stand in a special position, as they are declared to form a first charge on the property of the company from time to time, subject only to certain charges which have been already detailed.[4]

Rights of security-holder to sue company.

A mortgagee, bondholder, or debenture-holder (at least in the last case, if the debenture contains an obligation for repayment of the principal) is entitled to sue the company personally for

[1] See *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[2] *Ante*, p. 632.

[3] Per Jessel, M. R., *in re Florence Land Co.*, 1878, 10 Ch. D. 530, at p. 540.

[4] Railway Companies (Scotland) Act, 1867 (30 & 31 Vict. c. 126, s. 23).

repayment, or to petition for its winding-up, if the company is one which can be wound up by the Court.[1] In one case, where mortgage bonds were issued with a bonus share with each bond, and the contract was that the company would pay to certain trustees the interest on the bond, and that the bond and interest should form a charge on the property of the company, it was held that the bondholder had no right to sue the company personally, but could only sue through the trustees.[2] But in the ordinary case, where the security contains a direct obligation for repayment, the holder can maintain a personal action.[3] In a personal action against the company by a debenture-holder, for himself and the other debenture-holders, it was held in England that the plaintiff could not obtain a personal judgment for more than the amount of his own debenture, but that he might obtain a declaration that he and the other debenture-holders were entitled to stand in the position of judgment-creditors.[4]

To use diligence.

The holders of securities have also, it is presumed, the right to attach the property of the company, or debts due to it, by any ordinary and appropriate diligence, such as adjudication, arrestment, or poinding. But this right is subject to very important qualifications. Thus it has already been shown that the permanent way of a railway company cannot be adjudged. And it is provided by sec. 4 of the Railway Companies (Scotland) Act, 1867 (30 & 31 Vict. c. 126), that the engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling stock and plant used and provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for traffic, be liable to be attached by diligence on any decree on which diligence may proceed, obtained after the passing of the Act.[5] Even in the case of companies other than railway companies, but established for purposes of a public character by Act of Parliament, it is probable that the permanent works of the undertaking are not open to be attached by private diligence. Thus it was held that a harbour could not be taken possession of by bondholders to whom it had been *ex facie* assigned.[6] And in the case,

[1] Companies Clauses Act, 1845, s. 56; Companies Clauses Act, 1863, ss. 25, 27.

[2] *In re Uruguay Central Rwy. Co.*, 1879, 11 Ch. D. 372.

[3] *In re Olathe Silver Mining Co.*, 1884, 27 Ch. D. 278.

[4] *Hope* v. *Croydon Tramways Co.*, 1887, 34 Ch. D. 730.

[5] The Act was passed originally for one year only, but has since been annually renewed.

[6] *Greenock Harbour Trs.*, 1888, 15 R. 343.

for instance, of a tramway company, the opinion may be hazarded that although the cars and other appurtenances would be liable to be poinded by a private creditor, the permanent line would not.[1]

To apply for judicial factor.

The rarity of cases in which any attempt is made by security-holders, in companies incorporating the Companies Clauses Acts, to make use of a personal action, or of the ordinary forms of diligence, is doubtless explicable by the fact that a special and more efficient remedy is provided by these Statutes for the recovery of loans secured under these Statutes, by means of a petition to the Court for the appointment of a judicial factor to receive the tolls of the undertaking which the company is carrying on. The provisions of the Companies Clauses Acts in this respect are, however, purely directory, and only applicable in cases where the power to petition for a judicial factor is bestowed upon the security-holders by the special Act on which the company is founded.[2] Subject to this provision, the right to petition is open to a mortgagee if the interest on his mortgage is in arrear for thirty days, and is not paid after a demand in writing is made for it; or if the principal is payable, and is not paid within six months, and after a demand has been made for it in writing, provided that his mortgage amounts to the sum required by the special Act for the exercise of this power, or that he obtains the concurrence of other mortgagees to the said amount.[3] No provision is made as to the exercise of the right to petition by a bondholder, in the event of such a right being conferred upon him by the special Act. In the case of the holder of debenture stock, under the Companies Clauses Act, 1863, it is provided that if the interest is not paid within thirty days of the date at which it is payable, any one or more of the debenture-holders holding, individually or collectively, the sum in nominal amount provided by the special Act, or, if no such sum is provided, then a sum equal to a tenth part of the sum which the company is authorised to raise by borrowing, or the sum of £10,000, whichever of the two is the lesser, may petition for a judicial factor, without prejudice to his right to sue for the arrears in any competent Court.[4] In the case of railway companies, a petition for a judicial factor may be presented by any creditor who has obtained a decree which would, but for statutory provision, have entitled him to attach the property of the company by diligence.[5]

[1] Cf. *Marshall* v. *South Staffordshire Tramways Co.* [1895], 2 Ch. 36, *ante* p. 629.

[2] 1845 Act, s. 56.

[3] *Ib.*

[4] 1863 Act, s. 25.

[5] Railway Companies (Scotland) Act, 1867, s. 4, *ante*, p. 628, note 2.

Petition for appointment of judicial factor.

It would appear that in Scotland the Court will only appoint a judicial factor in the cases provided for in the Statutes, and has no power at common law to make such an appointment.[1] The English cases, therefore, in which a receiver, or a receiver and manager, has been appointed on the application of debenture-holders in a company registered under the Companies Acts, and without any statutory provision, are not applicable to Scotch law.[2] The petition must be directed to the Inner House, and is not competent before the Lord Ordinary on the Bills in vacation.[3] But where a factor already appointed had died, it was held that the Lord Ordinary on the Bills might make an interim appointment in vacation.[4] The petitioners are entitled to suggest the name of a party they desire as factor, and the Court will, in the absence of any personal objection, appoint the party so suggested.[5]

Powers of judicial factor: (*a*) Under Companies Clauses Acts.

The powers and duties of a judicial factor depend upon whether he is appointed under the Companies Clauses Acts, or under the Railway Companies Act. Under the former Acts the statutory duties of the judicial factor are "to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid."[6] Upon the appointment being made, all such tolls and sums of money are to be paid to the person appointed, and the money so received shall be so much money received by or to the use of the party to whom such interest, or principal and interest, shall be then due, and on whose behalf such judicial factor shall have been appointed.[7] After these claims and the expenses of the factory are paid, the power of the factor shall cease, and he shall be bound to account to the company for his intromissions, and to pay over to the treasurer any balance that may be in his hands.[8] These provisions have been interpreted as meaning that the factor has a right to demand the tolls or other income directly from the cashier of the company, and is not

[1] *Glasgow, Barrhead, etc., Rwy. Co.* v. *Caledonian Rwy. Co.*, 1850, 12 D. 1014.

[2] See *Makins* v. *Percy Ibbotson & Sons* [1891], 1 Ch. 133; *Edwards* v. *Standard Rolling Stock Syndicate* [1893], 1 Ch. 574.

[3] *Broad* v. *Edinburgh Northern Tramways Co.*, 1888, 15 R. 615.

[4] *Primrose* v. *Caledonian Rwy. Co.*, 1851, 13 D. 1214.

[5] *Broad* v. *Edinburgh Northern Tramways Co.*, 1888, 15 R. 641.

[6] 1845 Act, s. 57; cf. 1863 Act, s. 26.

[7] 1845 Act, s. 57.

[8] *Ib.*

required to obtain them through the directors. It is in his discretion how much of the tolls he should take; but in deciding the point he should have regard to the interests of the creditors he represents, and not to those of the company. Thus if the tolls received by a tramway in one week were sufficient to meet the amount due on the mortgages, the judicial factor would be entitled to take them all, without regard to the fact that he would thereby paralyse the company. If, however, the earnings of one week were not sufficient, it would be within his discretion to leave enough for the working expenses of the company for the ensuing week, and take only the balance.[1] This power to take tolls, however, would seem to be the limit of the powers of a judicial factor appointed on a company under the Companies Clauses Acts. He has no power to supersede the directors in carrying on the business for which the company was incorporated.[2]

(*b*) Under Railway Companies Act.

A judicial factor appointed under the Railway Companies (Scotland) Act, 1867, has wider powers. He is appointed factor "on the undertaking of the company"; and his duties are to collect the tolls, and to apply them, under direction of the Court, "after due provision for the expenses of the railway and other proper outgoings in respect of the undertaking," in payment of the debts of the company.[3] It has accordingly been held that the duties of such a factor are to supersede the directors in the management of the company, and to carry on the railway under his own management.[4] It is for him to decide what are the proper expenses and outgoings to which the tolls received should be applied, and how much may be distributed among the creditors of the company.[5] It may ultimately be the duty of the judicial factor to apply to Parliament for power to sell the line; and the Court has granted a petition by a judicial factor for authority to make such an application.[6]

Transfer of securities under Companies Clauses Acts.

The transfer of securities issued by companies incorporated by Act of Parliament is provided for by the Companies Clauses Act, 1845. Any person in right of a mortgage or bond may transfer it by a deed duly stamped, setting forth the consideration, and in the form of Schedule E of the Act.[7] Within thirty days after the exe-

[1] *Cotton* v. *Beattie*, 1889, 17 R. 262.

[2] *Haldane* v. *Girvan and Portpatrick Rwy. Co.*, 1881, 8 R. 669, per Lord President, at p. 672; *Cotton* v. *Beattie, supra.*

[3] 30 & 31 Vict. c. 126, s. 4.

[4] *Haldane* v. *Girvan and Portpatrick Rwy. Co.*, 1881, 8 R. 669.

[5] *Haldane, supra*, per Lord President (Inglis), at p. 674.

[6] *Haldane* v. *Rushton and Others*, 1881, 9 R. 253.

[7] Companies Clauses Act, 1845, s. 49.

cution of such a transfer, if made in the United Kingdom, or, if made abroad, within thirty days of its arrival in the United Kingdom, it shall be produced to the secretary of the company, who shall thereupon make an entry in the Register of Mortgages, on which the transferee is entitled to the full benefit of the mortgage or bond, and the transferor shall have no power to discharge it. Until such entry, the company is not responsible in any way to the transferee of the mortgage.[1]

All such securities are declared to be personal estate, and therefore pass to the executor.[2]

Securities granted by Local Authorities.

The main class of securities issued under statutory authority, and creating a statutory charge, in addition to those issued under the Companies Clauses Acts, consists of obligations granted for money borrowed by local authorities. It has been thought unnecessary to detail the provisions of the Statutes, the principal of which are noted below, on which these obligations are founded.[3]

[1] Companies Clauses Act, 1845, s. 50.

[2] *Ib.* s. 46.

[3] For local authorities in general, see 54 & 55 Vict. c. 34, amended by 56 Vict. c. 8; for county councils, 52 & 53 Vict. c. 50; and for parish councils, 57 & 58 Vict. c. 58.

CHAPTER XIX

DISTINCTIVE FEATURES OF CAUTIONRY

Definition.
Distinctive features of the contract.
Cautionry distinguished from independent contract.
Cautionry distinguished from delegation.
Cautionry distinguished from contracts of indemnity.
Cautionry distinguished from obligations for the obligant's own behoof.
Cautionry distinguished from representations as to the credit of a third party.

Definition.

A CAUTIONARY obligation or guarantee is an obligation accessory to a principal obligation, to answer for the payment of some debt or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance.[1] "Whoever is liable to pay the debt of another, whether for value, as in the case of a broker, who receives a commission for incurring liability, or gratuitously, as between himself and the person originally or primarily liable, is a surety; and I can understand no definition of surety which will not include a person in that situation."[2] The person who gives the promise is the cautioner, surety, or guarantor; the person to whom the promise is given is the creditor; and the person whose liability is the foundation of the contract is the principal debtor. Cautionry, in Scotland, corresponds to suretyship in England; and the principles which regulate the contract are practically identical in both countries.[3]

[1] Fell on *Guarantees*, p. 1; Bell, *Com.* (M'L. ed.) i. 364. The essential features of cautionry are precisely marked in the following definition: "Contractus . . . quo quis aliquam obligationem ob majorem securitatem, ita in fidem suam recipit, ut principalis debitor nihilominus maneat obligatus."—*Dig.* Lib. 46, Tit. 1. In the Indian Contract Code, s. 126, suretyship is succinctly defined as "a contract to perform the promise or discharge the liability of a third person in case of his default."

[2] Per Jessel, M. R., in *Imperial Bank* v. *London and St. Katherine's Dock Co.*, 1877, 5 Ch. D. 195, at p. 200.

[3] Bell, *Com.* (M'L. ed.) i. 364; see per Lord Eldon in *Grant* v. *Campbell*, 1818, 6 Dow App. 239, at p. 252. This is especially true since the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60,

Cautionry and guarantee.

The difference between a cautionary obligation and a guarantee is a difference rather in name than in substance. Professor Bell says that a guarantee is distinguished from a formal cautionary obligation chiefly by the looser epistolary form of the writing.[1] In other words, the term cautioner, as used by the older Scots lawyers, generally pointed to the obligant having bound himself by a bond. In regulating the rights and duties of the parties to the contract, however, the law looks to the substance and reality of the relation subsisting between them; so that the particular form of the transaction or of the document in which the obligation is undertaken is, as a general rule, of comparatively little importance.[2] It is stated in the rubric of *Wilson* v. *Tait*,[3] that the House of Lords in that case distinguished between cautionary obligations and guarantees, and held them not to be equivalent. An examination of the case shows, as Lord M'Laren has pointed out,[4] that this statement incorrectly represents the import of the decision. All that was really determined was, that the mere use of the term "guarantee" in the letter of the appellant, which formed the ground of action, did not necessarily make the letter a cautionary obligation, within the terms of the Statute 1695, c. 5, establishing the septennial limitation. It was held that the expression "I guarantee," as there employed, did not express an undertaking that others should perform what they had contracted to do, but amounted to a distinct contract to pay the sum due on demand. The Lord Chancellor's observations are in no way inconsistent with the fact that the two terms, guarantee and caution, as ordinarily used in legal terminology, are equivalent.[5]

An attempt is indeed made by Baylies, in his work on *Sureties*, to distinguish between the respective obligations of a

s. 6), by which the law of England as to the proof of the contract was extended to Scotland; see per Lord Blackburn in *Walker's Trs.* v. *M'Kinlay*, 1880, 7 R. (H. L.) 85, at p. 89.

[1] Bell, *Com.* (M'L. ed.) i. 388.

[2] In the earlier law the form of the obligation had effects on the extent of the liability undertaken by the obligant, which it does not now have. Thus, prior to the Mercantile Law Amendment Act, 1856, it depended on the form of the obligation whether the cautioner had, or had not, the right of discussion (see p. 785). Even now the form of the obligation may have important effects on the amount and duration of the cautioner's liability, *e.g.* in determining whether or not the obligation is within the Act 1695, c. 5, which establishes the septennial limitation (*vide infra*, Chap. xxvi.).

[3] 1840, 1 Rob. App. 137.

[4] See Lord M'Laren's note on the Mercantile Law Amendment Act, Bell, *Com.* i. 405.

[5] See observations of Lord Kinnear (Ordinary) on *Wilson* v. *Tait* in *Stocks* v. *M'Lagan*, 1890, 17 R. 1122, at p. 1127.

surety and a guarantor. According to Baylies, the distinguishing characteristics are as follows:—Suretyship creates a direct liability to the creditor for the performance of a certain act by the principal debtor, while a guarantee creates a liability only for the ability of the debtor to perform the act: a surety undertakes to perform the contract of the principal debtor, if the latter should not, while a guarantor undertakes that the principal can perform, and that he will be able to do so: again, the undertaking in suretyship is immediate and direct that the act shall be done, which, if not done, makes the surety at once responsible, while the liability in guarantee is dependent on the non-ability or insolvency of the principal.[1] Such distinctions, whether genuine or not, are of little practical value. In short, while the words, guarantee and cautionry, point to a difference in the form of the contract, yet, alike in regard to their essential characteristics, and in regard to the principles of law, by which they are regulated, the two obligations—the formal cautionry and the looser guarantee—are identical.[2]

Strictly accessory nature of the contract.

The main principles applicable to cautionry, along with many of the terms used in connection therewith, are taken directly from the Roman law on the subject.[3] The fundamental characteristic of the contract is that the obligation, on the part of the cautioner or guarantor, is strictly accessory in its nature. A cautionary obligation or guarantee is granted by way of security for the fulfilment of some primary obligation on the part of a principal debtor, who, as such, remains liable.[4] In other words, the obligation of a cautioner is not an independent obligation, but is essentially conditional in its nature, being properly exigible only on the failure of the principal debtor to pay at the maturity of his obligation. Of course cautioners may be, and very often are, bound as co-principals and full debtors along with the principal debtor. In such cases, although the form of the obligation is important in determining the manner in which the creditor can enforce his rights, yet in regulating the relations of the parties, the law looks to the reality of the transaction, and not to its form.[5] If the obligation be shown, either by the terms

[1] Baylies on *Sureties*, p. 4.

[2] The really important distinction is that between an independent obligation and an accessory obligation, not that between cautionry and guarantee.

[3] For the Roman law of *fidejussio*, see *Inst.* iii. 21; *Dig.* 46. 1; *Cod.* 8. 41.

[4] Ersk. iii. 3. 61; Bell, *Prin.* s. 245; see def.: "ut principalis debitor nihilominus maneat obligatus"—*Dig.* 46. 1.

[5] See, *e.g.*, the observations of the Lord Chancellor in *Mackenzie* v. *Macartney*, 1831, 5 W. & S. 504.

of the instrument, or by back-letter, or by competent proof,[1] to be essentially cautionary in its nature, the law of cautionry will apply, and effect is given to the rights and privileges properly belonging to the cautioner-obligants.[2]

There must exist a lawful principal obligation.

It follows from the accessory nature of cautionry, that the existence of a lawful obligation by the principal debtor to the creditor is an essential requisite. *Fidejussor obligari non potest ei apud quem reus promittendi obligatus non est.*[3] "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed."[4] The principal debt is not necessarily an obligation for the payment of a money claim. It may be for the performance of an act; for the delivery of goods; or for the performance of the duties of an office. In respect of any obligation, in short, which may lawfully be laid on the principal debtor—whether certain or indefinite in amount—a cautioner may intervene and intercede.[5] The liability on the part of the principal debtor, in respect of which the cautioner intervenes, may even be of the nature of damages for a wrong.[6]

It does not matter whether the principal obligation has been already contracted at the time of the transaction of cautionry, or whether, being then only in contemplation, it is not actually constituted till after that date.[7] All that is necessary is that there be a principal obligation; and such principal obligation may be either previously, or contemporaneously, or subsequently contracted.[8] In this matter the law of Scotland has always been in conformity with the Roman law. In England, on the other hand, it seems at one time to have been held to be necessary that the principal debt should have been constituted not later than the date of the accessory obligation. So early as 1787, however, it was authoritatively laid down in the leading case of *Matson* v. *Wharam*,[9] that no distinction is to be taken between

[1] See *infra*, pp. 674, 676, 925.

[2] See *infra*, pp. 676 *et seq.*

[3] *Dig.* 46. 1. 16.

[4] Per Lord Selborne in *Lakeman* v. *Mountstephen*, 1874, L. R. 7 H. L. 17, at p. 26.

[5] "Omni obligationi fidejussor accedere potest"—*Dig.* 46. 1. 1.

[6] *Kirkham* v. *Marter*, 1819, 2 B. & Ald. 613.

[7] *Dig.* 46. 1. 6. 2.

[8] "Fidejussor et præcedere obligationem et sequi potest"—*Inst.* iii. 20, s. 3.

[9] 1787, 2 T. R. 80.

cases in which the liability of the principal debtor emerges before, and those in which it emerges after, the surety's contract.

Contracts, not acceding to a principal obligation, are not cautionary, but independent, obligations.

Inasmuch as its accessory character is a distinctive feature of a cautionary obligation, it is clear that if a person undertakes an obligation, knowing that there is no liability on the part of a third party, or regardless whether or not such liability exists, or ever will exist, he is not a cautioner, but enters into an independent contract. Although it is not necessary to the constitution of a cautionary obligation that the liability on the part of the third person should actually be in existence at the date of the accessory contract, yet, if the contract is to be one of cautionry, it is necessary, where one binds himself for the performance of an obligation, which is to be undertaken subsequently by a third party, that, at the date of the transaction, the parties to it clearly contemplate, as the foundation of their present contract, the creation of a primary liability on the part of the third party at a future date. The mere fact that the obligation was undertaken for the benefit of a third party, or that the consideration passed to a third party, will not suffice to make the earlier contract one of cautionry, unless it be further shown that the intention of the contracting parties was that the third party should become actually primarily liable, and that this contemplated future liability on his part was the basis of the earlier contract.[1] Thus where a party, "as acting and taking burden on himself for" B., undertook to implement whatever an arbiter should determine by his decree, he was held to be primarily liable, upon the ground that, while it was for, or on account of, B. that he undertook, he had promised, not that B. would recognise and adopt the award, but that he himself would do so, whether B. acknowledged it or not.[2] Similarly, where two persons obliged themselves to pay a sum of money, as "taking burden" for a third party, they were held to have incurred a primary, and not an accessory, liability, inasmuch as they had bound themselves, and not the third party, to pay.[3] Again, an obligation to a creditor in these terms: "I will see the above account settled," was held "not a cautionary obligation," because it appeared that the obligant did not contemplate the continued liability of the original debtor as the basis of his undertaking. That being so, his undertaking was construed as an

[1] *Mountstephen* v. *Lakeman*, 1871, L. R. 7 Q. B. 196; affd. 1874, L. R. 7 H. L. 17.

[2] *Woodside* v. *Cuthbertson*, 1848, 10 D. 604; see per Lord Moncreiff, at p. 610.

[3] *Molleson's Trs.* v. *Crawfurd & Wilson*, 1851, 13 D. 1075.

independent and substituted obligation, in which he was liable as principal.[1]

Illustrations of the principles applied in distinguishing cautionary, from independent, obligations.

Although the distinction between cautionary and independent obligations is clear enough theoretically, yet there often arises considerable practical difficulty—especially in cases where the promise of the guarantor precedes the liability of the principal debtor—in determining whether or not the contracting parties really intended to make a certain future obligation or a contemplated future liability on the part of a third person, the actual basis of their present contract. On the determination of this question it depends whether the agreement of the parties is an accessory contract of cautionry or an original and independent undertaking. On the one hand, if the promise is to pay, whether a third person shall be liable or not, it is an original and independent contract; on the other hand, if the promise is to pay only in the second instance, and in the event of the failure of a third party, who is, or is about to become, primarily liable, it is a guarantee. So where A. induces a tradesman to deliver goods to B., by promising to see the price paid, the nature of A.'s contract is determined by the answer given, on a consideration of the circumstances, to the question: "To whom was credit given?"[2] If it appear that credit was given entirely to A., then the goods, though delivered to B., are considered as sold to A., who accordingly is liable as principal; if, on the other hand, the tradesman trusted primarily to the credit of B., then the goods are considered as sold to him, in which case A. is liable only in the second instance and as a cautioner for the price.[3] The question to which of the two credit was primarily given, is a question of fact, in determining which all the circumstances of the transaction are to be considered.[4] The circumstance, for example, that the tradesman did not originally debit one of the parties with the debt in his books is an important but not conclusive element.[5] A guarantee of this sort may be quite valid although the tradesman does not at the time bind himself to supply the

[1] *Morrison* v. *Harkness*, 1870, 9 M. 35.

[2] *Mountstephen* v. *Lakeman*, 1871, L. R. 7 Q. B. 196; affd. 1874, L. R. 7 H. L. 17.

[3] The cases illustrating this distinction are numerous, *e.g. Sutherland & Mackay* v. *Mackay*, 1867, 5 S. L. R. 67; *Blackwood* v. *Forbes*, 1848, 10 D. 920; *Grant* v. *Fenton*, 1853, 15 D. 424; *Couturier* v. *Hastie*, 1855, 22 L. J. Ex. 97.

[4] *Keate* v. *Temple*, 1797, 1 B. & P. 158; *Storr* v. *Scott*, 1833, 6 C. & P. 241; *Selkirk* (Stevenson's Tr.) v. *Campbell & Sons*, 1896, 33 S. L. R. 503.

[5] *Keate* v. *Temple*, 1797, 1 B. & P. 158; *Croft* v. *Smallwood*, 1793, 1 Esp. 121.

goods for the price of which, if furnished, the guarantor is to be answerable.[1]

The law on this subject was concisely stated *per curiam* in the leading English case, *Birkmyr* v. *Darnell*,[2]—a statement recently approved by the First Division of the Court of Session,[3]—as follows:—"If two come to a shop, and one buys, and the other, to gain him credit, promises the seller 'If he does not pay you, I will,' this is a collateral undertaking, and void, without writing, by the Statute of Frauds. But if he says 'Let him have the goods, I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." In the Scotch case referred to,[4] Stevenson had "financed" one Stark, a building contractor, who was in impecunious circumstances, and the question arose whether certain goods, admitted to have been delivered to Stark, were delivered under a contract of sale between the seller and Stevenson, or whether the agreement between the seller and Stevenson was that the latter should be cautioner for Stark. The Lord President laid it down that the matter was to be determined on the evidence as a whole. On the evidence, the Court held that Stevenson really undertook the execution of Stark's contracts, Stark being reduced to the position of a servant; and that this was the footing on which the seller supplied the goods. Accordingly, following the principle of distinction laid down in the above-quoted statement in *Birkmyr* v. *Darnell*, the Court held that Stevenson's obligation to the seller for the price of the goods was an independent, and not a cautionary, obligation.

Where the principal obligation fails, the accessory obligation also fails.

Since the existence of a principal obligation is a necessary foundation for the accessory contract of a cautioner, it is clear that, if the principal obligation turns out to be null and void, the obligation of the cautioner is equally of no effect. If, for example, the obligation of the principal debtor is void, by reason of its inherent illegality, as being *contra bonos mores*; or because it is impossible of performance;[5] or because it has not been completed,

[1] *Kennaway* v. *Treleaven*, 1839, 5 M. & W. 498, per Parke, at 401.

[2] 6 Mod. Rep. 249; 1 Smith's L. C. (10th ed.) 287.

[3] *Selkirk* (Stevenson's Tr.) v. *Campbell & Sons*, 1896, 33 S. L. R. 503.

[4] *Selkirk* (Stevenson's Tr.) v. *Campbell & Sons*, 1896, 33 S. L. R. 503; cf. also *Sutherland & Mackay* v. *Mackay*, 1867, 5 S. L. R. 67, in which case the obligation was held to be a direct obligation for the price of goods furnished, and not a guarantee, so that the 6th sec. of the Mercantile Law Amendment Act was inapplicable.

[5] *Dig.* 50. 17. 29.

as where the debtor has not subscribed his obligation;[1] or because the principal debtor, though formally bound, is in law totally incapable of contracting, as in the case of a pupil or insane person;[2] there can be no liability on the part of the cautioner. So where an accessory obligation is entered into on the basis of a contemplated liability to be subsequently undertaken by a third party, the emergence of such a liability on the part of the third party is a condition precedent to liability on the part of the surety.[3] Thus if A. says to B., "If I am to do certain work for C., I must be assured of payment by someone," and B. says, "Do it, and I will see you paid," no liability can attach to B. as surety, unless C. later becomes actually liable by giving an order to A. to do the work. If the third party, whose prospective liability is made the foundation of the contract, never actually himself becomes liable, then the accessory contract necessarily fails, because there is a failure of that which the parties intentionally made the foundation of their contract.[4]

Upon the same principle, so soon as the creditor's claim against the principal debtor—though valid at first—comes to an end, as where the debt guaranteed is allowed to prescribe,[5] the liability of the cautioner is extinguished.[6] As there can be no guarantee of a principal obligation which never comes into existence, so there cannot continue to be a guarantee of a principal obligation which has ceased to exist.[7]

Modifications of this rule:—Where there exists a good natural obligation on the part of the principal debtor.

The rule that, in order to the validity of an accessory contract of guarantee, there must exist a liability, actual or prospective, on the part of a principal debtor, is modified to this extent, that it is not necessary that the principal debt should be exigible against the principal debtor by process of law. For our law, following the Roman law, regards it as a sufficient foundation for the contract of cautionry that the principal debtor should be bound by a natural obligation—bound morally, though not legally.[8] In other words, the creditor may have a good title to sue the cautioner, though he has no action to enforce payment from the principal

[1] *Crichton*, 1612, M. 2074.

[2] Stair, i. 17. 11.

[3] See observations of Willes, J., in *Mountstephen* v. *Lakeman*, 1871, L. R. 7 Q. B. 196, at p. 202.

[4] *Mountstephen* v. *Lakeman*, 1871, L. R. 7 Q. B. 196; affd. 1877, L. R. 7 H. L. 17.

[5] *Halyburtons* v. *Graham*, 1735, M. 2073.

[6] "Cum causa principalis non consistit, ne ea quidem, quæ sequuntur, locum habeant"—*Dig.* 50. 17. 178.

[7] *Commercial Bank of Tasmania* v. *Jones* [1893], App. Cas. 313; see *infra*, p. 846.

[8] *Dig.* 46. 1. 1; 46. 1. 8. 6; 46. 1. 16. 4; Ersk. iii. 3. 64; Bell, *Prin.* s. 251.

debtor. Where, indeed, the principal debt is absolutely void, no cautionary obligation can exist; but where the principal debt is only voidable, the party intervening to secure payment is truly a cautioner, and the accessory obligation is good, though the primary obligation will not sustain an action against the principal. Thus the contract of a minor, who has no curators, being good until set aside on the ground of actual lesion, is a sufficient basis for a cautionary obligation. Even where a minor, who has curators, has entered into a contract without their consent, his obligation, although, in respect of the non-consent of his curators, it is ineffectual at law, has been held to afford a good basis for holding his cautioner liable.[1] A case of this sort appears, indeed, to approximate to the class of cases in which the principal obligation is absolutely null; for a deed, executed by a minor, having curators, without the concurrence of his curators, is, as a rule, null *ipso jure*. No action of reduction is necessary to set it aside, but its nullity may always be pleaded by way of exception. Nevertheless the decision in *Stevenson* v. *Adair*[2] rested on the view that the contract of the minor, though legally void, constituted a good natural obligation on his part, sufficient to render good the accessory obligation of the cautioner. A cautioner, who engages to make good a debt, is presumed to know the debtor's condition.[3] So though the personal obligation of a married woman is, in the ordinary case, invalid, and will found diligence neither against her estate nor against her person, her cautioner is bound.[4] Again, though the deed constituting the principal debt be invalid, owing to some informality of execution, as by reason of being subscribed by only one witness, yet the natural obligation of the principal may be sufficient to sustain the accessory liability of a cautioner, at least if the latter knew of the informality.[5] The whole doctrine is concisely stated by Erskine, in language which has frequently been quoted with approval by the Courts, as follows:—"A cautioner can in no case be bound in a higher sum to the creditor than the proper debtor is, for there cannot be more in an accessory obligation than in the principal.[6] Yet he may be more strictly obliged

[1] *Stevenson* v. *Adair*, 1870, 10 M. 919—the case of a cautioner of a minor in an indenture of apprenticeship, entered into by the minor without the consent of his father.

[2] *Ut supra.*

[3] Ersk. iii. 3. 64.

[4] *Shaw* v. *Maxwell*, 1623, M. 2074; *Buchanan* v. *Dickie*, 1828, 6 S. 986; *M'Kenzie* v. *Fraser*, 1827, 5 S. 597.

[5] *Nimmo* v. *Brown*, 1700, M. 2076; *Johnstoun* v. *Laird of Romano*, 1680, M. 2076.

[6] This consequence of the accessory nature of cautionry is treated under Extent of Cautioner's Liability, *vide infra*, p. 756 *et seq.*

than the proper debtor, as where the cautioner gives the creditor a pledge or a real right in his lands, or where one is cautioner for a debtor who is not himself civilly or fully obliged; for a cautionary obligation may be effectually interponed to an obligation merely natural. Thus a cautioner in an obligation where the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himself should get free by pleading the statutory nullity, or his own legal incapacity. The reason of this is obvious: *sibi imputet*, who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall make good the debt."[1]

—Where the cautioner knows that the principal obligation is invalid; but in this case the obligation is not really a cautionary, but an independent, obligation.

Where a person binds himself to a creditor on behalf of a third party, whom he knows not to be bound, or to be incapable of contracting, the obligation can be enforced; but an obligation of this sort, though it may formally be one of cautionry, is really an independent, and not an accessory, obligation. The Courts in England have gone quite as far as the Scotch Courts in the direction of enforcing the promise of a person who, in the knowledge that an obligation by a third party to a creditor is invalid, deliberately undertakes to secure payment to the creditor. So far has this doctrine been carried that the rule that a party cannot be liable upon a contract of guarantee, unless the principal be also liable, would appear, in some cases, to be true in form or words rather than in substance.[2] Thus where a company entered into a transaction, which, by reason of a statutory illegality, was void, it was held that the directors of the company, who had interposed as guarantors of rent in connection therewith, were liable under their guarantee.[3] Again, where a person engaged, professedly as surety, to answer for the payment of a debt by an infant, incapable of contracting, he was held bound as being substantially the only contracting party.[4] At first sight this principle, if fully carried out, seems to clash with Lord Stair's doctrine as to the non-liability of a cautioner for a pupil or insane principal.[5] It is to be observed, however, that in all the cases of this kind, in which the obligant has been held liable, his obligation to the creditor was undertaken in the knowledge that the

[1] Ersk. *Inst.* iii. 3. 64.

[2] Chitty on *Contract* (13th ed.), p. 468.

[3] *Yorkshire Railway Waggon Co.* v. *Maclure*, 1882, 19 Ch. Div. 478.

[4] *Harris* v. *Huntbach*, 1757, 1 Burr. 373.

[5] Stair, *Inst.* i. 7. 11; Note on Mercantile Law Amendment Act, Bell, *Com.* (M'L. ed.) i. 407.

contract of the debtor was void. That being so, the grounds on which he is held liable in the fulfilment of his undertaking are two: either he is, on account of his prior knowledge of the facts, personally barred from pleading the incapacity of his principal; or, by construction of law, he is regarded as, from the first, incurring a principal and not an accessory obligation, and his contract is enforced as an independent, and not as a subsidiary, contract. Both of these grounds of judgment are clearly implied in the passage from Erskine above quoted.[1] Contracts of this class certainly bear a resemblance to cautionry; and where there is a good natural, though not a good legal, obligation on the principal debtor, they are rightly classified under that head. Where, however, there does not lie even a good natural obligation on the principal, and an intervening obligant, knowing this, agrees to pay, the latter's obligation, though formally and nominally one of cautionry, in reality falls altogether outwith that species of contract: he binds himself in an independent, not a cautionary, contract. In cases of this sort, as in obligations of the type occurring in *Mountstephen* v. *Lakeman*,[2] *Morrison* v. *Harkness*,[3] *Selkirk* (Stevenson's Tr.) v. *Campbell*,[4] and other cases previously discussed, the question whether the engagement was original or accessory, depends on the contract between the parties, which must be determined not merely from the particular words or form of the undertaking, but from the whole circumstances of the transaction.[5]

In cautionry, principal debtor continues liable; cautionry thereby distinguished from novation.

It is an essential feature in a contract of guarantee, directly resulting from its accessory character, that the guarantor, by undertaking his guarantee, does not exonerate the principal debtor, or extinguish the principal debt.[6] In the words of

[1] Both grounds were, as appears from the opinions, present to the minds of the judges in *Stevenson* v. *Adair*, 1870, 10 M. 919, though the judgment in that case was put on the existence of a good natural obligation.

[2] 1871, L. R. 7 Q. B. 196; affd. 1874, L. R. 7 H. L. 17.

[3] 1870, 9 M. 35.

[4] 1896, 33 S. L. R. 503.

[5] Per Bayley, B., in *Simpson* v. *Penton*, 1834, 2 C. & M. 430. The position seems to be: If the promiser makes his promise on the basis that there exists, or will be constituted, a liability on the part of the principal debtor, he is a cautioner. If it turn out that no such liability exists or comes into existence, he is free; but if such liability, even if only natural, exists, or comes into existence, he is bound. If, on the other hand, the promiser makes his promise, knowing that there is no liability on the part of a third party, or regardless whether or not such liability exists, or ever will exist, then he is not a cautioner, but enters into an independent contract, which can be enforced against him.

[6] Cf. the words of the definition, p. 642: "Ut principalis debitor nihilominus maneat obligatus"—*Dig.* 46. 1.

Erskine, the obligation of a cautioner "is barely adjected to the debtor's obligation without extinguishing it."[1] This feature marks the distinction between guarantee and novation, or, more properly, delegation. Cautionry is the acceptance by the creditor of an additional debtor for, and along with, the original debtor; delegation is the acceptance by the creditor of a new debtor for, and in lieu of, the original debtor.[2] Where, in short, the original debt is discharged or destroyed by the new agreement, the contract is one of delegation, and not one of cautionry.[3] Even if the third party, whose obligation has been accepted by the creditor in room and discharge of the obligation of the original debtor, has an action of relief against the original debtor, he is not a cautioner *quoad* the creditor.[4] Delegation, however, is not to be presumed; so that *in dubio* the new obligation is accounted merely corroborative of the old.[5] Where there is an existing debt for which a person is liable, and a third party intervenes and undertakes to be answerable for it, it is often a difficult question of fact whether the creditor, by accepting the obligation of the new debtor, has relinquished his claim on the party originally liable. The principle of law, however, is clear; and unless the liability of the third party originally liable continues, the undertaking of the new debtor is not a guarantee.[6] So in England, where the obligation of the new debtor has the effect of releasing the original debtor from his liability, his undertaking is not a promise to answer for the debt, default, or miscarriage of another within the meaning of sec. 4 of the Statute of Frauds; nor can there be any doubt that such an obligation is equally outside the scope of sec. 6 of the Scots Mercantile Law Amendment Act. The leading English case on this point—and one that may be taken as a type of the others—is *Anstey* v. *Marden*.[7] There, on the insolvency of A., an agreement was entered into between his creditors and B., under which B.

[1] Ersk. *Inst.* iii. 3. 61.

[2] The distinction is accurately marked in Roman law by the terms *adpromissio* and *expromissio*. An *adpromissor* was a proper cautioner; an *expromissor* was a new debtor substituted for an old debtor.

[3] Cp. *Jackson* v. *M'Diarmid*, 1892, 19 R. 528; also *Magistrates of Haddington* v. *Howden*, 1816, Hume, 109.

[4] Stair, i. 17. 3. The fact that one obligant has a right of relief against another is no proof that the former is a cautioner; see, *e.g.*, per Lord President in *Union Bank* v. *M'Murray*, 1870, 7 S. L. R. 596.

[5] Stair, i. 18. 8; Ersk. iii. 4. 22; *M'Intosh & Son* v. *Ainslie*, 1872, 10 M. 304.

[6] *Morrison* v. *Harkness*, 1870, 9 Macp. 35.

[7] 1804, 1 B. & P. N. R. 124. See also *Browning* v. *Stallard*, 1814, 5 Taunt. 450; *Bird* v. *Gammon*, 1837, 5 Scott, 213, 220.

agreed to pay the creditors ten shillings in the pound in full satisfaction of their debts, the debts being assigned to B. It was held that this agreement was not an undertaking to pay the debts of A., but rather a purchase of these debts from A.'s creditors; and that, since the effect of the agreement was to extinguish A.'s liability, it fell outwith sec. 4 of the Statute of Frauds.[1] On the same principle, an agreement to convert a separate into a joint debt is not within the Statute; for the effect of such an agreement is to create a new debt, in consideration of the former debt being extinguished, *i.e.* it is a contract of novation, and not of guarantee.[2]

Obligation must be undertaken to the creditor in the principal obligation. Contracts distinguished by this test.

In a guarantee the obligation is undertaken to, or in favour of, the creditor in the primary obligation, or at least to, or in favour of, his agent, for his benefit.[3] This feature distinguishes guarantees from contracts of indemnity, in which one promises to keep another harmless from the result of a transaction into which he enters at the instance of the party giving the promise. In contracts of this latter sort the promise is made, not to the creditor, but to the debtor in the principal obligation, the purpose being to induce him to undertake the liability by assuring him of indemnity against loss. Thus where the defender, in a so-called letter of guarantee, promised the pursuer that if he would get certain shares subscribed for so as to enable a line of railway to be completed, he (the defender) would make good to him any loss which he might incur by so doing, the Court held that this was not the case of a person stepping in to corroborate the obligation of a principal debtor, but an independent obligation to relieve the other contracting party of any loss incurred by him by entering into the transaction. That being so, the obligation was held not to partake in any degree of the nature of a cautionary obligation, and the defender was found not entitled to any of the equities of a cautioner.[4] Upon the same principle, the English Courts hold that sec. 4 of the Statute of Frauds "applies only to promises made to the person to whom another is answerable."[5] Thus a promise,

[1] See also *Goodman* v. *Chase*, 1818, 1 B. & Ald. 297; *Lane* v. *Burghart*, 1841, 1 Q. B. 933, 937.

[2] *Ex parte Lane*, 1846, 1 De Gex, 300.

[3] Pothier on *Obligations*, 394.

[4] *Milne* v. *Kidd*, 1869, 8 Macp. 250.

[5] *Eastwood* v. *Kenyon*, 1840, 11 A. & E. 438. The rule was first laid down in *Thomas* v. *Cook*, 1828, 8 B. & C. 728; and it has been approved and acted upon by the Court of Exchequer in *Hargreaves* v. *Parsons*, 1844, 13 M. & W. 561; by the Court of Common Pleas in *Reader* v. *Kingham*, 1862, 13 C. B. (N. S.) 344; and by Malins, V.C., in *Wildes* v. *Dudlow*, 1874, L. R. 19 Eq. 198. See also *Guild & Co.* v. *Conrad* [1894], 2 Q. B. 885, C. A.

made by A. to B., to pay a debt due by B. to C., was held not to be a guarantee within sec. 4 of the Statute of Frauds, inasmuch as the promise was not made to C., the creditor, but to B., the debtor.[1] Again, where A. requested B. to join with C. in a joint and several promissory note, and at the same time verbally promised to indemnify him in case of loss, it was held, on B. being made liable under the note, that the verbal undertaking by A. to indemnify B. was binding, since, not being a guarantee, it did not require to be in writing.[2] The same construction would doubtless be put on sec. 6 of the Mercantile Law Amendment (Scotland) Act.[3] Two recent English cases illustrating the application of this principle may be mentioned. In one case the question was whether a promise by one partner of a firm to the other partners, to guarantee them against loss in respect of an existing debt due to the firm, was within sec. 4 of the Statute of Frauds.[4] Bowen, J., in holding the promise to be outside the Statute as being an indemnity and not a guarantee, said: "To bring a promise within the Statute, the debt for which the defendant has promised to answer must be a debt due to the person to whom the promise is made, and the promise must be made to a person who could bring an action for the debt." In *Guild & Co.* v. *Conrad*,[5] the defendant orally promised the plaintiff that if he would accept certain bills of exchange for a firm in which the defendant's son was a partner, he, the defendant, would provide him with funds to meet the bills. It was held that this was not a guarantee, but a promise of indemnity, and therefore was not required by sec. 4 of the Statute of Frauds to be in writing.

Similarly, if the undertaking is granted to a third party, not the creditor, it is not a guarantee. Thus a promise made to a bailiff to pay the debt, on consideration of his releasing the debtor from arrest, is not within the Statute of Frauds, because the bailiff to whom the promise is made is neither the creditor, nor the agent of the creditor.[6]

Since, in the words of Lord Stair, "caution is a promise or contract of any, not for himself, but for another,"[7] it is

One cannot be a cautioner for a debt due by himself.

[1] *Eastwood* v. *Kenyon*, 1840, 11 A. & E. 438.

[2] *Wildes* v. *Dudlow*, 1874, L. R. 19 Eq. 198.

[3] *Vide infra*, p. 717.

[4] *Re Hoyle* [1893], 1 Ch. 84. The ground of decision in the case, however, was that, even assuming the promise to be within sec. 4, there was sufficient written evidence to satisfy the Statute.

[5] [1894] 2 Q. B. 885. In this case the previous cases on this subject are reviewed. Cp. *in re* Bolton's Estate, *Morant* v. *Bolton*, 1892, 8 T. L. R. 668.

[6] *Reader* v. *Kingham*, 1862, 13 C. B. (N. S.) 344.

[7] Stair, i. 17. 3.

fundamental that one cannot guarantee his own debt. So Pothier lays it down that "it is evident that a person cannot become cautioner to or for himself."[1] Similarly, in England, a promise to answer for one's own debt, though the promise be to pay it to a bank instead of to the original creditor, is not a guarantee, it is merely a consent to the substitution of a new creditor.[2]

The liability of a cautioner must arise solely from his contract of cautionry, and must not be undertaken to relieve himself of a prior obligation or for some interest of his own.

The principle, simple as it seems, that a person cannot be cautioner for a debt due by himself, has important applications, and in many cases deprives obligants of the benefits and equities belonging to cautioners. If the main object and effect of an obligant's intervention be not to secure payment or performance by a third party, but to relieve himself or his property from some pre-existing liability, his obligation is not a guarantee.[3] The undertaking of such a person is not properly accessory or "barely subsidiary"[4] to the obligation of the third party, and consequently, even although it takes the form of a promise to answer for the debt of another, or even results in the discharge of the debt or liability of a third party, it is not a guarantee, but an independent contract. A guarantor intervenes in a matter in which he has no interest except in virtue of his guarantee; a person who intervenes in a transaction in which he has a material interest does so on his own behalf, and incurs an independent obligation. Thus in *Erskine* v. *Cormack*,[5] a party signed, *ex facie* only as cautioner, a bond of cash credit to be operated on by his son's firm, of which he was not a partner. It was proved, however, that the drafts upon the cash credit were applied for the *ex facie* cautioner's own behoof, partly in payment of an old bond, to which he was a party, and partly in payment of a private debt due to him by one of the partners of the firm. That being so, it was held, in a question with the representative of one of the partners of the firm who had signed the cash-credit bond, but who was not a party to the old bond, that the *ex facie* cautioner was not a mere cautioner, and consequently was not entitled, on paying the sum

[1] Pothier on *Obligations*, 394.

[2] *Hodgson* v. *Anderson*, 1825, 5 D. & R. 735; see also *Hargreaves* v. *Parsons*, 1844, 13 M. & W. 561, where it was laid down by Parke, B., that the Statute of Frauds applies only to "promises made to the persons to whom another is already, or is about to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee.

[3] *Milne* v. *Kidd*, 1869, 8 Macp. 250.

[4] Ersk. iii. 3. 62.

[5] *Erskine* v. *Cormack*, 1842, 4 D. 1478; see per Lord Fullerton. Compare the circumstances in *M'Murray* v. *M'Farlane*, 1894, 31 S. L. R. 531.

in the bond, to charge for relief the party in whose name the cash credit was kept. Similarly, in *Union Bank* v. *M'Murray*,[1] a bill for £5000 was granted by one M'Murray and a firm, Durham & Sons, in part payment of a large advance made to Durham & Sons by a bank. It was not disputed that if M'Murray had had to pay the bill to the bank he would have had, as a cautioner, a valid claim of relief against Durham & Sons. Nevertheless, on it being shown that the advance by the bank to Durham & Sons was made under an agreement that it should be applied *pro tanto* to liquidate an obligation by M'Murray to the bank, it was held that M'Murray was not a cautioner, and consequently was not liberated by time being given by the creditor to Durham & Sons. In other words, since one of the main purposes and effects of the transaction was to raise a sum of money for the obligant, who claimed to be a cautioner, the Court refused to hold that he was a cautioner or that he was entitled to any of the equities of a cautioner. "M'Murray," said Lord Deas, "was the man whom the bank was accommodating, and the introduction of Durham & Sons does not change the position in which he stood to the bank, which was that of a principal debtor in the whole transaction."[2]

English cases illustrating this principle.

The same principle is applied in England. Thus the liability of the assignor of a lease, who was under a covenant to pay the rent, was held not to be that of a surety to the lessor for his assignee, guaranteeing the payment of the rent of the assignee, but a primary and independent liability; and, accordingly, the assignor was not released from liability by the lessor and assignee altering the original contract without his consent.[3] So the 4th section of the Statute of Frauds is held not to apply to a debt for which the promiser himself is liable, although the payment of it by the promiser may exonerate another;[4] for if a party, though intervening nominally as a guarantor, is himself, prior to the so-called guarantee, either alone or jointly with others, liable for the debt which forms the subject of his subsequent promise,

[1] 1870, 7 S. L. R. 596; affd. by House of Lords 1873, 10 S. L. R. 319.

[2] Per Lord Deas in *Union Bank* v. *M'Murray*, 1870, 7 S. L. R. 596, at 601.

[3] *Baynton* v. *Morgan*, 1888, 22 Q. B. D. 74. In Scotland, after a lease has been assigned, and the assignation duly intimated to the landlord, and acquiesced in by him,—and this must have happened before the landlord and assignee could modify the contract,—the cedent is free of all claim for rent arising during the possession by the assignee, so that a case of this sort could not arise in Scotland—*Skene* v. *Greenhill*, 20th May 1825, F. C.; 4 S. 25.

[4] *Orrell* v. *Coppock*, 1856, 26 L. J. Ch. 269.

he is not a surety.[1] So in a recent English case an oral agreement had been entered into between certain stockbrokers, members of the Stock Exchange, and a person who was not a member of the Stock Exchange, that the latter should introduce clients to the former, receiving half of the commission, and paying half of the loss incurred in respect of such clients' transactions. In an action by the stockbrokers to recover half of certain losses which they had incurred under this agreement, it was urged by the defendant that his position was that of a guarantor or surety. It was held, however, that, as the defendant had an interest in the transactions equally with the plaintiff, he was not a guarantor, and was bound though his undertaking was not in writing.[2] Esher, M. R., pointed out that the question whether a contract was a guarantee or a contract of indemnity mainly turned on the test whether the person giving the undertaking is interested in the transaction, or whether he is totally unconnected with it. "If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, and not a guarantee.[3] An instance of prior interest on the part of the promiser, existing apart from his promise, and rendering his undertaking a primary, and not an accessory one, is where the creditor has a lien over certain goods of the debtor in his possession for the payment of his debt, and the promiser has some substantial interest in these goods. The promise to be answerable for the debt is, in such a case, made with the object of inducing the creditor to give up his lien over the goods, by giving up possession of them to the promiser; and that being so, even where the promise, if fulfilled, would result in the discharge of the debtor, the promiser is not a guarantor, but contracts on his own account.[4] The same rule holds in America, the law on the matter being laid down by Chief-Justice Kent as follows: "When the promise to pay the debt of another is founded on a new and distinct consideration, and one moving between the parties to the new promise, it is not within the Statute of Frauds.[5] It is considered in the light of an original promise."

Such contracts not within sec. 6, Mercantile Law Amendment Act.

Similarly in Scotland, as Lord M'Laren has pointed out, the

[1] *Macrory* v. *Scott*, 1850, 5 Ex. 907.

[2] *Sutton & Co.* v. *Grey* [1894], 1 Q. B. 285.

[3] Per Esher, M. R., in *Sutton & Co.* v. *Grey*, 1894, 1 Q. B., at 288.

[4] *Fitzgerald* v. *Dressler*, 1859, 29 L. J. C. P. 113; see per Cockburn, C.J., at p. 118; *Castling* v. *Aubert*, 1802, 2 East, 325; *Bampton* v. *Paulin*, 1827, 4 Bing. 264.

[5] *Leonard* v. *Vredenburgh*, 1811, 8 Johnson, 23, at p. 31.

existence of a liability on the part of the promiser in connection with the debt for which he becomes responsible, distinct from the liability of the third party for whom he intervenes, or the fact that the promiser's liability is founded on a consideration proper to himself and distinct from the cause of demand which the creditor has against the original debtor, puts his obligation outside the scope of sec. 6 of the Mercantile Law Amendment (Scotland) Act of 1856.[1] This interpretation of the section was given effect to by the First Division of the Court of Session in the recent case, *Wallace* v. *Gibson*.[2] In holding that the obligation in that case was not a "guarantee, obligation, or cautionary obligation made or granted by any person for any other person," within sec. 6 of the Mercantile Law Amendment Act, Lord Kinnear said: "These words appear to me to cover only the accessory obligation of a surety on the failure of a primary obligant, and to exclude liabilities attaching in the first instance to the supposed guarantor himself, and dependent on any consideration passing directly between him and the promisee. The case contemplated is that of guarantee for the debt of someone else given by a person who is entirely free from liability on his own account."[3] After pointing out that the money advanced on the supposed guarantee was not paid to the so-called principal debtor, but directly to the supposed guarantors, his lordship explained that he was unable to see any substantial distinction between the liability thence arising and that which would have attached if they had given a direct personal obligation to repay money, irrespective of any liability on the part of another.

At the same time, the doctrine that a person who intervenes to pay the debt of another is not a cautioner, if his obligation is undertaken upon some consideration, or in view of some interest, proper to himself, must be applied with caution. It does not apply, for example, to a cautioner who undertakes the obligation in consideration of a commission.[4] The Court, in the ordinary case, will not inquire closely into the motive which a party may have in making himself liable for the debt of a third person. Thus where an attempt was made to exclude a cautioner from the benefit of the septennial limitation, upon the ground that he was, to some extent, previously liable to the creditor, and had an

[1] See M'Laren's Note on the Merc. Law Amend. Act, Bell, *Com.* i. 407.

[2] 1895, 22 R. (H. L.) 56; see opinions of Judges of First Division, at p. 61 *et seq.*

[3] Per Lord Kinnear in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56 at p. 61.

[4] As in *Calder* v. *Cruickshank's Tr.*, 1889, 17 R. 74; *Burnett, Petr.*, 1859, 21 D. 1197; *Donaldson* v. *Ridley & Co.*, 1860, 22 D. 1471.

interest in the arrangement on account of which the cautionary obligation was granted, the Court held that the plea was irrelevant, and that the consideration for which the cautionary obligation was undertaken was foreign to the question.[1]

Position of *del credere* agent.

The question whether the position of a *del credere* agent is that of a cautioner to his principal for customers is a particular case of the above more general question. A factor who receives a *del credere* commission guarantees to his principal that the persons to whom he sells goods shall perform their part of the contract, and also warrants the remittances made as the proceeds of his sales.[2] The modern doctrine in England, overruling the earlier authorities, is that such a factor is responsible to his principal only in case of default on the part of the purchaser, and not in the first instance.[3] As a *del credere* agent is not liable to pay the debt till there has been a default by the purchaser, and as, upon such default, he becomes himself personally liable for the price, while at the same time the debt of the purchaser is not extinguished, his position is, so far, exactly that of a cautioner. Nevertheless, since the contract of the factor with his principal does not refer to any particular contract, which can be regarded as the principal obligation, and, further, has not for its immediate purpose the guaranteeing of the debt of a third party, but the selling of goods with special care and the earning of a higher rate of commission, it is regarded rather as an independent than an accessory contract. In other words, the fact that the main object of such an agreement is to regulate the terms of the agent's employment by his principal, and that any liability on the part of the former, which may subsequently emerge, to answer for the debts of other people, is merely an ulterior consequence of the terms of his employment, excludes such contracts from the category of cautionary obligations.[4] Accordingly, in England it is definitely settled that contracts of this description fall outside the 4th section of the Statute of Frauds.[5] In the case referred to, Baron Parke states, as a reason for this exclusion, that the liability of the factor has a *causam propriam*, the *del credere* commission, distinct from the *causa* of the debtor's liability to the principal, and that there-

[1] *Monteith* v. *Pattison*, 1841, 4 D. 161. See *infra*, p. 940.

[2] *Mackenzie* v. *Scott*, 1796, 3 Pat. App. 525.

[3] *Morris* v. *Cleasby*, 1813, 1 M. & S. 575; *Hornby* v. *Lacy*, 1817, 6 M. & S. 166. In view of these later authorities, Professor Bell's statement (*Com.* i. 395), that a *del credere* agent is directly liable, probably requires modification.

[4] *Sutton & Co.* v. *Grey* [1894], 1 Q. B. 285.

[5] *Couturier* v. *Hastie*, 1852, 8 Ex. 40; revd. on another point, 1856, 5 H. L. Cas. 673.

fore it is an independent contract, in which the so-called principal debt comes in only incidentally as a measure of the damages.[1] In Scotland *del credere* contracts have never been included under cautionary obligations. They could always, for example, be proved *prout de jure*, or might be implied from the nature of the employment,[2] and there is no reason to suppose, especially in view of the importance of uniformity in the commercial practice of the two countries on a matter of this sort, that sec. 6 of the Mercantile Law Amendment (Scotland) Act of 1856 has made any difference in this respect.[3]

Mandate to lend money or to give credit.

A similar question arises as to whether a person who gives a mandate to one party to lend money, or give credit to a third party, is, or is not, a cautioner. By the institutional writers such a mandant is regarded as a cautioner. Thus Stair says, that "when the mandant giveth order or warrant to contract with any other party to that party's behoof, then that party is the principal debtor and the mandant is cautioner."[4] So Erskine lays it down, that "one, merely by giving a mandate to lend money to a third person, becomes cautioner for him."[5] On the other hand, it is argued that, since there intervenes between the so-called cautioner and the creditor a regular contract of mandate, the mandant is bound *ex causâ mandati* in an independent, and not in an accessory, obligation. In this view, in short, the fact that the liability of the promiser arises from a cause distinct from the liability of the principal debtor prevents the contract being one of cautionry.[6] In some cases,[7] such an obligation has been treated by the Courts as exclusively one of mandate; but the question really depends upon the circumstances of the particular case.[8] The test is

[1] This statement by Baron Parke has been frequently approved, *e.g.* in *Fleet* v. *Murton*, 1871, L. R. 7 Q. B. 126, at p. 133.

[2] Bell, *Com.* i. 395; *Stein's Assignees* v. *Shirreff*, 1828, 7 S. 47.

[3] See Lord M'Laren's Note on Mercantile Law Amendment Act, Bell, *Com.* i. 406. In *Reid* v. *Reid Brothers*, 1889, 14 R. 789, the Second Division were equally divided in opinion as to whether it was competent to prove by parole that an agent had agreed with his principal to pay a minimum sum as the price of goods to be sold, whether that sum should be realised on sale or not. The judges, who held that parole evidence was incompetent, came to that conclusion solely on the ground of the unusual and anomalous character of the agreement.

[4] Stair, i. 17. 3.

[5] Ersk. *Inst.* iii. 3. 61.

[6] Pothier, *Oblig.* s. 446; Lord M'Laren's Note on Mercantile Law Amendment Act, Bell, *Com.* i. 408.

[7] *E.g. Paisley* v. *Rattray*, 13 Jan. 1779, F. C.

[8] The case of *Caves* v. *Spence*, 1742, M. 11021, mentioned by Lord M'Laren (*supra*, note 3) as to the application of the septennial limitation to such contracts, was decided upon wholly distinct grounds.

whether the third party, to whom the goods or money is furnished, is himself primarily liable to the creditor. On the one hand, those cases in which one person gives a mandate to another to lend money, or give credit to a third party, for behoof of the third party, who, on receipt of the money or goods, becomes himself primarily liable to the creditor for payment, the mandant being secondarily liable, resemble the class of cases where a cautioner binds himself for the performance of an obligation, which is subsequently to be undertaken by a third party. If the third party is thus liable as principal, then the engagement of the mandant or guarantor, whether it takes the form of a promise or of an order or of a request is only accessory, even though it may have been the chief inducement to the creditor to supply the money or goods. On the other hand, where the mandate is given for the behoof of the mandant himself, the contract strictly belongs to the category of mandate.[1] Accordingly, while a mandate proper, granted by the mandant for his own behoof, may, as a rule, be proved *prout de jure*, it is settled that mandates to pay money, for behoof of a third person, to the effect of setting up an obligation against the mandant, can be proved, like cautionry, only by writing.[2] In one case, indeed, in which A. gave a verbal order to B. to give £10 to C., for C's. behoof solely, it was held, after B. had executed the commission, that A.'s order could be proved by witnesses; but the soundness of this decision is justly doubted.[3]

The distinction between mandates granted for behoof of the mandant and those granted for behoof of a third party is illustrated in the obligations arising out of letters of credit. Such letters are essentially mandates authorising the person addressed to pay money, or furnish goods, to another on the credit of the writer. Where the letter is purchased from the granter by the person wishing the credit, it is regarded as in *rem versum* of the granter, and payments under the letter by the mandatary raise a debt only between the mandatary and the granter of the mandate. On the other hand, where the letter is not purchased from the

[1] Cf. the discussion of the requisites of mandate, Stair i. 12. 1.

[2] Dickson on *Evidence*, s. 572; Tait on *Evidence*, ss. 300, 302. Mr. Dickson gives, as a reason for this rule, the risk of the witnesses mistaking the purpose of the payment, and the general practice to employ writing in such cases. Still, the distinction, as regards the mode of proof, between the two kinds of mandatory contracts, is noteworthy, and may well be due to the cautionary character of the obligation in the one case.

[3] *Arbuthnot* v. *Scott*, 1765, 5 Brown's Supp. 910. As to the reasons for doubting the soundness of this decision, see note on the case in the report.

granter, but is given by him for the accommodation of the payee, it is an engagement to see paid any advances made to the payee, or, in other words, a guarantee of any draft accepted for, or bill discounted to, the payee. Accordingly, in this case, compliance with the mandate by the mandatary at once raises a debt to him not only against the granter of the mandate, but also against the payee, for whom the granter intervened.[1]

Representation as to the solvency of a third party distinguished from guarantee.

A cautionary obligation or guarantee imports a voluntary engagement, *i.e.* the liability of a guarantor is based upon an agreement on his part to be subsidiarily liable for the debt of another. In the case of a representation as to the credit of a third party, on the other hand, though it may, equally with a guarantee, subject a person *subsidiarie* for the debt of another, the liability may not, and frequently does not, depend on contract. There is clearly a difference between an expression of willingness to become liable for the payment of a debt, in case of the failure of a third party, and a statement regarding the credit of a third party.[2] The principles on which liability under a representation is based have been fully considered in a series of recent English cases.

In England liability for a representation is either (*a*) grounded on fraud, giving rise to an action *ex delicto*;

In England, liability under a representation, as distinct from liability under a guarantee, may arise in two ways. The more common case is where one makes a statement as to the solvency or trustworthiness of a third party which is false in fact, and made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the person to whom it is made. "It is a very old head of equity, that if a representation is made to another person, going to deal upon the faith of that representation, the former shall make that representation good if he knows it to be false."[3] The liability in this case is based on the fraudulent nature of the representation; it is not based upon contract, for there is no agreement or intention to contract. The person making the statement is liable *ex delicto* and not *ex contractu*. The injured party brings an action of damages for fraud: he does not sue upon a contract, as the creditor in a guarantee does. So, prior to Lord Tenterden's Act,[4] an action could lie on an oral representation, while, under the Statute of Frauds, a guarantee was

[1] Bell, *Com.* i. 389, *vide supra*, p. 585.

[2] See opinions in *Johnstone* v. *Owen*, 1845, 7 D. 1046, per Lords Jeffrey and Mackenzie.

[3] Per Lord Eldon in *Evans* v. *Bicknell*, 1801, 6 Ves. 174, at 183. This statement has been frequently quoted and approved in later cases.

[4] 9 Geo. IV. c. 14, s. 6.

invalid unless in writing.[1] To support such an action of deceit the pursuer is bound to prove, not only that the representation was untrue, but also that it was made fraudulently. "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.[2] Esher, M. R., in a recent case, emphasises this point: "To my mind the decision in *Derry* v. *Peek* turned on as simple a point of law as possible, viz. that to maintain an action for the effect of a misrepresentation, you must show it was a fraudulent misrepresentation."[3] Since fraud is the necessary foundation of an action of deceit, it follows that liability *ex delicto* is not incurred by a person who makes a false statement to another about to deal in a matter of business upon the faith of that representation, if he honestly believes it to be true. Unless there exist some special duty of inquiry on the person making the representation, there is no duty enforceable at law to be careful in his representation; and if he gives an honest answer,—that is, answers to the best of his knowledge and belief,—he incurs no liability thereunder.[4] "To make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud; to my mind it has no more meaning than legal heat or legal cold, legal light or legal shade."[5] Although, then, one man has made a representation as to the character or credit of another, couched in the most positive and unequivocal terms possible, yet if he spoke what he really believed, he is not liable *ex delicto*, however greatly he may have been deceived in the character of the other, or however greatly the person to whom the representation was made may have been injured thereby. So far, then, it is clear that liability under a false representation is based upon fundamentally different legal principles, and is enforced by a different form of action from liability under a guarantee.

[1] *Pasley* v. *Freeman*, 1789, 3 T. R. 51. Lord Tenterden's Act was thus not a mere extension of the Statute of Frauds, but stands as an independent provision.

[2] Per Lord Herschell in *Derry* v. *Peek*, 1889, 14 App. Cas. 347, at p. 374. As to reckless representation amounting to fraud, see remarks of Lord Blackburn in *Brownlie* v. *Miller*, 1880, 7 R. (H. L.) 66, at p. 81.

[3] *Tomkinson* v. *Balkis Consol. Co.* [1891], 2 Q. B. 614; see also *Angus* v. *Clifford* [1891], 2 Ch. 449, at p. 463.

[4] See opinions in *Low* v. *Bouverie* [1891], 3 Ch. 82.

[5] Per Bramwell, L.J., in *Weir* v. *Bell*, 1878, 3 Ex. D. 238, at 242; cf. per Bowen, J., in *Low* v. *Bouverie* (*supra*); see also *Le Lievre* v. *Gould* [1893], 1 Q. B. 491.

The second class of cases in which a representation may, in England, give rise to liability, are those in which the liability is supported by what is known as estoppel. The rule may be stated in the words of Lord Denman: "Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."[1] Since estoppel operates to prevent the disproof or denial of the state of facts on which the plaintiff bases his claim, the effect of it is to compel persons to make good their representations concerning existing facts, on the faith of which they have induced others to act.[2] The party making the representation becomes responsible for its consequences, not because he is bound to his representation by way of a contract founded upon agreement, as is the case in guarantee, but because he is estopped from denying the truth of the representation, and compelled to make it good as if it were true. As Sir Fred. Pollock points out, the extension of the doctrine to married women shows very forcibly that it has nothing to do with contract, or capacity for contracting.[3] In order that liability may accrue under a representation upon the ground of estoppel, the representation must be one regarding a state of facts alleged to be at the time actually in existence, and not a promise *de futuro*, which, if binding at all, must be binding as a contract;[4] and, further, the language upon which the estoppel is founded must be precise and unambiguous.[5] In *Low* v. *Bouverie*,[6] in which case the whole doctrine of liability under a representation is discussed, and the earlier cases reviewed, Low, being about to lend money to X. on the security of X.'s share of a trust fund of which Bouverie was trustee, asked Bouverie whether X.'s share in the fund was encumbered, and, if so, to what extent. Bouverie named certain charges, but did not name all; and Low, having lent the money on the faith of Bouverie's statement, and finding later that X.'s share was very heavily encumbered, brought an action to compel Bouverie to make good the loss. The Court

(*b*) results from estoppel.

[1] *Pickard* v. *Sears*, 1837, 6 A. & E. 469.

[2] See remarks of Lord Selborne in *Citizens Bank of Louisiana* v. *National Bank of New Orleans*, 1873, L. R. 6 H. L. 352, at 366.

[3] Pollock on *Contract*, 6th ed., p. 639; *Warden* v. *Jones*, 1857, 23 Beav. 487, at 493.

[4] See per Lord Selborne in *Maddison* v. *Alderson*, 1883, 8 App. Cas. 467, at 473.

[5] *Low* v. *Bouverie* [1891], 3 Ch. 82, per Bowen, L.J., at 106.

[6] *Supra*.

of Appeal held that Bouverie's statement could not be construed as a guarantee, so as to bind him by contract: that his statement, though false in fact, was not false to his knowledge, and consequently could not give rise to an action of damages; and that the doctrine of estoppel could not apply, seeing that the letters upon which Low sought to make Bouverie liable were not sufficiently precise and explicit to estop him from contending that there were other encumbrances upon the trust fund than those which he had mentioned to Low.

Scots law as to liability under a representation.

In Scotland the principles upon which liability under a representation is based have not been analysed or expounded so fully as has been the case in England; but it is conceived that the doctrines applied in England on this subject are, in their result, in accordance with the principles of Scots law.

As regards fraud, where a party has made a false and fraudulent representation as to the credit or financial position of a third party, either to a particular person or to the public, with the intention that it shall be acted on, and such representation has been acted on, with the result that the person acting on it has suffered damage by so doing, then the party making the representation is liable *ex delicto* in damages. In Scotland, as in England, a negligent as distinguished from a false representation, does not found liability *ex delicto*; for negligent representation is not fraud. Further, it must be clearly averred, not only that the representation was made fraudulently, but also that it was acted on, and that the person acting on it suffered damage by so acting on it.[1] By sec. 6 of the Mercantile Law Amendment Act, 1856, a representation as to the credit of a third person, even though fraudulent, cannot now give rise to any claim for damages by a person who has been misled by it to his detriment, unless it is in writing, and signed by the party making the representation, or by some one duly authorised by him.[1]

Also, in Scotland, the principle is fully recognised, that if a man makes a representation to another of the existence of a certain state of facts, which he intends to be acted on in a certain way, and the representation is acted on in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first party, though he has not been guilty of fraud, may incur liability. This liability may result from an application of the doctrine of personal bar, which seems to be practically identical in its effects with the English

[1] *Paton* v. *Clydesdale Bank*, 1896, 33 S. L. R. 533.

doctrine of estoppel.[1] In this view, apart from fraud, a party making a representation as to the position or credit of a third party may be barred from denying the truth of his representation in a question with one who has acted on it, provided that (1) such representation is one regarding existing facts, and (2) the party pleading personal bar can show that he has altered his position in consequence of the representation.[2] It is, however, probably more correct simply to hold that in such a case the person making the representation warrants the truth of his statement, and so is liable *ex contractu*, as in a guarantee.[3] Whether the liability is based on personal bar or on implied warranty or mandate, the practical result is that the party making the representation is bound to make good his untrue representation of the state of facts, as if it were true.[3]

What is in form a representation may be in another aspect a promise.

Even if personal bar is in Scotland, as estoppel is in England, a ground of liability under a representation, distinct from guarantee, it is frequently very difficult to determine whether a particular statement is to be construed as a representation of a fact, giving rise to a plea of personal bar, or as constituting a promise, or agreement, binding the person making it as a guarantor. It was pointed out by Lord Herschell in *Paton* v. *Clydesdale Bank*[4] that "That which is in form a promise may be in another aspect a representation"; and it is equally true that that which is in one from a representation may be in another aspect a promise. This is particularly true when the representation has reference to future conduct or intention.[5] Such a statement of intention may, indeed, be construed as a representation of fact, giving rise

[1] See per Lord Blackburn in *Mackenzie* v. *British Linen Co. Bank*, 1881, 8 R. (H. L.) 8, at p. 16; and per Lord Kinnear in *Mitchell* v. *Heys & Son*, 1894, 21 R. 600. See also *Clavering, Son, & Co.* v. *Goodwins, Jardine, & Co.*, 1891, 18 R. 652.

[2] The occurrence of a real change in position is always at the foundation of a plea of personal bar. See per Lord Cranworth, *Cairncross* v. *Lorimer*, 1860, 3 Macq. 827; also per Lord Pres. Inglis in *MacIntosh & Son* v. *Ainslie*, 1872, 10 M. 304, at p. 310.

[3] *Clavering, Son, & Co.* v. *Goodwins, Jardine, & Co.*, 1891, 18 R. 652. Lord Kyllachy (at p. 657) puts the right to sue on an implied warranty; Lord Young, on personal bar. As a unilateral engagement is binding in Scotland without consideration, there is not the same necessity in our law as there is in England of appealing to the doctrine of personal bar or estoppel in order to found liability.

[4] 1896, 33 S. L. R. 533, at 537.

[5] The fourth representation, in *Paton* v. *Clydesdale Bank*, is an instance in point. In that case the bank escaped liability, because the pursuer failed to aver that the bank did not actually do what they were expected to do. The bank, indeed, in that case, appears to have fulfilled its representation, and to have given effect to that which they alleged to be their intention.

to personal bar;[1] but it is more natural to construe it simply as a promise or undertaking constituting a binding contract when acted on.[2]

Review of Scotch cases.

In not a few earlier Scotch cases, persons who had apparently no intention to enter on a contract or render themselves liable for the debt of a third party were held liable as guarantors. Thus a letter written to a wholesale dealer, informing him that A. had taken a house for the sale of spirits, and adding, "I doubt not that he will give satisfaction in any transaction he may have with you," was construed as a guarantee, binding the writer for one transaction—a plea of false misrepresentation being withdrawn.[3] The soundness of this decision is justly doubted both by Brodie[4] and by Professor Moir,[5] upon the ground that the letter was a mere recommendation, and implied no obligation on the writer for the actings of A., and no intention to be liable for his debt. Again, in *Hunter* v. *Carson*,[6] a party was held liable as a guarantor upon the ground of a statement made to a person about to deal with a third party, that "there was not a better man in Scotland for the price," and that a bill at three months might be safely taken for the price. This statement, though it was an assurance as to the responsibility of a third person made with a view to a definite transaction, showed no intention to undertake a guarantee. The same remark applies to the case of *Ross* v. *Lindsay & Adam*.[7] The letter of Ross in that case, while it contained a most distinct statement as to the character and solvency of the third party, contained no expression of willingness to become liable for debts incurred by him; yet the writer was found liable as under a continuing guarantee. In this case the liability might have been based on the ground of fraudulent misrepresentation; for though it did not appear that the third party's insolvency was actually known to the writer, yet it was apparent that the letter had been written recklessly, careless whether the statements it

[1] This was the view taken of such a "promissory representation" in *Edgington* v. *Fitzmaurice*, 1885, 29 Ch. Div. 459, in which case the statement under consideration was described by Cotton, L.J., as "one of intention, but it is nevertheless statement of a fact"; and Bowen, L.J., observed: "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion."

[2] *Paton* v. *Clydesdale Bank*, 1896, 33 S. L. R. 533; see also per Lord Selborne in *Maddison* v. *Alderson*, 1883, 8 App. Cas. 467, at 473.

[3] *Rankin* v. *Murray & Muir*, 15 May 1812, F. C.

[4] Supp. to Stair, p. 924.

[5] Note in 17th ed. of Ersk. *Prin.*, p. 401.

[6] 1824, 2 S. 596.

[7] 1820, Hume, 116.

contained were true or false. In *Kembles* v. *Mitchell*,[1] a letter in these terms: "I shall feel obliged by your stating that A. is in excellent credit and possessed of capital for carrying on an extensive business," was construed as a mandate, which rendered the writer liable to persons dealing with A. on the faith of it, and which remained valid until it was recalled. The representation in the letter was true at the time, and falsehood was not alleged. In the later case of *Johnstone* v. *Owen*,[2] a letter, containing a positive testimony to the character and credit of a third party, was held not to amount to a guarantee, upon the ground that there were no words in the letter binding the writer to answer for the debt in case of the principal's default. The distinction between a testimony to a man's character and credit, and a guarantee of his dealing, was distinctly indicated, in accordance with the English decisions. This distinction was also carefully observed in *Park* v. *Gould*.[3] There a party, who made a statement to a merchant, in answer to inquiry, that a customer was "perfectly good," that "he was doing a large trade with him," and that "he would trust him to the extent of £200 at any time," was held liable to the merchant for goods supplied to the customer upon the faith of these statements. The Court, however, clearly indicated that it was "not a question as to the law of guarantee"; and the pursuers did not put their case upon that footing. Lord Fullerton, in particular, pointed out that the decision rested, not on the ground that the mere introduction of the third party implied a guarantee of his solvency, but on the fact that the defender made a representation of the third party's situation and solvency, which his knowledge of that situation and solvency did not warrant.

The statement of an opinion.

A mere introduction, recommendation, or general statement, expressing confidence in the ability or integrity of another, does not, if made in good faith, involve legal liability. The expression of an opinion, which is honestly entertained, does not bind the writer, although it afterwards turns out to be erroneous.[4] In a matter of opinion, the other party must be taken to rely on his own judgment. The representation does not do away with the necessity for inquiry or the exercise of sound discretion on his part; and if he chooses to act on it, and suffers detriment by so doing, his loss is the natural result of his own indiscretion in acting on another person's statement of opinion, when he ought to have judged

[1] 1831, 9 S. 648.
[2] 1845, 7 D. 1046.
[3] 1851, 13 D. 1049.
[4] *Taylor & Cunningham* v. *Waddell* 1804, Hume, 93; *Kembles* v. *Mitchell*, 1831, 9 S. 648.

for himself. If, however, such a statement of opinion was fraudulent, and given with the intention that it be acted on, a person who has acted on it, and suffered damage by so doing, has a valid ground for an action of damages against the writer.[1] In short, an action of deceit in England, or an action of damages in Scotland, does not lie for an opinion which, honestly stated, is falsified by facts; it only lies for a misrepresentation of an opinion—for a statement that a particular opinion is held, when it is not held.

Specific assurance as to matters of fact.

On the other hand, where the letter is not a mere expression of opinion, but contains a distinct and positive assurance as to the trustworthiness of a third party in relation to a specific transaction or course of dealing, or speaks in precise and unequivocal language to facts relevant to the solvency or ability of a third party,—particularly if the facts spoken to are matters as to which the writer of the letter has special means of knowledge,—with the intention and result that credit is given to the third party in reliance on the statements in the letter, the writer is bound.[2] The principle upon which this liability is founded, as well as the proper legal remedy open to the deceived party, will vary according as the statement was, or was not, fraudulent. If the circumstances show that the representations were tainted with fraud, as defined by Lord Herschell in *Derry* v. *Peek* in the passage already quoted,[3] the person who has been induced to deal with the third party, on the face of these statements, has an action of damages against the writer, and the latter is liable *ex delicto*; but if the statements, though negligent, were made with an honest belief in their truth, the letter, however specific, can ground no action of damages. At the same time, in a case of this sort, although there is no fraud, if the letter contains statements as to facts, which are untrue, a person who is led by the statements into a wrong belief as to the facts, and who acts on this belief to his detriment, can compel the writer to make good

[1] *Peck* v. *Gurney*, 1873, L. R. 6 H. L. 377; *Paton* v. *Clydesdale Bank*, 1896, 33 S. L. R. 533. This is so, although the representation is not made directly to the injured party; see *Philip* v. *Melville*, 21 Feb. 1809, F. C.; and *Langridge* v. *Levy*, 1837, 2 M. & W. 519. *Note.*—Bell (*Prin.* s. 280), says that in such a case the writer "will be held liable as by a guarantee." This is not strictly correct; the writer's liability arises solely *ex delicto*, and in no degree *ex contractu*. Bell's statement is a good illustration of the confusion of principles which, as has been pointed out, is found in the earlier Scotch authorities on this subject.

[2] Bell, *Com.* i. 389; *Ross* v. *Lindsay & Adam*, 1820, Hume, 116; *Park* v. *Gould*, 1851, 13 D. 1049; *Johnstone* v. *Owen*, 1845, 7 D. 1046.

[3] Page 664.

his representations. This he can succeed in doing, because the writer of the letter is personally barred from disproving or denying the state of facts, on which the pursuer bases his claim. Or again, although there is no fraud, if the letter contains a representation as to what the writer will do, which is susceptible of being construed as a promise or undertaking made with the intention that it should be acted on, there is an equally valid ground of liability; for inasmuch as the undertaking was relied on by the other party,—his actings constituting an implied acceptance,—the writer of the letter is bound *ex contractu* to fulfil his undertaking. Cases of this last kind merge into guarantees, in the proper sense of the term, in which there is an explicit offer on the part of the writer to bind himself, in case of the default of another, which offer is impliedly or expressly accepted by the creditor.[1]

Inquiry into the circumstances in which the representation is made is also important and relevant for other reasons. Thus if the statement as to the character or credit of a third party is made, not ultroneously, but in answer to inquiry, it is reasonable to infer that the writer may not at the time have been aware of the importance of his statement, or realised the consequences depending on it. Accordingly, in these circumstances, the words of the letter will be readily construed in favour of the writer, so that he may not be entrapped into liability by statements made in a friendly desire to give information.[2] On the other hand, when the representation is made without inquiry having been made, with distinct reference to a specific transaction or course of dealing, which he knows is in contemplation between the parties, he will not readily be heard to say that the representation was not made with the intention that it should be acted on, and with the knowledge of the responsibility which would ensue if it were acted on.[3] Again, the circumstances of the transaction may be important in showing that the party to whom the misrepresentation was made was not misled by it, as where he knew it to be false, or that it cannot have influenced his conduct, or at least that it was not the proximate cause of his altering his position by trusting the credit of the other party.[4]

Inquiry into the circumstances in which the statement is made.

[1] *Wilson & Corse* v. *Woods*, 1797, Hume, 81, and *Fraser* v. *M'Turk*, 1822, 1 S. 43, though frequently cited as cases of representation, are both distinct guarantees.

[2] Bell, *Com.* i. 389; Bell, *Prin.* s. 280. Much stress is laid on this point in the earlier cases.

[3] In *Wilson* v. *Wilson*, 1828, 5 Murr. 4, the question whether a letter was a guarantee or a recommendation was left to a jury.

[4] Cf. *Redgrave* v. *Hurd*, 20 Ch. Div. 1; *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.

CHAPTER XX

CONSTITUTION OF CAUTIONARY OBLIGATIONS

Classification of cautionary obligations.
Constitution of the contract.
Competency to contract.
Offer and acceptance.
Necessity of fairness of representation by creditor to cautioner.

Classification of cautionary obligations:

In a well-known English case,[1] Lord Selborne, using as a principle of classification the manner in which, or rather the parties between whom, the contract is constituted, distinguished three classes of cases, in which the relation of principal and surety subsists, as follows:—(1) "Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of these parties only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid."

(1) Cautionary obligations in which the creditor secured is from the first a party to the agreement.

In the ordinary case, the obligation of cautioners to answer for the debt or conduct of a third party is entered into directly by an agreement between the cautioner-obligants and the creditor secured by their obligation. Such an agreement is, from its commencement, a cautionary contract in the strict sense of the term. From the first the creditor, being a party to the agreement, is aware of the relation of principal and cautioner existing between his obligants, and accordingly, from the first, the principles of cautionry are fully applicable in regulating the relations of the different parties to the contract.

[1] *Duncan, Fox, & Co.* v. *North and South Wales Bank*, 1880, 6 App. Cas. 1.

Two forms: "proper" and "improper" cautionry.

The obligation of the cautioners in a contract of this sort may take one of two forms. The cautioner-obligants may either be bound simply and expressly as cautioners for the principal debtor, or they may be bound along with him as co-principals and full debtors.

"Proper" cautionry.

Where the cautioners are bound simply as cautioners,—a form of the obligation to which Bell applies the term "proper cautionry," —they had, prior to the Mercantile Law Amendment Act, the benefit of discussion, and continue to have the benefit of division, *i.e.* they are, in the first instance, liable to the creditor each only for his *pro ratâ* share, though, of course, in the event of the bankruptcy or insolvency of one of their number, the others must make up his share.

"Improper" cautionry.

On the other hand, where the cautioners are bound, along with the principal debtor, as co-principals and full debtors, or in a joint and several obligation,—a more common form of the obligation, to which Bell applies the term "improper" cautionry,—the creditor has instant and effectual recourse against each of them for the whole amount of the debt. Each of them has undertaken an unqualified obligation for the whole sum due, and the right of the creditor, so far as the enforcement of his debt is concerned, is regulated wholly by the terms of the instrument.[1] Accordingly, though, as among the obligants themselves, one of the number is liable as principal debtor and the others are liable only subsidiarily, as cautioners, yet, as regards the creditor, each of them is liable for the whole sum.[2] This is the meaning of Professor Bell's statement[3] that, in an obligation in this form, the cautioners have renounced the rights of cautioners as regards the creditor. They have renounced the right of discussion and the benefit of division. No evidence that an obligant, who is *ex facie* of the instrument a co-principal, is really only liable secondarily as a cautioner, can for a moment impair the creditor's right of at once enforcing his debt against any of the co-obligants.[4] At the same time, the fact that the cautioner-obligants are bound as co-principals in no way affects their rights of relief—either their right to total relief against the obligant, who is the real principal debtor, or their claims for contribution and mutual relief among themselves; for these rights of relief do not depend

[1] *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72.

[2] *Wilson* v. *Tait*, 1840, 1 Rob. App. 137, per Ld. Ch. Cottenham.

[3] Bell, *Prin.* s. 247.

[4] *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72; *Stuart* v. *Campbell*, 1852, 14 D. 443; *Hollier* v. *Eyre*, 1842, 9 Cl. & Fin. 1 at p. 45.

on the form of the instrument by which the obligants are bound to the creditor, but wholly on the agreement between the obligants themselves. Further, in the class of obligations with which we are now dealing, where the creditor has from the first accepted certain of the obligants as cautioners, knowing that, though all are formally bound as co-principals, one of the obligants is the real principal debtor, and the others have become bound merely in order to give him the benefit of their credit, the relation of the parties is from the first that of creditor and cautioners.[1] In all his dealings, the creditor must act with reference to this fact; and if he, by giving time to the principal debtor, by giving up securities, or by other actings, prejudice the rights of the cautioner-obligants, he does so at his peril.

Terms of instrument which suffice to show that the creditor was a party to the cautionary agreement.

The fact that the creditor, at the time of the constitution of the obligation, was aware of the relation of cautionry existing among his obligants, and accepted some of them merely as cautioners, is not, of course, presumed; the fact must be satisfactorily proved. Where the obligation takes the form of a "proper" cautionry, there can be no doubt on this point. Where, however, the cautionary obligation is constituted by means of a joint and several obligation on the part of the principal debtor and his cautioners, it must be proved by competent evidence that the creditor was a party to the cautionary agreement. The real nature of the mutual relation subsisting among the obligants, as well as the fact that the creditor, knowing this real relation, accepted some of the obligants as cautioners, are in most cases satisfactorily shown by the terms of the instrument by which the obligation is undertaken to the creditor. A statement in the bond or written obligation that certain of the obligants are cautioners, or the existence in the bond of a clause of relief, makes the matter clear.[2] The existence of a separate letter of relief, proved to have been distinctly intimated to the creditor at the time of taking the bond, is also sufficient. Apart from such formal methods, the terms and conditions of the obligation, or the nature of the transaction as disclosed by the instrument, may in themselves conclusively show that, though all the obligants were bound as principals, the real cautionary character of the obligation was brought home to the creditor; and it is well settled that the occurrence of the word "cautioner" or other

[1] *M'Kenzie* v. *Macartney*, 1831, 5 W. & S. 504; see opinion of Lord Chancellor.

[2] *Murray of Broughton* v. *Orchardtown*, 1722, M. 14651; affd. Robertson's Appeals, 465; *M'Kenzie* v. *M'Kenzie*, 1775, M. 14661.

technical expression of that kind in the instrument, or the existence of a formal clause or letter of relief, is not necessary to prove that the creditor was fully aware from the first of the cautionary character of the obligation.[1] Wherever it clearly appears from the nature of the transaction, as set forth in the deed, that certain of the obligants, though subscribing as principals, are merely cautioners,—though this be not formally stated,—the obligants in question are entitled to the rights of cautioners, not only in a question with the principal debtor, but also in a question with the creditor.[2] In determining the relation of the parties and their relative rights and duties, the law looks to the real nature of the transaction, not merely to the form of the obligation. Thus where M., having insured his life with a company, assigned the policy in security of a loan from the company, and gave a bond by himself and other obligants, bound jointly and severally with him, for payment of the sum borrowed, which bond contained a provision authorising the company, on M.'s death, to apply the policy towards discharging the debt, and to pay the surplus to M.'s representatives, and also a clause declaring that it should be in M's power to redeem the bond and policy by repaying the sum borrowed, and that, when this was done, the policy should be reassigned to him: these provisions were held clearly to show the real nature of the transaction to be that M. was the principal debtor, and that the other obligants, though bound jointly and severally with him, were in truth mere cautioners for him. Accordingly, these other obligants were held entitled to the equities of cautioners in a question with the company.[3] So in bonds of cash credit, though all the obligants are bound as full debtors, and none of them are expressly described as cautioners, yet the narrative upon which such bonds proceed, and the fact that the account is kept in the bank books in the name of only one of the obligants, who has the sole right of operating on the account, are held to show with sufficient clearness the real character of the transaction, namely, that the creditor has accepted the obligants as principal debtor and cautioners respectively. Accordingly, the obligants who do not

[1] *M'Kenzie* v. *Macartney*, 1831, 5 W. & S. 504, per Lord Chancellor, at p. 511.

[2] *Paterson* v. *Bonar*, 1844, 6 D. 987; *Fleming* v. *Royal Bank*, 1826, 2 W. & S. 277; *Storie* v. *Carnie*, 1830, 8 S. 853. The special rights or equities of cautioners, in a question with the creditor, are discussed in treating the modes in which cautionary obligations are extinguished by the actings of the creditor. *Vide infra*, Chap. xxv.

[3] *Scottish Provincial Insur. Co.* v. *Pringle*, 1858, 20 D. 465. Contrast with form of obligation in *Commercial Bank of Scotland* v. *Sprot*, 1841, 3 D. 939. Cp. *Stocks* v. *M'Lagan*, 1890, 17 R. 1122.

operate upon the credit are entitled to all the equities of cautioners, both against the party for whose credit they have intervened and against the bank.[1]

(2) Obligations in which the relation of principal and surety is constituted by an agreement between the obligants, to which the creditor is a stranger.

The second class of cases mentioned by Lord Selborne are those in which the relation of principal and surety is constituted by agreement between the principal debtor and cautioner only, the creditor being a stranger to the agreement. In such a case, though the relation of principal debtor and cautioner subsists between the obligants in virtue of the agreement, yet, *quoad* the creditor, the position of the obligants is determined wholly by the quality of the obligation undertaken to him as contained in the deed. If, then, the obligants are bound in a joint and several obligation, either in a bond or through the machinery, for example, of a promissory note, they are, as regards the creditor, merely *correi debendi*. The existence of mutual agreements and liabilities among the co-obligants *inter se* cannot, of itself, affect the character of their legal relations to the creditor, as evidenced by the written contract, *i.e.* cannot, of itself, make any of the co-obligants into mere cautioners in a question with him. Not only may the creditor enforce the debt against each or all of them, but also, being *ex hypothesi* no party to the mutual agreement among his obligants, he is, in his dealings with them, untrammelled by the rules applicable to the conduct of a creditor in a cautionary obligation.

The rights of the obligants *inter se* depend on the agreement between themselves—proof of this agreement.

At the same time, the fact that the obligants are all co-principals in relation to the creditor does not impair the respective rights of the obligants *inter se*—rights which belong to them in virtue of the relation of principal and cautioner subsisting between them under the mutual agreement entered into among themselves. These rights—both the right of total relief on the part of the cautioner-obligants against the principal debtor, and the claims for contribution which may arise on the part of one obligant against another[2]—do not depend upon their contract with the creditor, or upon the terms of their obligation to the creditor:

[1] *M'Kenzie* v. *Macartney*, 1831, 5 W. & S. 504. The mode in which it may be proved that the creditor has accepted certain joint and several obligants as cautioners, when the fact does not appear from the terms of the instrument, is discussed later. *Vide* pp. 678 and 926 *et seq.*

[2] In all joint and several obligations, even in those in which the parties are co-principals alike in a question with the creditor and between themselves, each obligant has a claim for rateable contribution against his co-obligants on paying more than his share. To this extent the right of mutual relief between *correi* as between cautioners. In the case of cautioners, however, the cautioners have, in addition to the claim for contribution, a right of total relief against that one of the obligants who holds the position of principal debtor.

they depend wholly upon the agreement, express or implied, among the obligants themselves.[1] As regards the proof of the agreement between the obligants, it is obvious that, in the case with which we are dealing, the bond or instrument under which they are bound to the creditor will not afford the means of proof. The bond, indeed, will show clearly enough the obligation undertaken to the creditor; but seeing that, *ex hypothesi*, the creditor is not a party to the constitution of the relation of principal and cautioner subsisting among the obligants, it is vain to look to the bond to instruct the rights of the cautioner-obligants against their fellow principal-obligant, or to disclose the facts necessary to enable the Courts to determine these rights.[2] It is, however, perfectly settled that such a mutual agreement among co-obligants may, even where the obligation to the creditor is by formal bond, be competently proved by parole evidence or circumstantial proof, with a view to settling questions of relief among the obligants *inter se*, or their respective rights to securities, and so on; and any such agreement, though merely oral, if it has been openly made between all the co-obligants, will be given effect to, provided it does not contradict the terms of the bond.[3] "In cases of joint obligation it is always competent to prove by facts, or even in part by parole, for whose behoof the transaction has been entered into; and the party thus proved to be the principal debtor is bound in relief to all the other obligants."[4] When it is proved that the relation of principal debtor and surety exists between obligants *ex facie* bound as principals, then, if any one of those who are (in fact) surety-debtors is called upon by the creditor to pay any part of the debt, he is, both in Scotland and England, entitled to total relief from the obligant who is (in fact) principal debtor;[5] and, as between the obligants who are merely sureties, if one pays more than his share of the debt of the principal, he is entitled to claim a rateable contribution from the others.[6]

[1] *Morton's Tr.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72. See per Lord M'Laren.

[2] If the bond did disclose these matters, then clearly the creditor must have been from the first aware of, and a party to, the cautionary relation; so that the contract would belong to the first of Lord Selborne's classes, *i.e.* it would be a contract of cautionry in the strict sense.

[3] Bell, *Prin.* s. 267; *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022; contrast with *MacPhersons* v. *Haggarts*, 1881, 9 R. 306, where all the obligants were not parties to the alleged agreement.

[4] Per Lord Cunningham in *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.

[5] *Drummond* v. *Creditors of Nicolson*, 1697, M. 12329; *Smollet* v. *Bell & Rannie*, 1793, M. 12354. See per Stirling, J., in *Badely* v. *Consolidated Bank*, 1886, 34 Ch. D. 536; *Ramskill* v. *Edwards*, 1883, 31 Ch. D. 100.

[6] *Ward* v. *New Zealand Bank*, 1883, 8 App. Cas. 755.

Effect of notice of the surety relation subsisting among the obligants being subsequently given to the creditor.

It has been pointed out that a creditor, who is not a party to the agreement constituting the relation of principal and surety among his debtors, is entirely unaffected by the relation subsisting among his obligants, and continues unaffected by it so long as he remains ignorant of it. It is otherwise, however, from the moment that he is made cognisant of the real nature of the relation subsisting among his debtors. So long as he continues a stranger to the contract of cautionry among his debtors, there is, so far as he is concerned, no contract of cautionry at all; and he is subject to none of the obligations incident to the position of a creditor in a cautionary obligation. Nevertheless, as soon as notice of the cautionary relation existing among his debtors is given to the creditor, he becomes liable in the duties and responsibilities incident to such knowledge, and is bound, in all his subsequent actings in respect of the debt, to regard and protect the rights and interests of the surety-obligants. These new duties on the part of the creditor towards the obligants, who, it is intimated to him, are mere cautioners, obviously do not depend upon contract: they depend entirely upon principles of equity. In some respects these duties are analogous to the duties imposed upon a prior security-holder, to whom intimation is conveyed that another party holds a postponed security over the same subject. Notice of a relation of principal and cautioner subsisting among the obligants is an intimation to the creditor that, after him, the cautioner-obligant is the creditor of the principal debtor. The principle then applies that, in the words of Lord Eldon, "it shall not depend upon the will of one creditor to disappoint another."[1] Accordingly, while intimation of the fact that certain of the obligants are truly cautioners does not in any way impair the creditor's right to enforce the debt, it imposes upon him the duty, which the Courts will strictly enforce, of doing nothing wantonly to affect prejudicially the interests of the surety-obligants; and if, after intimation, by giving time to the principal, by giving up securities, or by any similar act, he prejudice the rights of the surety-obligants, the latter are free from their obligation.[2] The position is concisely stated by Lord Selborne: "The person who, as between himself and another debtor, is in fact a surety (though the creditor is no party to that contract of suretyship), has, against the other debtor, the rights of a surety; and the creditor, receiving notice of

[1] Per Lord Eldon in *Aldrich* v. *Cooper*, 1803, 8 Ves. 382, at p. 389.

[2] *Greenough* v. *M'Clelland*, 1860, 30 L. J. Q. B. 15; *Oriental Corporation* v. *Overend*, 1874, L. R. 7 H. L. 348.

his claim to those rights, will not be at liberty to do anything to their prejudice or to refuse (when all his own just claims are satisfied) to give effect to them. In such cases the equity is direct in favour of the surety-debtor against the principal debtor; but it affects the creditor, towards whom they are both principals, only as a man who has notice of the obligations of one of his own debtors towards the others."[1] Knowledge on the part of the creditor of the existence of a cautionary relation among his obligants is not, of course, presumed in favour of the cautioner-obligants, but must be proved by competent evidence.[2] When, however, the creditor is shown to have been made aware of the real position of matters among his debtors, the duties on the part of the creditor towards the cautioner-obligants resemble those resulting from a contract of cautionry belonging to the first of Lord Selborne's three classes, in which, though the obligants are formally bound jointly and severally, the creditor is himself from the first a party to the contract of cautionry.

(3) Obligations in which, without any contract of cautionry, there is a primary and secondary liability on the part of two persons for one and the same debt.

The third class of cases in which the principles of cautionry are applicable are cases in which, without any contract of cautionry, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of the parties only, and not equally of both, so that the other, if he is compelled to pay it, is entitled to reimbursement from the person by whom, as between the two, it ought to have been paid. In other words, the equitable principles which underlie the whole law of cautionry are applied in determining the rights of persons who, though they have not entered on any contract of cautionry, nevertheless are in a relation to each other analogous to that of a principal and cautioner.

Application of the principles of cautionry in the relation of partners to their firm.

An example occurs in the relation between the partners in a firm and the firm of which they are members. While the firm is primarily liable for the partnership debts, each individual partner is subsidiarily liable for the payment of these debts. In other words, the partners are in the position of cautioners for the firm, and, as Professor Bell points out, every contract of partnership is in legal construction held to imply a guarantee by each partner to third parties of all the engagements legally undertaken in the social name.[3]

Application of the principles of cautionry in the relation of parties to bills.

Another important instance of the application of the principles

[1] Per Lord Selborne in *Duncan, Fox, & Co.*, 1880, 6 App. Cas. 1, at p. 12.

[2] As to what evidence is sufficient, *vide infra*, p. 925 *et seq.*

[3] Bell, *Prin.* s. 351; Bell, *Com.* ii. 507, 508.

of cautionry is found in bills of exchange. In a bill accepted and indorsed for value, the acceptor occupies a position which in legal effect is almost identical with that of a principal debtor in a cautionary obligation, all the other parties, both the drawer and the indorsers, being, like cautioners, liable on his default for the payment of the bill to the holder—the creditor in the obligation. Similarly, as between the drawer and indorsers, each subsequent party occupies a position closely resembling that of a cautioner to the holder for each of the prior parties to the bill. Thus payment by, or a discharge to, a prior party, the principal debtor, discharges all the subsequent parties, the cautioners; but a discharge to a subsequent party is not a discharge to the acceptor, or any of the prior parties. Again, any subsequent party, on paying the bill, is entitled to relief against the principal debtor, and, further, is entitled to be placed in possession of all the rights possessed by the holder, the creditor, against such principal debtor. "The equity," in the words of Lord Selborne, "between the indorser and the acceptor is the same as that between a surety and a principal debtor, when the creditor is not a party to the contract of suretyship."[1] So an indorser, on paying a bill, is entitled to all securities for its payment deposited with the holder by the acceptor, even though at the time of his indorsement he did not know of the deposit of such securities;[2] and most acts which will discharge cautioners will also discharge indorsers.[3] It is to be observed, however, that, in the case of an ordinary bill, the drawers and indorsers are not strictly in the position of cautioners till the bill is dishonoured, and notice of dishonour has been given. Thus, during the currency of the bill, the indorsers cannot prevent the holder of the bill from dealing, as he may think desirable, with prior parties, unless he thereby prevents himself giving notice of dishonour, or from varying in the ordinary course of business the securities received from the acceptor, as long as the latter remains solvent and before the acceptance is dishonoured.[4] At the same

[1] Per Lord Selborne in *Duncan, Fox, & Co.* v. *North and South Wales Bank*, 1880, 6 App. Cas. 1, at p. 15.

[2] *Duncan, Fox, & Co.* v *North and South Wales Bank*, 1880, 6 App. Cas. 1.

[3] *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 765.

[4] *Duncan, Fox, & Co.* v. *North and South Wales Bank*, 1880, 6 App. Cas. 1. See per Lords Selborne and Blackburn. Where, as is frequently the case, a bill or note is merely the machinery for creating an ordinary contract of cautionry, to which the holder or creditor is himself a party, the doctrines of cautionry apply in their entirety.

time, so closely does the relation of the parties to a bill, as interpreted by the law merchant, resemble the relation of principal and cautioner, that many of the most valuable illustrations of the doctrines of cautionry are found in cases dealing with bills.

The rights and duties of the prior and subsequent parties to a bill, analogous as they are to the rights and duties of principal debtor and cautioner, are not, of course, in any way the result of an express contract of cautionry; for contract of cautionry, in the ordinary case, there is none.[1] These rights and duties result solely from the interpretation put by the law merchant on the signatures *ex facie* of a bill; and their resemblance to the rights and duties of principal and cautioner arises simply from the application of the same principles of equity to relations which, in substance, have much in common, there being, in the one case as in the other, a primary and a secondary liability on the part of two persons for one and the same debt.

Position of accommodation party to a bill in a question with the holder, seeking to enforce payment —parole proof of extrinsic agreement is inadmissible.

Very frequently a party accepts a bill, without receiving value, solely with the view of lending his name to some other party, or of guaranteeing the payment of the bill by that other. Where the acceptor, *i.e.* the principal debtor according to the terms of the instrument, is in substance a mere cautioner for some other person, who may or may not be a party to the bill, it is an accommodation bill. Though the motive of a party who incurs an obligation on the bill is to guarantee a third person, and though this is perfectly well known to the person who gave value for the bill, yet the holder for value is entitled, in enforcing his debt, to treat the accommodation party as the principal debtor, if, *ex facie* of the bill, his name appears as principal, *i.e.* as acceptor.[2] From the signatures on a bill the law merchant infers certain obligations on the parties; and a holder for value is, for the purpose of enforcing the debt, entitled to look solely at the contracts expressed on the bill, whatever may be the true relations of the parties to the bill arising out of agreements among themselves extrinsic of the bill.[3] Even where an acceptor, named in the bill and not a stranger to it, has, in accepting, added to his signature the words "as cautioner," his acceptance is deemed an absolute acceptance, and the qualification, whatever effect it may have in a question of relief between the parties

[1] *I.e.* in the ordinary case; of course the bill may be merely part of the machinery of a contract of cautionry.

[2] *M'Donald* v. *Union Bank*, 1864, 2 M. 963; Bills of Exchange Act, 1882, s. 28 (2).

[3] *National Bank of Australasia* v. *Turnbull & Co.*, 1891, 18 R. 629.

themselves, has none at all as against the holder of the bill.[1] It is indeed provided by the Bills of Exchange Act, 1882, s. 100, that "in any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence." This provision, however, does not make it competent for a party to a bill, in a question with a holder for value seeking to enforce payment of the amount due, to contradict by parole his liability as it appears on the face of the bill.[2] Of course the contract expressed by a bill, like any other written contract, may be controlled and contradicted, to the effect even of preventing the holder enforcing payment, by a contemporaneous or subsequent written agreement, to which the holder in question is a party; but, apart from the production of a special written agreement, binding the holder and controlling the effect of the bill, a person who, though merely with the object of becoming a cautioner for another, has put his name to a bill, becomes subject to the liabilities which the law merchant attaches to his signature, and cannot, in a question with a holder for value, prove that he is only a cautioner, to the effect of getting rid of his liability to pay the amount of the bill.

In a question between the parties to a bill *inter se*, an agreement extrinsic to the bill is effectual and may be proved by parole.

The case is different where an extrinsic agreement exists between the obligants on a bill or note *inter se*. In regulating the mutual rights and liabilities of the parties to a bill or note among themselves, the law has regard to the real, and not the apparent, relations subsisting between the parties. An accommodation bill, for example, is discharged when it is discharged by the person who is in substance, though not in form, the principal debtor.[3] So all questions of relief among the parties are determined by the true contractual relations proved to subsist between them, and not by the position of their names on the bill. Thus, the drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor; and

[1] *Sharp* v. *Hervey*, 1808, M. App. *v.* Bills of Exchange, No. 22; *M'Dougall* v. *Foyer*, 13 Feb. 1810, F. C.; Bell, *Com.* i. 474, approved by Lord Watson in *Walker's Trs.* v. *M'Kinlay*, 1880, 7 R. (H. L.) 85, at p. 96.

[2] *National Bank of Australasia* v. *Turnbull & Co.*, 1891, 18 R. 629. Lord Adam expressed a contrary opinion. While under this section it is now competent in Scotland, as in England, to prove by parole that no value was received, the engagement to pay cannot be contradicted. See observations by Tindal, C.J., in *Abbott* v. *Hendricks*, 1840, 1 Man. & G. 791; cf. *Gibson's Trs.* v. *Galloway*, 1896, 22 R. 414.

[3] Bills of Exchange Act, 1882, s. 59 (3).

that agreement, when proved, will be binding upon them both, although it can have no effect upon their obligations to third parties interested in the bill.[1]

As it is competent for parties to a bill or note, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant, so it is competent, more particularly since the enactment of sec. 100 of the Bills of Exchange Act, 1882, to prove by parole evidence the true relations of the parties, as constituted by mutual agreements extrinsic of the bill; and when these true relations are proved, they will be given effect to between the parties.[2] All facts and circumstances attendant upon the making, issue, or indorsement of a bill or note,—as, for instance, the order of time in which, and the purpose for which, the indorsements were made, the fact that no value was received, and so on,—are susceptible of oral proof, with a view of determining the character and liabilities of the parties *inter se*. So where a note, made by a company, was indorsed by three directors in succession, it was held competent, in an action for contribution, to show by parole evidence that they indorsed the note as co-sureties in pursuance of an agreement among themselves; and their liabilities *inter se* were settled on this basis.[3] The rule, in short, is clear, that in determining the rights and liabilities *inter se* of the drawer, acceptor, and indorsers of a bill, or of the makers and indorsers of a promissory note, the Court will look to the actual contract between the parties, and not simply to the interpretation put by the law merchant on the signatures; and this actual contract, in the case of parties to a bill, as in the case of parties to any joint and several obligation, can be proved by parole.[4] The decision of the House of Lords in *Walker's Trs.* v. *M'Kinlay's Tr.*[5] is quite in accordance with this state of the law.[6] There the contract between the parties, different from the contract which the law merchant

[1] Per Lord Watson in *Walker's Trs.* v. *M'Kinlay*, 1880, 7 R. (H. L.) at p. 95; *Ewin* v. *Lancaster*, 1865, 6 B. & S. 571; *Overend* v. *Oriental Corpor.*, 1874, L. R. 7 H. L. 348.

[2] The effect of sec. 100 of the Bills of Exchange Act in extending the competency of parole proof is discussed in *National Bank of Australasia* v. *Turnbull & Co.*, 1891, 18 R. 629.

[3] *M'Donald* v. *Whitfield*, 1883, 8 App. Cas. 733. When there is no agreement between two parties to a bill, both of whom were in substance cautioners for the drawer, their respective liability is settled by the position of their names on the bill —*Beveridge* v. *Liddel & Co.*, 1852, 14 D. 328.

[4] *Hamilton* v. *Freeth & Co.*, 16 R. 1022.

[5] 1880, 7 R. (H. L.) 85.

[6] See remarks on that decision in *M'Donald* v. *Whitfield*, 1883, 8 App. Cas. 733.

would infer from the signatures *ex facie* of the bill, which it was proposed to establish by extrinsic oral evidence, was substantially an independent contract of guarantee; that being so, the House of Lords refused to allow it to be proved by parole, simply on the ground that, by sec. 6 of the Mercantile Law Amendment Act, parole proof of a contract of guarantee is incompetent.[1]

Constitution of the contract.

Cautionry or guarantee is at common law a consensual obligation; that is, writing is required only in evidence, and not in solemnity.[2] Thus Lord Stair says, that "caution is interposed any way by which consent is truly given";[3] and Erskine distinguishes between contracts such as cautionry and "bargains where writing is essential to their constitution, as in those relating to land."[4] In Scotland, in other words, cautionry is not at common law a *literarum obligatio*;[5] and before the Mercantile Law Amendment Act merely verbal guarantees were, in certain cases, valid.[6] By sec. 6 of the Mercantile Law Amendment (Scotland) Act, 1856, it is provided that cautionary obligations or guarantees "shall be in writing . . . otherwise the same shall have no effect." It is a question whether, under this section, writing is now essential in Scotland to the constitution of the contract, or whether writing is still required only in *modum probationis*. It seems probable, however, in spite of the emphatic character of the words,—"otherwise the same shall have no effect,"—that the correct interpretation of the statutory provision is that, while making it necessary to have written evidence of the contract before it can be made a ground of legal action, it does not alter the law to the effect of making

[1] The question what evidence is competent to prove knowledge on the part of the holder, or creditor, of the cautionary relation subsisting between the parties to a bill or note, in virtue of an agreement among themselves extrinsic of the bill or note, is treated *infra*, p. 927. Such knowledge imposes on the holder the duty of protecting the interests of those parties, who are merely cautioners. The acts of a creditor which have the effect of liberating cautioners are discussed in Chap. xxv.

[2] The constitution of an obligation is to be carefully distinguished from the proof of the obligation. See remarks on the distinction, per Lord Kyllachy (approved in Inner House), in *Bryan* v. *Butter Bros.*, 1892, 19 R. 490.

[3] Stair, *Inst.* i. 17. 3.

[4] Ersk. *Inst.* iv. 2. 20.

[5] By immemorial usage, indeed, a formally attested writing is required in certain special forms of cautionry —More's Note to Stair, i. 17. 3.

[6] Bell, *Prin.* s. 18; Dickson on *Evidence*, 2nd ed., s. 597. There is, indeed, conflicting authority on this point, *e.g.* *Walker* v. *Duncan*, 1785, Hailes, 985, Mor. 17057; *Edmonston* v. *Laing*, 23 June 1786, F. C.; *Brown* v. *Campbell*, 28 Nov. 1794, F. C. The earlier cases are collected by Professor Bell, *Illust.* i. 175–6. His summary in *Illust.* of the results of the cases is not quite consistent with the statement of law in his *Principles*, s. 18; *Church England Assur. Co.* v. *Hodges*, 1857, 19 D. 414.

cautionry a *literarum obligatio*. The purpose of the Act, as explained in the preamble, was to remedy the inconveniences felt by traders by reason of the differences between Scots and English law in certain matters of common occurrence. Now, in England, it is finally settled that the true construction of the corresponding provision of the Statute of Frauds[1] is to render writing necessary only in evidence of the contract, and not in solemnity. In other words, the effect of the English Statute is not to make oral guarantees void, still less illegal, but merely to render written evidence indispensable, where it is sought to enforce the contract.[2] If, then, sec. 6 of the Scotch Act were interpreted as making writing necessary to the constitution of contracts of guarantee, its effect would be not only to introduce a radical change in the law of Scotland, but also to set up a difference between the laws of Scotland and England in this matter, instead of bringing about the assimilation which it was the professed aim of the Statute to effect. Further, it has been expressly laid down by Lord Blackburn, that the effect of sec. 6 of the Mercantile Law Amendment Act is to extend the law of England in this particular matter to Scotland.[3] Although, then, the terms of sec. 6 of the Scotch Act are certainly more stringent than the corresponding section of the Statute of Frauds, it seems reasonable to construe the enactment merely as rendering it necessary to have written evidence of the contract before it can be made a ground of legal action, and not as altering the common law, according to which, in order to the constitution of a guarantee, all that is necessary is that parties, being competent to contract, have duly contracted.[4]

[1] 29 Chas. II. c. 3, s. 4.

[2] Per Lord Blackburn in *Maddison* v. *Alderson*, 1883, L. R. 8 App. Cas. 467, at p. 488. The actual words of sec. 4 of the Statute of Frauds do not go so far as the words in sec. 6 of the Scotch Act. Sec. 4 merely provides that "no action shall be brought unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing."

[3] Per Lord Blackburn in *Walker's Trs.* v. *M'Kinlay's Tr.*, 1880, 7 R. (H. L.) 85, at p. 88.

[4] In *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, at p. 59, Lord Wellwood (Ordinary), in discussing the meaning and effect of sec. 6 of the Mercantile Law Amendment Act, observed: "I think that this Court would be slow to sustain a construction of the Mercantile Law Amendment Act which would establish a difference between the laws of the two countries instead of assimilation, and which would also, according to the opinions of many eminent judges and legal writers, introduce a radical change in the law of Scotland by making the contract of cautionry or guarantee an *obligatio literarum*, which, according to these authorities, it was not before." In the same case, Lord Watson, referring to the question whether writing and subscription are now essential to the constitution of a cautionary obligation, said: "In a Scottish court that

Capacity and competency to contract a cautionary obligation.

Married Women.

The capacity of persons to enter on a cautionary contract is in the main regulated by the same rules as capacity to contract other personal obligations. For obvious reasons, however, these rules are applied in cautionry with somewhat greater strictness than in the generality of personal obligations. Thus, by the common law of Scotland, a married woman is incapable of granting a binding cautionary obligation, even where she has a separate estate;[1] and the Married Women's Property Act[2] has not altered the law in this respect.[3] Where, for example, a married woman, who had considerable property, from which, by her marriage contract, the *jus mariti* was excluded, granted a letter of guarantee for goods furnished to her son, to which her husband subjoined the words, "The above is done with my consent," it was held that the obligation of the wife was null, and that the husband, by merely consenting to the deed of his wife, was not bound.[4] So, too, where the wife of one of the partners of a firm signed promissory notes, along with the firm, as guarantor of a composition payable by the firm to their creditors, it was held that the Married Women's Property Act of 1881 had not taken away the common law protection of a married woman against granting a bill of exchange as cautioner for a debt.[5] Similarly, in a recent case, the obligation of a married woman who had, with the consent and concurrence of her husband, signed a cash-credit bond, was found not binding on her. This decision was arrived at although it was shown that the bond in question had been granted in discharge of a prior bond, given by the woman's father, for the payment of which, had it continued undischarged, she would have been liable to the extent of her share in her father's estate.[6] A transaction, however, by a married woman in taking over an inheritance, which included a personal obligation by her to guarantee a debt connected with the inheritance, has been held good, as being in *rem versum*.[7] Though an unmarried woman is

question can never be of any but academical interest. In a foreign court, whose curial rules differ from the law of Scotland, the question might become of importance"—per Lord Watson in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, at 66. *Infra*, p. 724.

[1] See observations of Lord President Inglis in *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470, at 481.

[2] 44 & 45 Vict. c. 21.

[3] *Jackson* v. *M'Diarmid*, 1892, 19 R. 528.

[4] *Lennox* v. *Auchincloss*, 1821, 1 S. 19; see also *Mather* v. *Mathie*, 1823, 2 S. 263 (N. E. 233). In *Bayne* v. *Russell*, 1869, 7 S. L. R. 101, it was held to be beyond the *præpositura* of a married woman, whose husband was absent at sea, to sign an obligation of relief.

[5] *M'Lean* v. *Angus Bros.*, 1887, 14 R. 448.

[6] *Jackson* v. *M'Diarmid*, 1892, 19 R. 528.

[7] *Nairn* v. *Mercer*, 1785, M. 5860; Fraser on *Husband and Wife*, pp. 535–8.

not disqualified from being a cautioner, for example, for a judicial factor,[1] yet, as a matter of practice, no woman has hitherto been received as cautioner for an executor-dative.[2]

Minors.

Cautionary obligations granted by a minor, who has curators, without the assent of these curators, are null, and may be challenged at any time. A minor, who has no curators, or a minor, acting with the consent of his curators, may undertake a cautionary obligation, and may be sued thereon. In both of these cases, however, the obligation may be challenged in an action of reduction by the minor himself, his heirs or his creditors, at any time within four years after he has reached majority, upon the ground of minority combined with lesion, *i.e.* proved injury to the minor; and, in a cautionary obligation, there is a presumption of law to aid the proof of lesion.[3]

A partner has not, in the ordinary case, implied authority to bind his co-partners by a guarantee of the debt of a third party;

From the contract of partnership there results an implied authority in each partner to act as agent for the firm and the other partners for the purpose of the business of the partnership; and an act of a partner in the line of the firm's business binds the firm, unless he has in fact no authority to act in the particular matter, and this want of authority is known to the person with whom he deals.[4] Subject to this exception, any form of signature whereby a partner indicates that he signs as the acting partner of the firm is sufficient to bind the firm and all the partners, within the line of the partnership business.[5] On the other hand, where one partner pledges the credit of the firm for a purpose not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners.[6] Generally speaking, it is clearly not in the ordinary course of a firm's business to make themselves liable for the debts or conduct of third parties. Accordingly, a partner has not implied authority to bind the firm by adhibiting the firm signature to a guarantee of the debt of a third party, unless it is shown that the granting of guarantees is necessary for the purpose of carrying on the business of the firm in the ordinary way; as, for example, in the case of a guarantee association. While much depends upon the usage or custom of the particular trade, as well as upon the nature of the business of the firm, and the previous course of

[1] *Fraser, Jud. Fact.*, 1892, 19 R. 500.

[2] *Petn., French*, 1871, 9 Macp. 741.

[3] Stair, i. 6. 44; Bell, *Com.* i. 135; Fraser, *Parent & Child*, 407; Bell, *Prin.* s. 2100.

[4] Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 5), declaratory of common law.

[5] Per Lord Cranworth in *Blair Iron Co.* v. *Allison*, 1855, 1 Pat. Sc. App. 609; Partnership Act, 1890, s. 6.

[6] Partnership Act, 1890, s. 7.

dealing, or the practice, of the partners,[1] the general rule is clear, that the mere existence of a copartnership does not imply authority to one or more of the partners to pledge the partnership name for the debt of a third party.[2] Where, for example, one of a firm of attorneys signed the firm name to an undertaking to pay the debt of a client, in order to release him from custody, the guarantee was held not to be binding upon the other partner, who had given no express authority.[3] Such a guarantee was obviously outside the regular scope of the partnership dealings. Similarly in the Scotch cases, in which one of several partners has given a guarantee in the trading name of the firm to secure the payment of a debt due by a third party, the purpose of the guarantee has been clearly unconnected with the firm's business. Thus in *M'Nair & Co.* v. *Gray, Hunter, & Speirs*,[4] the acting partner of a firm granted a letter of guarantee, signed by the firm name, for the price of goods to be furnished to himself and his mother, not in the way of the firm's trade, and the guarantee was held not to bind the firm.[5] In one case, indeed, where a father, a partner in a firm of three members, granted a guarantee for goods to be supplied to his son, putting thereto the signature of his firm, decree was given in an action on the guarantee against the father's firm and the father as an individual, consideration of the cause as against the other partners being reserved.[6] Although the guarantee in this case was clearly outwith the business of the firm,—the guaranteeing firm being publishers, and the debt guaranteed being for tobacconist's goods,—the plea of want of authority to bind the firm was not expressly stated by the non-signing members of the guaranteeing firm.

—even where such a guarantee is a reasonable means of effecting partnership purposes.

While there is no Scotch case dealing with the implied authority of a partner to bind his firm in a guarantee of a debt due by a third party, where the guarantee was granted in a matter closely related to the firm's business, and was a reasonable means of effecting partnership purposes, cases of this sort have arisen in England, with the result that it is now settled that even in

[1] See *infra*, p. 690.

[2] *Duncan* v. *Lowndes*, 1813, 3 Camp. 477; 3 Ross' Leading Cases (Commercial Law), 475—the case of an ordinary mercantile firm. The partner or partners signing a guarantee incur personal liability—*Ex parte Harding*, 1879, 12 Ch. Div. 557. This individual liability is expressly reserved in sec. 7 of the Partnership Act, 1890.

[3] *Hasleham* v. *Young*, 1844, 5 Q. B. 833.

[4] 1803, Humes, *Dec.* 753.

[5] See also *Kennedy, Petr.*, 22 Dec. 1814, F. C.; *Miller* v. *Douglas*, 22 Jan. 1811, F. C.; *Blair* v. *Bryson*, 1834, 13 S. 901; *Paterson Brothers* v. *Gladstone*, 1891, 18 R. 403; *Johnson, etc.* v. *Phillips*, 1822, 1 Sh. App. 244.

[6] *Veitch* v. *Murray & Co.*, 1864, 2 M. 1098.

these circumstances a partner has no implied authority. Thus in *Brettel* v. *Williams*,[1] a firm of railway contractors, having undertaken certain work, made a sub-contract for the performance of a part of the work. The sub-contractor being in need of coal for the work, one of the partners of the original contracting firm guaranteed, in the name of the firm, to the plaintiffs, who were coal merchants, payment of coals to be supplied by them to the sub-contractor. It was admitted that the giving of this guarantee was a reasonable, and even a judicious, act towards effecting the partnership purposes. Yet, after much consideration, the Court held that the guarantee did not bind the partners of the contractor signing it.[2] There is little doubt that this strict interpretation of the rule would be followed by our Courts, it being, as Professor Bell has pointed out, more consistent with the principles of copartnership.[3]

Cases in which co-partners are bound by a guarantee given by one of their number.

A guarantee granted by one partner will of course be binding on the firm if the other partners have either previously assented to the giving of the guarantee, or have subsequently recognised or ratified it. So where a guarantee outwith the ordinary course of a firm's business was granted by one of the partners, the firm was held bound upon the ground that the guarantee was part of a larger contract, which entered the books of the firm, and must have been known to the other partners.[4] Again, a partner in a trading firm has an implied power to borrow money for the firm's business on the firm's credit.[5] Where a partner borrows money for firm purposes, the debt is the debt of the firm and, at common law, apart altogether from any instrument of guarantee, each partner is liable to the lender, as a guarantor of the debt of the firm.[6] So if one partner undertakes that, if a person will accept a partnership bill, the firm will put him in funds to meet

[1] 1849, 4 Exch. 623.

[2] See also *In re Cunningham & Co. Lim.*, 1887, 36 Ch. Div. 532—the case of a manager of a trading firm signing a promissory note on behalf of the firm, as a guarantee for a deposit made by a third party to procure credit for the firm.

[3] Bell, *Com.* ii. 506. See remarks of Lord Blackburn in *Shiell's Trs.* v. *Scottish Prop. Invest. Soc.*, 1884, 12 R. (H. L.) 14, at p. 23.

[4] *Sandilands* v. *Marsh*, 1819, 2 B. & Ald. 673.

[5] *Bryan* v. *Butters Bros.*, 1892, 19 R. 490. Cf. per Lords Rutherfurd Clark and Young in *Sinclair, etc.* v. *Wallace*, 1880, 7 R. 874. So if the managing partner of an undisclosed joint adventure obtains money or goods on his own individual credit, and thereafter applies the same to the purposes of the joint adventure, the joint adventurers, though unknown to the creditors, are jointly liable for the money or goods—per Lord Pres. Inglis in *Cameron* v. *Young*, 1871, 9 Macp. 786.

[6] Bell, *Prin.* s. 351; Bell, *Com.* ii. 408; *supra*, p. 679.

the bill when due, this undertaking binds the firm; for this is not a guarantee of the debt of a third party.[1] Though the distinction between guaranteeing the debt of the firm and guaranteeing the debt of a third party seems an obvious one, cases may occur in which a guarantee, formally belonging to the latter class, is in substance an undertaking for the firm's own debt. A partner, in the course of transactions entered into for the purpose of raising money for the use of his firm, may find it necessary to undertake a guarantee, which, though *ex facie* for the debt of a third party, is really undertaken to procure credit for the firm. It is possible that, in a case of this sort, the other partners would be bound by the act of the partner signing the guarantee.[2] Again, where it is shown that in a previous course of dealing the firm has granted guarantees of the debts of third parties, or that it is in accordance with the practice of the partners to grant such guarantees, this may be sufficient to prove a mutual authority to any one partner to bind the others in transactions of that sort.[3] The same result might follow where it is the usage of the particular trade in which the firm is engaged, to undertake engagements of this kind—such usage being proved by evidence that it is the custom of similar partnerships to give such guarantees.[4] As has been pointed out, where the giving of guarantees for the debts of third parties is within the regular and ordinary scope of a firm's business, as in a guarantee association, the signature of a partner will bind the firm. In one case, however, where the Court had allowed execution pending an appeal, on condition of caution being found for repetition of sums recovered in the event of a reversal, a bond of guarantee executed by a guarantee association, whose ordinary business was to guarantee the fidelity of persons in situations of trust, was refused by the Court, upon the ground that the guarantee in question did not fall within the ordinary business of the company.[5] In *Buchanan* v. *Dennistoun*,[6] the managing partner of a firm granted a holograph letter, signed in the firm name,

[1] *Johnson* v. *Peck*, 1821, 3 Stark. 66.

[2] *In re West of England Bank*, 1880, 14 Ch. Div. 317; *Blackburn Building Co.* v. *Cunliffe, Brookes, & Co.*, 1882, 22 Ch. Div. 61, and 1884, 9 App. Cas. 857; Lindley on *Partnership*, 6th ed., 144. But see Simpson's claim, *in re Cunningham*, 1887, 36 Ch. Div. 532.

[3] See per Baron Parke in *Brettel* v. *Williams*, 1849, 4 Exch. 623.

[4] *Ib.*

[5] *Donaldson* v. *Priestley & Co.*, 1860, 22 D. 1471. Bonds of caution by public companies carrying on guarantee business are now regularly accepted as sufficient by the Courts, if within the line of the company's business—*M'Kinnon, Petr.*, 1884, 21 S. L. R. 476.

[6] 1835, 13 S. 841.

guaranteeing the promissory note of one of the partners "to the extent of the value of the stock which he may have in our house, subject to the liquidation of our debts," and undertaking, in the event of his stock being reduced below £10,000, to apprise the creditor of the fact. Nominally, the stock of the partner in question was maintained in the firm's books above £10,000, but, in reality, it was reduced below that limit, without notice being given to the creditor. The Court, while finding no ground in law on which the firm was directly liable to pay the creditor the amount of the note to which the guarantee related, found the firm liable for such loss as accrued to the creditor from the firm's neglect to give due notice of the reduction of the partner's stock, in terms of their engagement.

Directors of Companies.

A company is not bound by a guarantee given by its directors, managers, or other officials, unless power so to bind the company is conferred in the rules, or articles, or memorandum of association, either expressly or by fair implication.[1] This rule is applied strictly. In *Shiell's Trs.* v. *Scottish Prop. Invest. Soc.*,[2] for example, the directors of a building society, which had lent a sum of money upon a postponed heritable security, in order to prevent an immediate sale of the subjects by the prior bondholder, granted him a bond of corroboration, which was, in substance and effect, a guarantee of his debt by the society. In an action brought by the liquidators of the society against the prior bondholder for the reduction of the bond of corroboration, the Court reduced the bond, upon the ground that no power to grant such an obligation was expressly conferred on the directors, and that the powers given to realise securities did not imply, as properly and necessarily incidental thereto, a power to grant a guarantee. Lord Blackburn indicated an opinion that the authority of directors, acting under a general power of management, is similar to the implied authority of a partner in a firm, carrying on a similar business, and is limited in the same way.[3] In every case the real test is whether the act is authorised, expressly or by fair implication, in the constitution or articles of the company; hence no rule can be laid down applicable to all cases. If wide discretionary powers are conferred on directors for the purposes of management, the test comes to be simply whether the guarantee is fairly within the scope of the company's

[1] *Ridley* v. *Plymouth Grinding Co.*, 1848, 2 Ex. 711; *Kirk* v. *Bell*, 1851, 16 Q. B. 290; *Donaldson* v. *Priestley & Co.*, 1860, 22 D. 1471.

[2] 1883, 10 R. 1198; affd. by House of Lords, 1884, 12 R. (H. L.) 14.

[3] Per Lord Blackburn in *Shiell's Trs.*, *supra*, at p. 23.

business. Thus the directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers, and to act as might seem best in the interest of the bank, have been held entitled to bind the bank in a guarantee for the payment of interest on the debentures of a company, issued for the purpose of forming the company, where the formation of the company in question was of importance to the bank.[1] The directors of a company may, of course, become cautioners for the company to third parties,[2] and, in such a case, although the debt guaranteed turn out not to be binding on the company, as being *ultra vires*, yet the directors may be bound.[3]

Agents.

An ordinary commercial agent or manager, however wide and general be his authority in conducting the business of his principal, has no implied power to bind his principal by a guarantee of the credit of a third person.[4] In order that the principal should be bound by such a transaction, the authority of the agent must be direct and express. Even if the guarantee were given with an intention on the part of the agent to promote the interests of his principal, or were shown to be to the advantage of the business of the principal, these considerations would not suffice to render the principal liable, in the absence of clear evidence of assent or ratification.[5] So in a recent English case, where the manager of a trading company abroad, "appointed to take entire charge of the interests of the company" in the foreign country, signed a promissory note, purporting to be signed on behalf of the company, as a guarantee for the repayment of a sum of money deposited by a third party in order to procure credit for the company from a merchant with whom they were about to deal, the company were held not to be liable under the note.[6] On the other hand, where the giving of guarantees is in the ordinary course of the business which an agent does for his principal, the power of the agent to bind his principal in a guarantee would doubtless be implied, although no specific authority had been

[1] *In re West of England Bank*, 1880, 14 Ch. Div. 317.

[2] *M'Donald* v. *Whitfield*, 1883, 8 App. Cas. 733; *Gray* v. *Seckham*, 1872, L. R. 7 Ch. App. 680.

[3] *Yorkshire Railway Wagon Co.* v. *Maclure*, 1881, 19 Ch. Div. 478; cf. *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q. B. D. 54.

[4] *Colvin* v. *Dixon*, 1867, 5 Macp. 603—see per Lord Deas; *Hamilton* v. *Dixon*, 1873, 1 R. 72; *Ross, Skolfield, & Co.* v. *State Line Co.*, 1875, 3 R. 134.

[5] See opinion of Lord Young in *Sinclair, Moorhead, & Co.* v. *Wallace & Co.*, 1880, 7 R. 874—a case of borrowing by agent.

[6] *In re Cunningham & Co. Lim.*, 1887, 36 Ch. Div. 532. Cf. *Sinclair, Moorhead, & Co.* v. *Wallace & Co.*, 1880, 7 R. 874.

given for the particular transaction in question.[1] Also, a principal is liable for fraudulent representations made by an agent regarding the credit of third parties,—a liability, in some respects, akin to that under a guarantee,—where the representations were made by the agent in the course of his employment, and for the benefit of his principal, though made without express authority from the principal.[2] Although a principal is not bound by a contract of guarantee entered into by an agent, the agent may incur personal liability. If there was really no principal in existence, the agent is personally liable;[3] and although there is in existence a principal who could have authorised the agent, but did not, the agent will be liable on his implied representation that he had authority to contract a valid guarantee.[4]

Forms which the contract may take.

No particular form of words or technical expression is necessary to constitute the relation of principal and cautioner.[5] Any writing which, on a fair interpretation, imports a promise to a creditor to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is liable in the first instance, constitutes a guarantee. Even where the writing merely imports an undertaking to give a guarantee when required, such an undertaking, if acted on by the other party, is a good cautionary obligation, and is as binding on the writer as a direct obligation.[6] The law, in short, looks beneath the mere form to the essence and real nature of the transaction. Thus, on the one hand, a person, in giving his promise, may use the term "guarantee," and yet his undertaking may not import an obligation of the nature of cautionry;[7] and, on the other hand, although there is no express mention of guarantee, if the relation of the parties presents the essential characteristics of cautionry, whether it arises out of a course of dealing or out of express contract in any form, the parties are bound to each other in what is, in substance and effect,

[1] The principal in such a case "holds out" the agent as having authority, and the doctrine of "holding out," resting on the conduct and past dealings of the parties, applies; cf. *Barwick* v. *English Joint Stock Bank*, 1867, L. R. 2 Ex. 259.

[2] *Paton* v. *Clydesdale Bank*, 1895, 23 R. 38, at 44; *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H. L.) 53; cf. *Jardine's Tr.* v. *Carron Co.*, 1864, 2 Macp. 1101.

[3] *Kelner* v. *Baxter*, 1866, L. R. 2 C. P. 174.

[4] *Collen* v. *Wright*, 1857, 7 E. & B. 301; *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q. B. D. 54; see *infra*, p. 727 *et seq.*, as to the signature of agents.

[5] *M'Kenzie* v. *M'Taggart*, 1831, 5 W. & S., 504, per Lord Chancellor.

[6] See observations of Lord Watson in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, at p. 65.

[7] *Wilson* v. *Tait*, 1840, 1 Rob. App. 137.

a contract of guarantee.[1] Thus the relation of principal and cautioner may be effectually constituted by an order to lend money, or furnish goods, to a third person, who himself is primarily liable in payment;[2] by a letter of credit; by a guarantee of payment or collection of a bill of exchange or promissory note indorsed thereon; or by a bond of corroboration.[3] Again, a relation closely resembling that of principal and cautioner may be constituted indirectly through the interpretation put by the law merchant on signatures to bills,[4] or by the construction put, at common law, on the contract of partnership, each partner being a cautioner for the firm.[5]

The cautioner may be bound for the principal, as express cautioner, in a "proper" cautionry, or along with the principal in a joint and several obligation in an "improper" cautionry.[6] Again, the obligation of the cautioner may be contained in the same instrument as that of the principal debtor, or in a separate instrument;[7] and it may be undertaken either previously to the obligation of the principal debtor,—provided the parties contemplate the future liability of a third party as the basis of their present contract,—or contemporaneously, or subsequently.[8]

Offer and acceptance.

In order to a completed contract, there must be a concurrence of intention in two parties—the cautioner and the creditor; the former offers to guarantee the debt of another, and the latter accepts the offer. No particular form of words, or even expression of *de presenti* obligation, is necessary, provided the language used conveys the meaning, and is understood by the other party to import that the writer intends to offer a guarantee. Thus, in a recent case, a letter was construed as importing a direct offer of a guarantee, in which the only reference to the subject of guarantee was in the words: "It is therefore an excellent security, apart from our guaranty." The House of Lords, looking to the whole circumstances of the case, held that, in the view of the parties, this elliptical expression might be completed by adding "which we hereby offer," and, accordingly, construed the letter as an un-

[1] Of course there must exist the statutory evidence. See *infra*, Chap. XXI., as to proof of the contract.

[2] *Vide supra*, pp. 647 *et seq.* and 661.

[3] *Shiell's Trs.* v. *Scottish Prov. Invest. Soc.*, 1884, 12 R. (H. L.) 14.

[4] Page 680.

[5] Bell, *Prin.* s. 351; Bell, *Com.* ii. 506.

[6] As to the relations of the parties in proper and improper cautionry respectively, *vide supra*, p. 673 *et seq.* As to the manner in which the cautionary relation can be proved in the case of improper cautionry, and the effect of notice to the creditor of the cautionary relation among the obligants, see pp. 674, 678, and 924 *et seq.*

[7] Bell, *Com.* i. 364.

[8] See pp. 645 *et seq.*

qualified offer of guarantee, which, when accepted, imported a complete obligation of guarantee. Further, Lord Watson explained that even if the above-quoted elliptical sentence were completed by adding "which we will give when required," such an undertaking to give a guarantee when required would, if acted on by the other party, have been as binding on the writer as a direct offer of guarantee duly accepted.[1] At the same time care is required in discriminating between a completed contract and a mere proposal, offer, or tender of a guarantee, which must be definitely accepted before it becomes a completed contract. An offer of guarantee is not in itself binding: at any time before acceptance it may lapse by the death of either party, or be withdrawn by the party making it. The question what is necessary to complete the contract—that is, whether it is necessary to give express notice of acceptance, or whether the acceptance may be impliedly communicated by acting upon the guarantee—must be answered with reference to the terms and circumstances of each particular offer.

Cases in which an express acceptance is necessary.

Express acceptance of an offer is, of course, necessary in all cases where the offer contemplates such express acceptance. Again, where an offer of guarantee does not, by its terms, show a clear intention on the part of the sender that it should be conclusive, and, still more, where it contains expressions indicating that he does not regard the offer as final, or that he expects certain preliminary steps to be taken before he becomes bound, the person who, without express notice of acceptance, proceeds to act on the offer does so at his peril. The Court will not allow a person to be entrapped unwittingly into a guarantee, more especially if the proposed guarantee is given gratuitously. The leading case in England is *M'Iver* v. *Richardson*.[2] There, on the plaintiff refusing to furnish goods to A. on his credit alone, the defendant wrote a letter, ending with these words: "I have no objection to guarantee you against any loss from giving A. this credit." The plaintiff, on receipt of this letter, furnished the goods to A., without sending any notice to the defendant. The Court held that, in the case of an offer in the above terms, it was not sufficient communication of acceptance merely to act upon the guarantee by furnishing the goods. The words of the offer did not show a clear intention that it should be conclusive; and that being so, the intending guarantor was entitled to expect an express

[1] *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56; see per Lord Watson, at p. 64; cp. *Thomson* v. *Dudgeon*, 1851, 13 D. 1029; 1854, 1 Macq. 714, at 726.

[2] 1813, 1 M. & S. 557.

communication of acceptance, before his offer constituted a binding guarantee. The defendant was accordingly assoilzied on the ground that there was no completed contract between the parties.[1] In a Scotch case, where a party wrote expressing willingness to give a guarantee for the price of certain goods to be furnished by the creditor to a third party, on getting an invoice of the goods and information as to the price, it was held that this letter, and a subsequent letter of similar import, since they contemplated certain preliminary actings, and even the giving of a future final guarantee, could not be read as an unambiguous and absolute offer of a kind which might be impliedly accepted by being acted on.[2] So in construing a letter in these terms: "Do you supply wholesale tobacconists' fancy goods? If so, be pleased to quote prices, with sample. They are for W. S. M., a son of the writer, and his trade will be guaranteed by N. & Co. Signed, N. & Co.," the Court had no doubt that it required an answer before being acted on.[3] As, however, in answer to the letter, the pursuers duly supplied "prices, with samples," and the defender thereupon wrote another letter, enclosing an order from his son, and adding: "Which please to execute," it was held that the two letters taken together, on the one side, and the execution of the order, on the other, constituted a completed contract of guarantee between the parties, not only for the single order, but also for a continuous course of dealing. Again, a creditor who writes to a person proposing that the latter should become cautioner to him in transactions with a third party,—as, for example, for the price of goods to be sold by the proposed cautioner on behalf of the creditor to the third party,—is not safe in acting upon the expected guarantee until he has received from the cautioner an express acceptance of his proposal; at the same time, if the proposed cautioner does not mean to undertake the guarantee, he must dissent timeously.[4] Any indication in an offer of guarantee that the writer expects some preliminary step to be taken before he is bound, makes notice of acceptance necessary, before acting on the offer. For example, a letter stating, "I have no objection to being answerable. . . . For any reference, apply Messrs. A.," was construed as showing that the defendant only intended to be bound in case, upon inquiry, the creditor was satisfied of his solvency. Accord-

[1] See also *Mozley* v. *Tinkler*, 1835, 1 C. M. & R. 692; *Symmons* v. *Want*, 1818, 2 Stark. 371.

[2] *Thomson* v. *Marquess of Breadalbane*, 1854, 16 D. 943.

[3] *Veitch* v. *Murray*, 1864, 2 Macp. 1098.

[4] *Watson* v. *O'Reilly, Hill, & Co.*; 1826, 4 S. 310.

ingly, the creditor, not having notified to the writer that he was satisfied with his security, and not having sent an express acceptance, was held not entitled to recover.[1] Similarly, if references have been required from an intended surety, and the creditor means to dispense with the references, and act upon the guarantee without them, he is bound to give notice to the surety of the intended renunciation, before he acts upon the guarantee.[2]

Cases in which an implied acceptance, by acting on the offer, is sufficient.

On the other hand, where the offer of a guarantee is made definitely, unconditionally, and without ambiguity, acceptance will be implied if the person to whom it is sent acts upon it, although he does not expressly notify his acceptance. This is so, especially where the guarantor undertakes to be responsible for a debt already incurred, or where the offer is to guarantee a specific obligation or set of transactions, the amount and extent of which are definitely known to the guarantor at the time of entering into the contract. Notification of acceptance is required for the benefit of the person who makes the offer. Accordingly, if a person, in an offer made by him to another person, expressly or impliedly indicates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the person to whom the offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly indicates in his offer that it will be sufficient to act on the proposal without intimating an acceptance of it, the fact that the offer has been acted on constitutes sufficient acceptance without notification.[3] Thus, in *Pope* v. *Andrews*[4] the question was, whether the pursuer had accepted a guarantee. No oral or written assent was suggested, but the Court held that an assent may be by act as well as by word, and that it was an implied acceptance of the guarantee on the part of the recipient, that he did not dissent or return it to the sender within a reasonable time; and an unexplained delay of three weeks was regarded as unreasonable. "If a person," said Coleridge, J., "offers a guarantee, and, more still, if he signs a guarantee by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time; and if he keeps the guarantee an unreasonable time, he is bound to accept it, just the same as if he has assented

[1] *Mozley* v. *Tinkler*, 1835, 1 Cr. M. & R. 692.

[2] *Morten* v. *Marshall*, 1864, 33 L. J. Ex. 54.

[3] Per Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.* [1893], 1 Q. B. (C. A.) 256, at 269.

[4] 1840, 9 C. & P. 564.

to it by words."[1] This is in accordance with a well-established principle of the general law of contract. Thus Bowen, L.J., in a recent case, dealing with the question what is sufficient evidence of assent, explained: "Assent of the mind is not sufficient unless that assent is communicated to the other party. Communication need not be in writing or words: conduct may amount to communication. The circumstances here show that the plaintiffs thought, and had a right from the defendant's conduct to think, that the defendant had accepted."[2] Similarly, in *Wallace* v. *Gibson*,[3] Lord Herschell stated that even if the letter were regarded as a promise, if the loan was made, to give a guarantee, he was prepared to hold it a binding obligation as soon as the loan was made. "It cannot be controverted," his Lordship observed, "that the letter amounted at the least to such a promise, and that the money was advanced on the faith of it. Why, then, should it not be obligatory?" So, in a guarantee of employment,—as, for example, one in these terms: "I agree to be security to you for A. for whatever, while in your employ, you may trust him with, and, in case of default, to make the same good,"—the obligation attaches and becomes binding, without express notification of acceptance, as soon as the person to whom it is given takes the individual into his employment.[4] Similarly, where a person induces a tradesman to furnish goods to a third party by undertaking, unambiguously and definitely, to see the goods paid, the contract is completed between the tradesman and the cautioner by the delivery of the goods to the third party, and it is not necessary to the validity of the guarantee that the tradesman should bind himself to supply the goods for the price of which, when furnished, the cautioner is to be answerable.[5]

Acceptance in case of a guarantee of future dealings of indefinite amount.

Where the guarantor's offer has reference to future advances, especially if these are of indefinite amount, it is always expedient for the creditor, before making the advances to the principal debtor, to give notice to the guarantor that his offer is accepted. Even, however, in the case of a guarantee of prospective debts to be contracted or contingent liabilities to be incurred, the amount and extent of which are undefined and unknown to the guarantor at the time of making the offer, an acceptance may

[1] Per Coleridge, J., in *Pope* v. *Andrews*, 1840, 9 C. & P. 564, at p. 568. Cf. *Watson* v. *O'Reilly, Hill, & Co.*, 1826, 4 S. 310.

[2] Per Bowen, L.J., in *Dartford Union* v. *Trickett*, 1889, 5 T. L. R. 619.

[3] 22 R. (H. L.) 56.

[4] *Kennaway* v. *Treleaven*, 1839, 5 M. & W. 498, per Parke, B.

[5] *Kennaway* v. *Treleaven*, *supra*; *Hardie* v. *MacDonald*, 1844, 6 D. 762; *Wilson & Corse* v. *Woods*, 1797, Hume, *Decisions*, 85.

be implied from conduct. Thus it was laid down by Lord Eldon, as the law both of Scotland and England, that if one puts into the hands of another a letter by which he engages to pledge himself for the payment of whatever sums may be advanced on the faith of that letter, if money is so advanced he must abide by the consequences.[1] A strong example of this is found in *Ewing* v. *Wright*.[2] There a person gave a letter, neither dated nor addressed, in favour of a firm, binding himself to guarantee "the regular payment at the ordinary periods of credit of whatever purchases they may make from you within twelve months from this date." A partner of the firm filled up the date and addressed and delivered the letter to a merchant, who furnished goods on the stipulated conditions. The Court held that the obligation was binding on the guarantor, and that there was no necessity to notify to him the furnishings. Persons who write and deliver a letter of this sort, importing that they are prepared to guarantee the dealings of a third party, must contemplate that the letter will be used for the purpose for which it was apparently intended; and when a creditor has made advances to, or dealt with, the third party, on the faith of the letter, the writer cannot turn round and say, "I did not intend my letter to be so used."[3] An offer of this kind, if not expressly accepted, can be withdrawn at any time before it is acted on.[4] More than that, a guarantee of future dealings, although a fixed period is mentioned in it, may, if it has not been formally accepted, be withdrawn, as regards liabilities not actually incurred, at any time, even within the period named, if due notice of revocation is sent to the creditor. This is illustrated by *Offord* v. *Davies*.[5] Messrs. Davies made a written offer to Offord, that if he would discount bills for another firm of Davies & Co., they would guarantee the payment of the bills to the extent of £600 during a period of twelve months. Certain bills were discounted by Offord, and duly paid; but, before the expiry of the twelve months, Messrs. Davies withdrew their offer, and gave notice that they would guarantee no more bills. Offord, however, continued to discount bills, and, some of these bills not having been paid, sued

[1] Per Lord Eldon in *Grant* v. *Campbell*, 1818, 6 Dow, 239, at p. 252; see also *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, per Lord Watson.

[2] 2 June 1808, 14 F. C. 172. Cf. *Lyon* v. *Butter*, 1841, 4 D. 178, per Lord Fullerton, at p. 188.

[3] *Johnstone* v. *Grant*, 1844, 6 D. 875; *National Bank of Scotland* v. *Campbell*, 1892, 19 R. 885.

[4] *Stewart* v. *Mitchell*, 7 Feb. 1786, F. C. See observations of Lord Eldon in *Grant* v. *Campbell*, 1818, 6 Dow, 239, at 252.

[5] 1862, 12 C. B. (N. S.) 748.

Messrs. Davies on the guarantee. The Court held that the offer was to guarantee discounts extending over a year, and that each discount turned the offer into a contract, as regards that particular transaction. In the absence, however, of express acceptance, it was held that the offer could at any time be revoked, except as regards those bills which had been discounted on the faith of the offer before notice of revocation was received; and accordingly the revocation was found a good defence to the action. Where a guarantee is granted for advances to be made on the happening of future events, which may or may not happen, it is expedient for the creditor, in addition to giving express notice that he accepts the guarantee, to advise the guarantor of the occurrence of the contingencies; for, otherwise, the guarantor might not know that any use had been made of his guarantee, and might, for this reason, lose opportunities of obtaining indemnity from the principal debtor.[1]

Conditional or contingent offers.

Where an offer of guarantee is made subject to conditions, the strict fulfilment of these conditions is necessary before any liability can attach under the guarantee. Such conditions, however, usually take the form of conditions precedent to the cautioner's liability under his guarantee, rather than of conditions precedent to the constitution of a binding contract. Accordingly, the subject of conditions in guarantees is more conveniently treated in dealing with the liability of cautioners.[2] At the same time, a condition attached to an offer of guarantee may be of such a nature as to make a completed contract between the parties impossible until the condition in question is fulfilled. A common stipulation in an offer, which may be construed as a condition precedent to the constitution of a binding contract, is that a formal instrument should be drawn up embodying the contract between the parties. The effect of such a stipulation may be that, until the formal instrument is drawn up, there is no contract. A case, for example, is reported by Hume, in which a person agreed in an informal missive to become cautioner for £300, mention being made in the missive that a bond was to be executed by the principal debtor and cautioner. Later, a bond was delivered to the creditor, apparently signed by both principal and cautioner, but in which the signature of the cautioner was a forgery. An attempt was made to make the cautioner liable under the missive, on the ground that

[1] Cf. observations of Lord Fullerton in *Watt* v. *National Bank*, 1839, 1 D. 827.

[2] *Vide infra*, p. 739 *et seq.*

it had been acted on; but the Court held that the payments made were to be ascribed to the bond and not to the missive, and that the cautioner was not bound.[1] Where an informal letter, which contemplates the drawing up of a formal instrument, has been accepted or acted on without any formal instrument being drawn up or signed, it is a question of construction in the circumstances of each case whether the parties intended that the letter and acceptance should in themselves constitute a complete contract, or that there should be no binding agreement until the formal instrument had been drawn up and signed.[2]

A person may offer, or even sign, a guarantee on condition that it should not become obligatory until some other person or persons shall also sign it. In this case, too, the stipulation may be construed as a condition precedent to the constitution of the contract; so that, until the condition is fulfilled, there is no binding contract.[3]

Conditions attached to the delivery of the instrument.

In many cases an offer or letter of guarantee is handed by the proposed cautioner to the principal debtor, with a view to dealings between the latter and third parties, who are to be the creditors in the guarantee. Such an offer or letter, though *ex facie* unconditional, may not be in reality so unconditional as it appears; for the delivery of the letter by the proposed cautioner to the principal debtor is frequently accompanied by agreements and stipulations which in effect encumber the guarantee with a variety of conditions and provisos.[4] The effect of a breach of conditions, agreed on between the cautioner and principal debtor at the time of the delivery of the instrument, depends on circumstances. On the one hand, where a cautioner puts a letter, *ex facie* unconditional and sufficient to bind him, into the hands of the principal debtor, and the latter hands it to a creditor who acts on the faith of it, the law will hold that the apparent authority with which the cautioner clothed the principal debtor was a real authority, and will refuse to take cognisance of conditions imposed upon the delivery, but unknown to the creditor. On the other

[1] *Skelton* v. *MacLaren*, 1816, Hume, *Dec.* 106. *Quaere*, Whether the cautioner should have been bound had there been no bond, and the creditor had made the payments relying simply on the missive?

[2] *Rossiter* v. *Miller*, 1878, 3 App. Cas. 1124; *Gray* v. *Smith*, 1889, 43 Ch. D. 208. Cf. *Erskine* v. *Glendinning*, 1871, 9 Macp. 656.

[3] A condition of this sort, however, is a condition precedent to the liability of the guarantor, rather than a condition precedent to the constitution of the contract. Such conditions are treated *infra*, p. 754.

[4] Such extrinsic agreements, being incidental to the delivery, can be proved by parole. *Vide infra*, p. 750.

hand, where there exists an agreement between the guarantor and the principal debtor importing conditions and qualifications into an *ex facie* unconditional guarantee, and where the creditor has notice of some such agreement, and, in spite of this, advances money to, or deals with, the principal debtor, he may not be able to enforce the guarantee, if the conditions agreed on between the guarantor and the principal debtor have not been fulfilled.[1] If the existence of an extrinsic agreement has in any way come to the knowledge of the creditor, there may be a duty imposed upon him, before acting on the *ex facie* unconditional guarantee, to inquire into the real terms of the agreement between the cautioner and the principal debtor, in pursuance of which the offer of guarantee was made.[2] The instrument itself may carry upon it sufficient indications of an extrinsic agreement to put the creditor on his inquiry,—as where persons, named in it as joint cautioners, have not signed. In all such cases if a creditor "snap at"[3] the *ex facie* unconditional guarantee, knowing that it is really qualified by extrinsic agreements, or under circumstances which should have excited his suspicion and put him on his inquiry, he takes the risk of the existence of qualifications and conditions, which, if unperformed, will prevent him from enforcing the cautioner's undertaking.

Consensus ad idem.

The question frequently arises whether, in an alleged guarantee, the minds of the contracting parties have been *ad idem* on the subject and terms of the contract,—in other words, whether there really has been a completed contract. If one party intends to contract on one set of terms, and the other intends to contract on another set of terms, there is no contract; and not infrequently, in guarantees, one of the parties claims to repudiate the contract on the ground that his meaning was misunderstood, or that he misunderstood that of the other party. The circumstances, indeed, may be such as to preclude one of the parties to the contract from denying that he has agreed to the terms of the other. "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."[4] Thus where

[1] *Grant* v. *Campbell*, 1818, 6 Dow, 239.

[2] *Ib.*

[3] The expression is that of James, L.J., in *Tamplin* v. *Jones*, 1880, 15 Ch. D. 221.

[4] Per Blackburn, J., in *Smith* v. *Hughes*, 1871, L. R. 6 Q. B. 597, at 607.

a defendant, mistaking the meaning and effect of the document, signs a guarantee which gives full effect to the plaintiff's intentions, and the plaintiff is thus deceived by the reasonable reading of the guarantee as to what has been the defendant's meaning, the defendant cannot alter his contract by turning round and saying, "I meant what I have not stated; and although you have relied upon my statement, I will only be liable for what I meant."[1] At the same time, if it can be shown that the creditor, in accepting the promise, was aware that the granter of the promise really understood his promise in a sense different from its apparent sense, or made it subject to conditions and provisos, which do not appear *ex facie* of the writing, the creditor may be prevented from enforcing the promise.[2]

—Where the guarantee is undertaken in a formal document.

Where the obligation of the guarantor is embodied in a regular probative document, he cannot escape from the liability undertaken by asserting that the terms of the document are not such as he agreed to. The Court will not proceed to adjust anew the terms of the bond, nor listen to parole evidence contradicting the terms of the written document.[3] The only remedy open to the guarantor in such a case, where the terms of the guarantee are not in themselves ambiguous, is to reduce his obligation upon the ground of essential error, misrepresentation, or fraud.[4] On the other hand, where the instrument is neither holograph nor probative, the *onus* is on the creditor to prove that the signature was adhibited to the document as it stands, or that what appears in the document was put there by the authority of the signatory.[5]

—Where the contract of guarantee is read out of a correspondence.

Where a contract of guarantee is alleged to have been constituted by the correspondence and actings of parties, it is more difficult to determine whether both parties have actually agreed to the same thing in the same sense. There is in this case more chance of escape from liability by a party who alleges that his meaning was misunderstood and that there was no completed contract, than exists in the case where the undertaking is embodied in a formal instrument. If there are no words of doubtful trade meaning in the correspondence, and if the extrinsic facts are not in controversy, it is a question for the determination of

[1] *Hayman* v. *Gover*, 1872, 25 L. T. Q. B. 903, per Cockburn, C.J.; *Scott* v. *Littledale*, 1858, 8 El. & Bl. 815.

[2] This is a general principle in the law of contract—see per Hannen, J., in *Smith* v. *Hughes*, 1871, L. R. 6 Q. B. 597; see also Anson on *Contracts*, 7th ed., p. 137.

[3] *Magistrates of Aberdeen* v. *Robison*, 1858, 20 D. 668.

[4] *Magistrates of Aberdeen* v. *Robison*, 1858, 20 D. 668. As to fraud and misrepresentation, *vide infra*, p. 706 *et seq.*

[5] *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907. See *infra*, p. 722.

the Court, looking to the words used and the circumstances of the transaction, whether or not there has been a completed contract.[1] Where the Court is asked to find a contract in a correspondence, and not in one particular instrument formally signed, the whole correspondence and actings of the parties must be taken into consideration. Though the first two letters of the correspondence seem of themselves to constitute a binding contract, yet it may be that the subsequent letters and actings of the parties show that a complete contract was not intended by the two letters in question, or that, if there was a contract, it was departed from.[2] This departure from an apparent contract must, however, be made reasonably clear; and doubtful expressions in subsequent letters, or a wavering on the part of the creditor in acting on the instrument, will not suffice to do away with the effect of the earlier agreement. In construing the documents the Court simply gives effect to what appears to have been the real intention of the parties. Thus if a letter, which is susceptible of being construed as an offer of guarantee, though other constructions are possible, is interpreted by the creditor as a guarantee, and acted on by both parties as such, the Court will hold that the true meaning of the words in question was that which was accepted and acted on by both parties at the time the letters passed between them.[3] At the same time, the doctrine of an eminent Irish judge is of equal application: "We must not forget that to bind the defendants in a contract of guarantee, the language used must clearly express an intention to take upon themselves the liabilities of sureties. If the writing falls short of that, or if the expressions used are doubtful or ambiguous, no contract of guarantee arises."[4] In the case referred to, two Cork merchants, H. &. M., bought a cargo of wheat from Gunn & Co., Montreal. Gunn & Co. drew a bill of exchange for the price, and presented it for discount to the Bank of Montreal. It is usual in such a case to deposit with the bank the bill of lading and other shipping documents, to be delivered to the purchaser or consignee on payment of the bill of exchange. On

[1] *Bank of Montreal* v. *Munster Bank*, 1876, 11 Ir. R. C. L. 47.

[2] *Hussey* v. *Horne Payne*, 1879, 4 App. Cas. 311. In this case, even parole evidence of subsequent conversations between the parties was admitted, to show the real state of their minds towards the alleged contract. Cf. *Bristol Aerated Bread Co.* v *Maggs*, 1890, 44 Ch. D. 616; *Bellamy* v. *Debenham*, 1890, 45 Ch. D. 481.

[3] See per Lord Kinnear in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, at 62.

[4] Per Fitzgerald, J., in *Bank of Montreal* v. *Munster Bank*, 1876, 11 Ir. R. C. L. 47, at 55.

this occasion, the Bank of Montreal having refused to discount the bill without further security, the manager of the Munster Bank at Cork telegraphed to the Montreal Bank as follows: "Friends purchased cargo, Gunn. Please see documents in order —you no responsibility"; and, on the same day, wrote them a letter, informing them of H. & M.'s purchase of wheat from Gunn & Co.; complaining of the delay and trouble caused in previous years by the bills of lading coming in different lots and without insurances being perfected; begging them to obviate a repetition of this; and concluding: "On presentation of cash order and all documents at Union Bank of London, payment will be promptly made." It was contended by the Montreal Bank that this telegram and letter constituted a guarantee by the Munster Bank that the bill drawn by Gunn & Co. for the price of the cargo would be paid; and it was alleged that on the faith of that guarantee they discounted the bill in question. The Court, however, held that the Munster Bank were not bound as guarantors. In *Sorby* v. *Gordon*,[1] on the other hand, it was held, upon the correspondence and actings of parties, that there was a completed contract of guarantee. There Gordon, wishing goods sent to R. & Co., a firm in India, wrote to Sorby, a Sheffield manufacturer, asking the price of certain goods, to be sent out to R. & Co. In reply, Sorby stated his lists of prices and his terms. On 11th July Gordon wrote: "I shall be very glad that you should come to an arrangement with R. & Co., that they should be your agents there; but that requires direct correspondence between you and them. I am quite willing to guarantee the first shipment." The same day, Sorby wrote for a confirmation of the order, which he duly received; and the goods were shipped. On the failure of R. & Co. to make payment, Gordon, when the plaintiff referred to the possible necessity of acting on the letter of 11th July did not repudiate his liability thereunder. Subsequently he disclaimed liability on various grounds, but the Court found him liable as guarantor.

Consideration.

Want of consideration affords, in Scotland, no ground of invalidity in an obligation of guarantee. By the institutional writers, indeed, cautionry is always described as being a gratuitous engagement,[2] although, of course, it is neither unlawful, nor infrequent in practice, to allow a commission or percentage

[1] 1874, 30 L. T. R. 528.

[2] Stair, i. 17. 3. In Bell, *Prin.* s. 246, an old case, *King* v. *Kerr*, 1711, M. 9641, is mentioned, in which it was held *pactum illicitum* for the cautioner to stipulate for a valuable consideration.

to the party undertaking a guarantee.[1] In England, on the other hand, all agreements not under seal require proof of consideration to support action on them; and further, it used to be held inadmissible to prove the consideration by parole evidence, and necessary in all cases that the consideration should appear on the face of the written engagement.[2] This, however, has been altered by the provision of the Mercantile Law Amendment Act, to the effect that no guarantee to answer for another is to be invalid because the consideration for it does not appear in writing, or by necessary inference from a written document.[3] Though thus far the law of England has been assimilated to the law of Scotland in this matter, the Statute does not dispense with the necessity, at English common law, for consideration for a promise, but only for the necessity of it appearing on the document, or by "necessary inference" therefrom. As in many other cases in English law, the smallest consideration suffices; and the question of its adequacy or inadequacy is, for the purpose of supporting the promise, immaterial.[4]

Necessity of fairness of representation on the part of the creditor.

In the constitution of guarantees, it is a general rule, applicable to all the special forms which the contract may take, that there must, at entering into the engagement, be perfect fairness of representation so far as the creditor is concerned; otherwise the cautioner is free. At the same time, in the ordinary case, there is in guarantee no universal obligation on the creditor to make disclosure of the whole state of matters to the proposed cautioner; in other words, guarantee is not, like insurance, a contract *uberrimæ fidei*, where full disclosure is required on the part of one of the contracting parties. "The rule that all material circumstances known to the assured must be disclosed is peculiar to contracts of insurance, and does not extend to contracts of guarantee; this, I think, is founded on principle as well as authority."[5] So in a recent Scotch case, it was held that, in an ordinary guarantee for debt, there is no duty on the creditor

[1] *Burnett, Petr.*, 1859, 21 D. 1197; *M'Kinnon, Petr.*, 1884, 21 S. L. R. 476; *Sim, Petr.*, 1863, 2 M. 205. Companies registered under the Companies Acts, which carry on guarantee business, are now regularly accepted as cautioners in cases under the supervision of the Court. The matter is always one for the discretion of the Court, guided by the report of the Accountant of Court. An advantage of having a public company as cautioner is that its financial sufficiency is more readily ascertainable than that of an individual.

[2] *Wain* v. *Warlters*, 1804, 5 East, 10.

[3] 19 & 20 Vict. c. 97, s. 3.

[4] *Harris* v. *Venables*, 1872, L. R. 7 Ex. 235.

[5] Per Blackburn, J., in *Lee* v. *Jones*, 1864, 34 L. J. C. P. 131, at p. 138; see also *per cur. North British Insur. Co.* v. *Lloyd*, 1875, L. R. 10 Ex. 523.

to make any representation whatever to a proposed cautioner, or to give him any warning or information as to the extent of the risk he is undertaking, unless he is expressly asked to do so.[1] The case in question was that of a cautioner who, without knowledge of its contents, signed a guarantee to a bank for the "payment of any advances made, and which may hereafter be made to" a customer of the bank. The cautioner, who had been in the habit of signing bills for the accommodation of the customer for sums between £300 and £400, was induced by the principal debtor to believe that the obligation he was undertaking to the bank was only for a sum of similar amount. As a matter of fact, however, at the date of the guarantee the customer had overdrawn his account with the bank to the amount of £5000. The bank agent did not disclose the state of the account; and it was proved that the cautioner, in signing the guarantee, was in grievous error as to the extent of the debt for which he was undertaking liability. The Court, however, held that this error was the result of his own negligence and the misrepresentations of the principal debtor, and was not induced by the bank, and that therefore it afforded no ground for reduction in a question with the bank. On the question whether the bank agent was bound to disclose to the cautioner the state of the account, Lord Shand observed: "There can be no ground of complaint because of concealment by the bank agent, for nothing is better settled than this, that a bank agent is entitled to assume that the cautioner has informed himself upon the various matters material to the obligation he is about to undertake. The agent is not bound to volunteer any information or statement as to the accounts, although, if information be asked, he is bound to give it, and to give it truthfully."[2] It lies with the guarantor to satisfy himself as to the position and credit of the principal debtor—whether his account is overdrawn, whether he is punctual in his dealings, or other matters material for him to know. Thus in *Hamilton* v. *Watson*[3] the rights and liabilities of a company, to which the principal debtor was indebted in the sum of £750, were taken over by a new company, which called for payment of the £750. Thereupon the debtor obtained a new cash account with the new company to the amount of £750, a cautioner being taken

[1] *Young* v. *Clydesdale Bank Lim.*, 1889, 17 R. 231.

[2] Per Lord Shand in *Young* v. *Clydesdale Bank*, 1889, 17 R. 231, at p. 244.

[3] *Hamilton* v. *Watson*, 1843, 5 D. 280; 1845, 4 Bell's App. 67. See particularly the opinions of Lord Moncreiff in Court of Session and Lord Campbell in House of Lords.

bound with him for the new account. A week later the debtor drew on this new cash account for the whole £750, and therewith paid off the old debt. It was held that there had been no such concealment of facts as would discharge the cautioner; and that the mere application of the new credit to discharge the old debt, there being no agreement beforehand to do so, did not vitiate the transaction. Similarly, it is unnecessary for a creditor, upon taking a guarantee for a debt, to disclose the circumstance that the debt had been previously guaranteed, and that the previous guarantor was withdrawing his guarantee.[1]

Effect of a partial and misleading statement.

On the other hand, where the creditor, either spontaneously or in reply to questions by the proposed cautioner, does make a representation, the representation must be a full and fair one.[2] If the creditor, in making his statement, conceals any fact which obviously or materially affects the risk, or, still more, if, even from mere carelessness, he so misrepresents the facts as necessarily to mislead the cautioner regarding the hazards of, or the necessity for, his undertaking, the cautioner is liberated.[3] Suretyship is a contract in which very little said, which ought not to have been said, and very little not said, which ought to have been said, is sufficient to prevent the contract from being valid.[4] A statement which is true, so far as it goes, may be accompanied by such a suppression of facts as to convey a misleading impression, or may be of such a partial and fragmentary nature that the withholding of that which is not stated makes that which is stated practically false. Thus a bank, having previously advanced £20,000 to a party on the security of certain heritable subjects, and being about to make a further advance of £22,000, agreed to take a heritable bond over the subjects for the whole sum of £42,000, but desired to get cautioners for the interest on the later advance of £22,000. The draft guarantee submitted by the bank to the cautioners bore that the bank had made an advance of £22,000 upon a security over certain lands, but no mention was made of the fact that the security embraced the previous debt of £20,000, due to them by the same obligant. This statement, though not intended by the bank to mislead, and not untrue in itself, was nevertheless held to be calculated to mislead the

[1] *North British Insur. Co.* v. *Lloyd*, 1875, 10 Ex. 523.

[2] *Stone* v. *Compton*, 1838, 5 Bing. N. C. 142.

[3] *Railton* v. *Mathews*, 1844, 6 D. 536, reversed 1844, 3 Bell's App. 56; *British Guarantee Assoc.* v. *Western Bank*, 1853, 15 D. 834.

[4] Per Fry, J., in *Davies* v. *London and Provincial Marine Insur. Co.*, 1878, 8 Ch. D. 469, at p. 475.

cautioners, and cause them to view the circumstances in a false light; and accordingly a cautioner, who did not know the precise state of the facts, was found entitled to set aside her obligation of caution. The other cautioner, who, being aware of the state of the facts, could not plead that he was misled by the statement, remained bound.[1]

Circumstances in which there is a duty of disclosure on the part of the creditor —in guarantees of money debts.

If, in the relations between the creditor and the principal debtor, there exists some fact material to the risk that might not be expected to exist, and of which the cautioner is excusably ignorant, there is a duty on the creditor to make disclosure of it.[2] If a creditor, either spontaneously or by request, describes to the cautioner the transaction proposed to be guaranteed (as, in general, a creditor does), and, knowing that there is something not naturally to be expected in his relation to the principal debtor, which is unknown to the intending cautioner, makes no mention of it, fearing that if it were known to him he would not enter into the contract, his non-disclosure of it will be held equivalent to an implied representation that the unusual circumstance did not exist.[3] In guarantees of money debts, the most usual instance of the existence of a matter, affecting the risk, which the cautioner would not reasonably expect, is where the creditor and principal debtor have previously entered into an agreement between themselves, forming an integral part of the immediate transaction out of which the cautionary obligation arises, which renders the position of the cautioner more hazardous than he might reasonably have expected.[4] Non-communication of such an agreement is treated as an implied representation that it does not exist, and the cautioner is liberated from his engagement. Thus where a guarantee was given for the price of goods sold, and it was agreed between the buyer and seller that the sum stated in the guarantee to be in payment of goods should be sufficient to cover a prior debt besides the price of the goods, the guarantor, to whom this agreement was not disclosed, was liberated.[5] Another example of concealment amounting to an implied misrepresentation is found in the Scotch case, *Falconer* v.

[1] *Royal Bank of Scotland* v. *Rankin*, 1844, 6 D. 1418.

[2] See opinion of Lord Campbell in *Hamilton* v. *Watson*, 1845, 4 Bell's App. 67.

[3] Per Blackburn, J., in *Lee* v. *Jones*, 1864, 34 L. J. C. P. 131, at p. 138.

[4] See opinions of Lords Lyndhurst and Campbell in *Hamilton* v. *Watson*, 1845, 4 Bell's App. 67, at p. 103. Note also comments on these opinions by L. J. C. Inglis in *Falconer* v. *North of Scotland Bank*, 1863, 1 Macp. 704, at 713.

[5] *Pidcock* v. *Bishop*, 1825, 3 B. & C. 605.

North of Scotland Banking Co.[1] There a bank and one of their debtors, who was insolvent, came to an arrangement, which practically amounted to a contract for the composition of the debt. In furtherance of the arrangement, a bond for £2000 containing an assignation of a policy of insurance on the debtor's life was prepared, with an accessory cautionary obligation for the payment of premiums on the policy and of interest on the sum in the bond. The narrative of the bond, as finally adjusted, bore that the bond was granted to the bank in consideration of an advance of £2000,—a statement which, if not inconsistent with the true state of the facts, at least disguised the real nature of the transaction, which was essentially an arrangement to settle an old debt. The obligation of the cautioner was set aside upon the ground that the narrative was not a fair representation of the antecedent arrangement between the bank and the principal debtor. It may be noted that in this case the Court, instead of adjusting issues for trial by jury, allowed a proof by commission before answer, for the reason that "delicate questions of legal inference were involved."[2] In a somewhat similar English case, on the other hand, it was expressly laid down by Lord Blackburn that such a question of implied representation was "a question of fact, proper for a jury."[3]

Circumstances in which there is a duty of disclosure—in guarantees of good conduct.

The rule that the concealment of a material circumstance, which the cautioner might reasonably not expect to exist, is construed as an implied representation by the creditor that the circumstance in question does not exist, is best illustrated in guarantees of the good conduct of servants or agents. The principle applicable to this class of obligations is not different from that applied to guarantees of money debts; but, the relation of the parties and the circumstances of the cautioner being in many respects different,[4] the Courts in the former class of cases, more readily than in the latter, hold that a concealment of material facts constitutes an implied misrepresentation, and so avoids the contract. The very existence of the relation of principal and agent, or, in other words, the fact that a person continues an agent

[1] 1863, 1 M. 704.

[2] *Falconer* v. *North of Scotland Bank*, 1862, 1 Macp. 704.

[3] *Lee* v. *Jones*, 1864, 34 L. J. C. P. 131; see per Lord Blackburn at p. 138.

[4] See observations in Bell, *Com.* i. 380, as to the disadvantageous position of a guarantor of conduct—*e.g.* of a bank agent—as compared with that of a guarantor of a money debt. The distinction is emphasised in the opinions in the Court of Session in *Hamilton* v. *Watson*, 1845, 4 Bell's App. 67; see opinions of L. J. Clerk and Lord Moncreiff, p. 97, and observations of Lord Campbell at p. 102.

in his employment, is in itself an implied representation that he considers him trustworthy, as it is presumed that he would not continue to employ an agent whom he considered untrustworthy. Where, then, the employer of a person in a position of trust takes a guarantee for the honesty or good conduct of an employee, the fact of the employment imports a representation to the cautioner that the employee is honest, so far as the employer knows, and the non-disclosure of a fact, known to the employer, materially affecting his honesty, avoids the guarantee. This principle was first clearly laid down by Lord Eldon in *Smith* v. *Bank of Scotland*,[1] as follows:—"If a man or a body of men employing a number of agents find one whom they have reason to suppose not trustworthy, one who most likely owes them large sums of money, and call upon that man to give sureties, both for his past and future dealings, thereby holding him out as a person trustworthy, when they know, or have strong grounds for suspecting, that he is not so, that would not bind the sureties." This doctrine was applied by the House of Lords, reversing the Court of Session, in *Railton* v. *Mathews*.[2] There it was held, that where a person takes a bond of caution for the conduct of an agent, in whose conduct, prior to the taking of the bond of caution, there were circumstances, which were known to, or might have been ascertained by, the creditor, materially increasing the hazard of the cautioner's undertaking, the non-disclosure of these facts to the cautioner liberates him from his engagement, although it is not proved that the concealment was deliberate and intentional on the part of the creditor. So in England, it has been held that a person who took a guarantee for an agent, whose duties were to receive and account for money, without disclosing the fact that the agent was then in arrear in his accounting to a large amount, could not hold the surety to his engagement.[3] Similarly, in a recent Scotch case, where an employer, on account of certain irregularities in the conduct of an agent, refused to continue him in his service unless he found caution for his intromissions, it was held that the persons, who had been induced to become cautioners by the misrepresentations of the agent, were free from their undertaking on account of the creditor's failure to communicate to them the circumstances in

[1] 1813, 1 Dow, 272, at p. 294, where the case of *Maltby* (*q.v.*) is cited. The quotation from Lord Eldon in the text is taken from the fuller report of his Lordship's opinion in a later stage of the case, *Smith* v. *Bank of Scotland*, 1829, 7 S. 244, at p. 248.

[2] 1844, 6 D. 536; revd. 1844, 3 Bell's App. 56.

[3] *Lee* v. *Jones*, 1864, 34 L. J. C. P. 131.

which the cautionary obligation was demanded.[1] So strictly is the doctrine of implied misrepresentation applied, where the creditor has knowledge of previously discreditable conduct on the part of the person for whom the bond is granted, as in effect to lay upon the creditor the whole duty of protecting the interests of the cautioners, by ultroneously giving them full information as to the character of the person guaranteed, even where the cautioners intervene at the request and in the interest of the debtor only.[2] Further, after the contract of suretyship has been entered into, if the person whose conduct is guaranteed commits any acts of dishonesty, the surety has a right instantly to withdraw his guarantee *quoad* the future;[3] and if the creditor, knowing of the dishonest conduct of his servant or agent, continues to employ him, and does not inform the surety of what has occurred, this concealment releases the surety from all liability for subsequent loss through further acts of dishonesty on the part of the agent.[4]

Responsibility of creditor for representations by principal debtor.

Apart from special circumstances, such as those we have considered, which impose upon the creditor the duty of making a full disclosure of the facts to the proposed cautioner, the creditor is not liable for misrepresentations on the part of the principal debtor made to induce the cautioner to undertake the obligation,[5] unless it is proved that he was privy to the fact that the cautioner was being deceived.[6] There seems also to exist a certain presumption that the cautioner intervened at the request of the principal debtor, whose clear interest it is in most cases that the guarantee be undertaken, rather than at the request of the creditor, whose interest in the guarantee being obtained is generally less conspicuous.[7] At the same time, if the circumstances of the transaction are such as fairly to lead a reasonable man to believe that fraud must have been used by the principal debtor to obtain the consent of a cautioner, the duty on the creditor to make full disclosure becomes imperative, and he cannot shelter himself behind the plea that he was not bound to make inquiry; for when a transaction is tainted with fraud,

[1] *French* v. *Cameron*, 1893, 20 R. 966.

[2] See remarks of Lord Trayner in *French* v. *Cameron*, 1893, 20 R. 966, at p. 973.

[3] *Burgess* v. *Eve*, 1872, L. R. 13 Eq. 450.

[4] *Phillips* v. *Foxall*, 1872, L. R. 7 Q. B. 666. See *infra*, p. 870.

[5] *Young* v. *Clydesdale Bank*, 1889, 17 R. 231.

[6] As was the case, *e.g.*, in *Falconer* v. *North of Scotland Bank*, 1863, 1 Macp. 704.

[7] *Bank of Scotland* v. *Dunnet*, 1893, 1 S. L. T. No. 20.

wilful ignorance is not to be distinguished from knowledge.[1] In *Owen* v. *Homan*,[1] A., being largely indebted to B. & Co., and being on the verge of bankruptcy, brought them, on different occasions, bills, etc., signed by himself, and his aunt as surety. The aunt was, to the knowledge of B. & Co., an old woman, aged seventy-five. It was held that the circumstances were such as reasonably to create in the minds of B. &. Co. a suspicion of fraud on the part of the principal debtor towards his aunt; and therefore the plea, that they were not called on to ask, and did not ask, any questions on the subject, did not avail them. The question whether the misrepresentation of a principal debtor, made without the knowledge of the creditor, will suffice to liberate the cautioner from his liability, was discussed at considerable length in *Wardlaw* v. *M'Kenzie*.[2] The circumstances of the case were very special. A person, who had been served tutor-at-law to a fatuous brother, entered into the management of the ward's estate without finding caution, but later induced his sister to sign a bond of caution for his whole intromissions from the commencement of the tutory. Afterwards, on the bankruptcy of the tutor-at-law, a *curator bonis* was appointed. In an action of reduction of the bond of caution brought by the cautioner, upon the ground that she had been induced to sign by misrepresentations by the tutor, the principal debtor, as to the nature and extent of the cautionary obligation, the Lord Ordinary held that the averments of misrepresentation by the tutor were not relevant against the fatuous person and his curator, since it was not averred that they were cognisant of the misrepresentations. This decision was reversed in the Inner House, and the pursuer was allowed a proof of her averments upon the ground that, as the bond was granted without consideration as regards the ward's estate, and as no change in the condition or management of that estate had taken place in consequence of it, the cautioner was entitled to have her obligation set aside, if it were shown that the bond was obtained by the fraud of the tutor.

[1] *Owen* v. *Homan*, 1853, 20 L. J. Ch. 323, 4 H. L. Cas. 997.

[2] 1859, 21 D. 940.

CHAPTER XXI

PROOF OF THE CONTRACT OF CAUTIONRY

Proof at common law.
Proof under sec. 6 Mercantile Law Amendment Act.
Stamp.
Delivery.

Proof of cautionry at common law.

FROM an early period in the law of Scotland, cautionary obligations —though, according to the better opinion, constituted by consent —could, in the ordinary case, be proved only by written instruments.[1] Seeing that writing was required, not as a matter of solemnity, but only by way of proof, it would have been in accordance with principle to hold that the writing need not be probative, but that it was sufficient if it were shown to be genuine; for the old Scots Statutes regulating the authentication of deeds[2] properly relate, not to writings produced *in modum probationis* to set up consensual contracts, but only to operative writings founded on as constituting obligations.[3] Nevertheless, owing to the tendency in the older law to require a formal instrument authenticated in the manner prescribed by the Statutes in every case in which written proof was necessary, it undoubtedly became the practice in cautionary obligations not granted *in re mercatoriâ*, or followed by *rei interventus*, to require that the instrument evidencing the obligation should be a holograph writ or a probative deed, executed in terms of the Statutes.[4] In particular cases, indeed, the necessity for the cautioner's obligation being embodied in a formally attested deed has been settled by immemorial usage. These special cases are obligations of judicial cautionry, and obligations granted by cautioners for the due discharge of public offices, or for cash credits, or for indentures.[5] On the other hand, it

[1] Ersk. iv. 2. 20; Bell, *Com.* i. 388; Tait on *Evidence*, 3rd ed., p. 224.

[2] 1541, 1579, 1681, c. 5.

[3] On this matter, see the opinion of Lord Kyllachy in *Bryan* v. *Butters & Co.*, 1892, 19 R. 490 (a case of loan). His Lordship's reasoning on this subject was expressly approved in the Inner House.

[4] *Church of England Life Assur. Co.* v. *Hodges*, 1857, 19 D. 414.

[5] More's Note to Stair, i. 17. 3; Dickson on *Evidence*, s. 60.

was equally recognised that, in certain special circumstances, guarantees might be competently proved without writing.[1] As regards cautionary obligations, not falling within any of the classes above enumerated, in which a formally attested deed was necessary by established usage, and not granted in such special circumstances as to admit of their being proved by parole evidence, the authorities are not clear or unanimous as to whether formal attestation of the instrument evidencing the obligation is necessary, where the instrument itself is not holograph. Thus, on the one hand, it is laid down by Professor Bell in his *Principles*, that "a writing of which the subscription is acknowledged is good evidence of cautionry";[2] while, on the other hand, Mr. Dickson states that it is the "undoubted rule," that "so long as things are entire, the contract is proveable only by writing duly executed according to the terms of the Statutes, or recognised as a privileged writ."[3] The earlier decisions on the subject seem to have fluctuated;[4] and in modern times, though there has been no express decision on the point, the tendency of the Courts has been to assume that at common law a cautionary obligation can be proved only by probative writ, unless it has been granted *in re mercatoriâ*, or has been followed by *rei interventus*.[5]

In cautionry, as in other obligations established by probative writings, the formalities of execution are dispensed with at common law (*a*) where the writ is *in re mercatoriâ*, or (*b*) where it has been followed by *rei interventus*.

Informal documents *in re mercatoriâ*.

In mercantile documents the statutory solemnities are not required. Documents of this kind are valid if merely subscribed; and if their authenticity is disputed, it may be proved *prout de jure*.[6] Where, then, a letter of guarantee is within the category of writings *in re mercatoriâ*, a probative writing is unnecessary to establish the obligation.[7] Thus a guarantee for future furnishings given to a trader is valid though not formally attested; and it would seem that the same would hold of a guarantee for past furnishings.[8] It is still an open question whether a letter of

[1] As to these special cases, *vide infra*, p. 717.

[2] Bell, *Prin.* s. 249.

[3] Dickson on *Evidence*, s. 603.

[4] See Note by More to Stair, i. 17. 3.

[5] *Church of England Life Assur. Co.* v. *Hodges*, 1857, 19 D. 414.

[6] Bell, *Com.* i. 324; Dickson on *Evidence*, s. 793.

[7] *Thomson* v. *Gilkison*, 1831, 9 S. 520; *Johnston* v. *Grant*, 1844, 6 D. 875.

[8] *Paterson* v. *Wright*, 31 Jan. 1810, F. C.; affd. 1814, 6 Pat. App. 38. See also opinions in *Ballantyne* v. *Carter*, 1842, 4 D. 419.

guarantee for advances by a bank to a merchant is, or is not, a writ *in re mercatoriâ*. On this point the Court was equally divided in opinion in *Johnston* v. *Grant*.[1] The question was debated in *The National Bank* v. *Campbell*,[2] in which case Lord M'Laren, without expressing an opinion on the point, dismissed it, as one of merely theoretical interest, on these grounds: "If in such a case the writing had not been acted on, I suppose it would be open to the guarantor to give notice to the bank that he meant to recall it. If advances had been made on the faith of the obligation, the obligation would be binding, upon the principle of *rei interventus*."[3]

Informal writing followed by *rei interventus*.

Again, though a writing is not executed in accordance with the statutory formalities, it is nevertheless effectual to bind the obligant, if it has been followed by *rei interventus*. Such *rei interventus*, or part-performance, puts an end to *locus pœnitentiæ*, and bars a party, bound by an informal obligation, from resiling. Thus even in the case of a sale of heritable property, the objection of want of attestation can only be taken when the matter is *in nudis finibus contractus*.[4] If, accordingly, a person by improbative writing undertakes an obligation of guarantee, and actings of the kind which he contemplated follow upon it, these actings validate the obligation.[5] In order to establish *rei interventus*, it is not necessary to aver that the advances or other actings on the faith of the writing took place with the knowledge of the granter of the informal obligation; for the granter is presumed to know that the writing will be used for the purpose for which it was granted. If, for example, an advance by some creditor must have been contemplated by the granter at the time he put his name to the writing, the making of the advance excludes *locus pœnitentiæ*, although the granter of the writing had no actual knowledge of the advance.[6] Further, the fact that advances were made by the creditor, and that this was done on the faith of the informal guarantee, may competently be proved by parole evidence.[7] The mere fact that an improbative guarantee is formal in

[1] 1844, 6 D. 875.

[2] 1892, 19 R. 885.

[3] Per Lord M'Laren in *National Bank* v. *Campbell*, 1892, 19 R. 885, p. 892. Lord M'Laren's alternative, however, does not meet the case of a letter of guarantee granted for advances already made.

[4] *Goldston* v. *Young*, 1868, 7 Macp. 188.

[5] Ersk. iii. 2. 3; Bell, *Com.* (M'L. ed.) i. 346; *Ballantyne* v. *Carter*, 1842, 4 D. 419; *United Mutual Mining Assur. Co.* v. *Murray*, 1860, 22 D. 1185; *Manderson* v. *M'Minn*, 1802, Hume, *Dec.* 90; *Douglas* v. *Clapperton*, 1809, Hume, *Dec.* 105; *Trotter & Tosh* v. *Martin*, 1817, Hume, *Decisions*, 105.

[6] *Johnston* v. *Grant*, 1844, 6 D. 875.

[7] *Grant* v. *Johnstone*, 1845, 7 D. 390.

its terms, and ends with the words, "In witness whereof," does not prevent the operation of the principle of *rei interventus* in validating the granter's obligation, if it is shown that the document was really subscribed by the granter and duly delivered.[1] On the other hand, it is doubtful whether *rei interventus* will render valid a guarantee, in which the obligation is prospective and no creditor is named.[2]

Cautionary obligations might at common law be proved in certain cases without writing in any form.

Further, it was well established that at common law cautionary obligations could, in certain cases, be proved without the existence of writing in any form. Thus a cautionary obligation—unless it belonged to the special classes of obligations for which, by immemorial usage, writing was necessary[3]—could be proved by the cautioner's oath on reference where the creditor had, with the cautioner's knowledge, relied on the obligation and it had been followed by *rei interventus*.[4] Moreover, where a cautionary obligation was an integral part of a larger contract competent to be set up by parole evidence, the parole evidence was admitted to set up the subsidiary contract of cautionry as well as the larger principal contract.[5] The cautionary obligation in such a case, however, must have been interposed at the time the larger bargain was entered into; if an interval of time intervened between the principal and the accessory contract, the latter could be proved only by writ or oath.[6] Also, at common law, persons might be held liable upon the ground of verbal representations made by them as to the credit of third parties, to the same effect as if they had bound themselves orally by a guarantee.[7]

Proof of the contract under the Mercantile Law Amendment Act, 1856, s. 6.

The necessity, in all cases, of written evidence in order to prove contracts of guarantee is now fixed by sec. 6 of the Mercantile Law Amendment (Scotland) Act. It is provided by that section that: "All guarantees, securities or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit and ability, trade or dealings of any person made or granted to the effect, or for the purpose of, enabling such person to obtain credit, money, goods or postponement

[1] *National Bank of Scotland* v. *Campbell*, 1892, 19 R. 885.

[2] *Burnett* v. *Burnett*, 1859, 21 D. 813.

[3] See More's Note to Stair, i. 17. 3.

[4] Dickson on *Evidence*, s. 602; Bell, *Prin.* s. 249.

[5] *Rhind* v. *Mackenzie*, 20 Feb. 1816, F. C.; Dickson on *Evidence*, s. 602; Bell, *Prin.* s. 249.

[6] *Campbell* v. *M'Lauchlan*, 1752, M. 12286; *Campbell* v. *Munro*, 1815, Hume, *Decisions*, 106.

[7] *Park* v. *Gould*, 1851, 13 D. 1049.

of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations or assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."[1]

Scope of the enactment in sec. 6.

The enactment in sec. 6 is in the widest and most general terms. It comprehends all cautionary obligations and guarantees in whatever form they are constituted, as well as all representations, which are of the character and made with the intent, specified in the section. Its effect is to make it impossible to enforce a guarantee, however completely it may be proved, unless there exists the statutory evidence; that is, unless the obligation is in writing and subscribed as the Statute requires. So representations of the character, and made with the purpose, described, do not now, if verbal, afford a ground of action to the person who may be misled by them to his detriment. In other words, the section in substance provides that no person, to whom verbal representations as to the credit of a third party are made, shall have any right to rely upon them; and that if he does choose to act upon them, he must bear the consequences of his own credulity.[2]

Contracts to which the section applies.

As regards the "guarantees, securities or cautionary obligations," mentioned in the Statute, there is no doubt that, in spite of the use of the word "securities,"—a word which, in popular language, is highly ambiguous, and which, even in legal terminology, is not susceptible of very precise definition,—the Scotch Courts, in interpreting the section, would carefully discriminate between obligations which are truly cautionary in their nature, and obligations which, though they may resemble cautionry, are nevertheless distinguished in law from cautionry, and that obligations of the latter kind would be held to be outside the scope of the enactment.[3] The term "securities" must, in short, be here construed as referring to obligations *ejusdem generis* with guarantees and cautionary obligations; so that the term as used in the section, is "probably just equivalent to suretyship."[4] That being so, various classes of contracts, which, though they resemble cautionry in many particulars, are nevertheless distinct therefrom,

[1] 19 & 20 Vict. c. 60, s. 6.

[2] See per Lord Watson in *Paton* v. *Clydesdale Bank*, 1896, 23 R. (H. L.) 22.

[3] *Selkirk* (Stevenson's Tr.) v. *Campbell & Sons*, 1896, 23 R. 711.

[4] See Lord M'Laren's Note on the Mercantile Law Amendment Act, Bell, *Com.* i. 406.

inasmuch as they lack some essential characteristic of a cautionary obligation, fall outside the scope of this enactment, just as they fall outwith sec. 4 of the Statute of Frauds. The several contracts which are thus distinguished from cautionry, as well as the features by which they are so distinguished, have already been fully discussed in Chap. XIX.[1]

Whether any given representation possesses the special character referred to in sec. 6 depends on its nature and the facts of the case.

As regards representations, the section only applies to those representations which possess the special character, and are made with the purpose, which it specifies. The question whether any particular statement is a representation or assurance as to the "character, conduct, credit, ability, trade, or dealings" of a third person, within the meaning of the enactment depends on the nature of the statement and the circumstances in which it was made. The elaborate discussions in the great English case, *Lyde* v. *Barnard*,[2] show the difficulty which may arise in determining whether a statement is, or is not, within the Statute. In that case, which arose under sec. 6 of Lord Tenterden's Act,[3]—the terms of this enactment are in substance the same as those of sec. 6 of the Mercantile Law Amendment (Scotland) Act,—Barnard orally represented that the life-interest of a third party in certain trust funds was charged only with three annuities, whereby Lyde was induced to make advances to the third party, secured by an assignment of his life-interest in the said funds; whereas Barnard well knew that the said interest was charged not only with three annuities, but with a mortgage for £20,000. Lord Abinger and Gurney, B., held that the representation was within the Statute, upon the ground that it related to the ability of the third party effectually to perform a pecuniary engagement. On the other hand, Parke and Alderson, Barons, held that the representation did not fall within the Statute. "It does not," it was observed, "concern or relate to his *character* or to his *credit*; it does not relate to his *conduct*, *trade*, or *dealings*, for it is totally immaterial who had encumbered the fund; the only question in substance being, to what extent it was encumbered. And it does not concern or relate to his ability; for that word, especially when we look at those which accompany it, means, in its ordinary sense, some quality belonging to the third party, and not to the thing to be transferred."[4] The view that such a statement as

[1] See pp. 646–662.

[2] 1836, 1 M. & W. 101.

[3] 9 Geo. IV. c. 14.

[4] The Court being equally divided in opinion, no decision was arrived at. In consideration of the importance of the matter a new trial was allowed; but the case did not come again before the Courts.

that in *Lyde* v. *Barnard* is within the Statute appears to be strengthened by the opinions of the Court in the later English case, *Swann* v. *Phillips*.[1] On the other hand, the Act has been held not to apply to the representation by a secretary of a company that a transfer of shares has been lodged with the company.[2] In a recent Scotch case, a representation—the fourth of the series—by a bank agent to a firm, who were about to accept certain bills, that no portion of the proceeds of the acceptances by the firm would be applied towards the extinction of the bank's debt, was held by the House of Lords not to possess the character of a representation to which the Statute applies, in respect that it contained no assurance relating to the credit of a third party.[3]

Representations of the character specified are within the section, even though they are fraudulent.

There exists no exception or limitation whatever to the application of the section to representations of the character, and made with the purpose, specified in the enactment. A very important limitation on the scope of the section was, indeed, introduced by the judgment of the Second Division in *Paton* v. *Clydesdale Bank Lim.*, in which case it was held in the Court of Session that the section did not apply to representations and assurances alleged to have been made falsely, and as part of a fraudulent scheme.[4] The effect of this decision was to limit the generality of the enactment, by introducing a proviso to the effect that it should not apply in cases where the person making the representation has in view some ulterior and illegitimate purpose, beyond inducing the person to whom it is made to give credit to a third party. This decision, which undoubtedly would have had the effect of largely nullifying the operation of the Statute, in so far as it deals with representations, was reversed in the House of Lords, upon the ground that no warrant for such a limitation was to be found in the words of the clause, and that effect must be given to the imperative and comprehensive character of the provision.[5] A representation as to the credit of another is probably none the less within the scope of the section because it was not made to the pursuer directly. Such a representation made to a third party to be communicated to the pursuer, or made to the public generally, with a view to its being acted on, and acted on by the pursuer to his detriment, will found liability; but the proof required by the Statute is as

[1] 1838, 8 A. & E. 457.
[2] *Bishop* v. *Balkis Co.*, 1890, 25 Q. B. D. 512.
[3] *Paton* v. *Clydesdale Bank Lim.*, 1896, 23 R. (H. L.) 22. See per Lord Watson at p. 26.
[4] *Ib.* 1895, 23 R. 38.
[5] *Ib.* 1896, 23 R. (H. L.) 22.

necessary in this case as in any other.[1] A representation by a person as to the credit of a firm, of which he is a member, has been held in England to be a representation as to the credit of another person within the meaning of Lord Tenterden's Act (9 Geo. IV. c. 14, s. 6);[2] and there is no doubt that such a representation is equally within sec. 6 of the Mercantile Law Amendment Act.[3]

So far as the Statute is concerned, mere subscription by the granter is enough.

Again, the Act, while it requires writing and subscription, does not decide whether in any particular case the mere signature of the granter is enough, or whether the writing must be holograph or formally attested in the manner prescribed by the old Scotch Statutes. This question remains to be settled by the rules in force before the Act.[4] Apart from certain special forms of cautionary obligations,[5] which, by established practice and usage, are undertaken by formally attested documents, there is, as has been pointed out, considerable doubt as to how far it is necessary at common law that the instrument evidencing a cautionary obligation should be holograph or probative.[6] On the one hand, the tendency of the Courts has been to assume that, where the document is not *in re mercatorîâ*, and has not been followed by *rei interventus*, a probative writing is required; on the other hand, if the writing is required merely for proof, and not in solemnity, it is more in accordance with principle to hold that formal authentication is unnecessary.[7] So far as the proof of cautionary obligations is dependent on the Statute, it would seem that, in the case of an ordinary guarantee, the mere subscription of the granter is sufficient without formal attestation; for the words of sec. 6 do not appear to contemplate that the document should be tested.[8] Moreover, according to the construction put

[1] See per Quain, J., in *Swift* v. *Winterbotham*, 1873, L. R. 8 Q. B. 244, at 253. The case was reversed, but on a different point.

[2] *Devaux* v. *Steinkeller*, 1839, 8 Scott, 202.

[3] See also per Lord Blackburn in *Walker's Trs.* v. *MacKinlay*, 1880, 7 R. (H. L.) 85, at 88.

[4] See Lord M'Laren's Note, Bell, *Com.* i. 404.

[5] See p. 714. The special forms in question are judicial cautionry; and obligations by cautioners for the due discharge of public offices, or for cash credits, or for indentures.

[6] Dickson on *Evidence*, s. 601; More's Note to Stair, i. 17. 3.

[7] *Vide* p. 715. See per Lord Kyllachy in *Bryan* v. *Butters & Co.*, 1892, 19 R. 490. The question whether, under the Statute, writing is essential to the constitution of a contract of cautionry, or whether writing is still, as common law, required only *in modum probationis*, is discussed *supra*, p. 684.

[8] This finds support in the interpretation put by the Scotch Courts on the provision of the Statute 1696, c. 5, which enacts that the written proof of trust must be "lawfully subscribed by the person alleged to be trustee"; for it is well settled that in this case the writing need not be a probative deed.

on the corresponding Statutes in England, the mere signature of the granter is enough without further attestation; and this fact is highly relevant, inasmuch as the express purpose of the Mercantile Law Amendment Act was to assimilate the laws of the two countries,[1] and the effect of sec. 6 of the Act, as construed by the highest authority, has been to extend the law of England on this matter to Scotland.[2]

In practice, however, the question whether the writing evidencing the cautioner's obligation must be probative, or whether it is sufficient if it is merely subscribed by the granter, can rarely cause difficulty. In all mercantile guarantees, a writing, signed merely by the guarantor or his agent, is undoubtedly sufficient. Again, though the guarantee is not a mercantile one, if advances have been made on the faith of the improbative writ, or if in any way it has been acted on by the creditor, it will be binding, in virtue of the *rei interventus*.[3] It is, then, only in the case of a non-mercantile guarantee given for a debt already incurred, that an objection can be taken to the improbative character of the writing evidencing the obligation. If an informal guarantee for future dealings, merely signed by the guarantor, has not been acted on, and has not been expressly accepted by the creditor, the granter may withdraw it before it is acted on.[4] Moreover, any creditor who takes a guarantee which is neither holograph nor probative, exposes himself to the disadvantage of having to prove not only the genuineness of the signature, but also that the signature was adhibited to the document as it stands, or that there was authority given to write over it what appears to have been written there. If the creditor fail to prove this,—and the *onus* of the proof is wholly upon him,—he cannot enforce the obligation.[5]

In interpreting the requisites of authentication prescribed by the Statute, the decisions on the corresponding English Statutes are important.

The Mercantile Law Amendment Act was passed, as stated in the preamble, for the purpose of remedying "the inconvenience

[1] See the preamble of the Statute.

[2] Per Lord Blackburn in *Walker's Trs.* v. *MacKinlay*, 1880, 7 R. (H. L.) 85, at 88. It may be noted, however, that Professor Bell seems to hold that contracts, "required by Statute to be in writing," are "written contracts, in strict technical language, to which authentic written evidence is required, not merely in proof, but in solemnity," Bell, *Prin.* s. 18.

[3] *Vide supra*, p. 716. In the absence of writing and subscription, *rei interventus* is, since the Mercantile Law Amendment Act, of no avail to validate the contract; for where a contract cannot be proved by parole, it is quite impossible to validate a verbal agreement by proving *rei interventus*—*Edmonston* v. *Bruce or Edmonston*, 1861, 23 D. 995.

[4] *Stewart* v. *Mitchell*, 7 Feb. 1786, F. C.; see also per Lord Eldon in *Grant* v. *Campbell*, 1818, 6 Dow, 239.

[5] *Wylie & Lochhead Lim.* v. *Hornsby*, 1889, 16 R. 907.

felt by persons engaged in trade by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence." It had long been the law of England, as provided by the Statute of Frauds, that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."[1] By the Statute commonly known as Lord Tenterden's Act,[2] the provisions of sec. 4 of the Statute of Frauds were in substance extended to representations as to the credit of third parties. Meanwhile, in Scotland, cautionary obligations and representations as to the credit of third parties could, in certain cases, be enforced without writing in any form.[3] That being so, it might happen that the validity of a guarantee or the liability of a person under a representation would depend upon whether the matter was to be determined by Scots or English law; and such a case fell precisely within the inconveniences recited in the preamble of the Mercantile Law Amendment Act. The remedy devised by the Legislature was, as stated by Lord Blackburn, to extend the law of England in this particular matter to Scotland; and the provisions of sec. 6 of the Mercantile Law Amendment (Scotland) Act are in substance the same as the above-mentioned English Statutes, viz. sec. 4 of the Statute of Frauds and sec. 6 of Lord Tenterden's Act.[4] Consequently, in construing the requisites of authentication prescribed in sec. 6 of the Mercantile Law Amendment Act, or, in other words, in determining what forms of writing or subscription will satisfy the statutory requirements, the English decisions interpreting the corresponding sections of the Statute of Frauds and Lord Tenterden's Act are highly relevant and important.

In England the written memorandum is necessary only to evidence the contract, not to constitute it; in other words, a verbal contract of guarantee is not in itself void.[5] "It is now finally settled that the true construction of the Statute of Frauds is not to render the contracts under it void, still less illegal, but is

In England the writing is required only in proof, not in solemnity —effects of this.

[1] 29 Chas. II. c. 3, s. 4.

[2] 9 Geo. IV. c. 14, s. 6.

[3] *Vide supra*, p. 717.

[4] See per Lord Blackburn in *Walker's Trs.* v. *Mackinlay*, 1880, 7 R. (H. L.) 85, at 88; and per Lord Watson in *Paton* v. *Clydesdale Bank*, 1896, 23 R. (H. L.) 22.

[5] "The agreement, in truth, is made before any signature," per Tindal, C.J., in *Laythoarp* v. *Bryant*, 1836, 2 Bing. N. C. 735, at 744.

to render the kind of evidence required indispensable, when it is sought to enforce the contract."[1] Accordingly, if money has been paid in pursuance of a verbal guarantee, the money cannot be recovered;[2] and if a party, by paying the money into court on the plea of tender, admit that he has made a binding guarantee, it has been held that proof of the guarantee by written memorandum is unnecessary.[3] In spite of the difference of expression between the English and Scotch Statutes,—it being declared in the English Statute that, in the absence of the statutory requirements, "no action shall be brought whereby to charge the defendant," whereas, in the Scotch Act, it is provided that, in similar circumstances, the obligation "shall have no effect,"—it is probable that the correct interpretation of the Scotch Act is similar to that adopted by the English Courts in construing the English Statute.[4] As was pointed out by Maule, J., in *Leroux* v. *Brown*,[5] to say that no action shall be brought upon a verbal agreement is, for most purposes, equivalent to saying that it shall be void. The Statute applies even where the action is not brought directly on the verbal agreement, provided the effect of allowing the action to be maintained would be to charge the defendant thereby.[6] From the fact that the writing is necessary as *evidence*, it follows that a verbal guarantee is incapable of being enforced in an action brought in the English courts, although the contract was entered into in France, and is valid and enforceable there.[7]

Contents of the writing required by the Statute.

As to the contents of the writing required by the Statute, it is held in England that the names, or a sufficient description of the contracting parties, particularly of the creditor, must appear *ex facie* of the written document. If the creditor be not indicated in the writing in such a manner as to reasonably identify him, either by name, or description, or reference, the writing is not sufficient. Where, for example, a letter

[1] Per Lord Blackburn in *Maddison* v. *Alderson*, 1883, 8 App. Cas. 467, at 488. The passage has frequently been quoted with approval, *e.g.* in *Lucas* v. *Dickson*, 1889, 22 Q. B. D. 357. See also per Bowen, L.J., in *In re Rownson, Field* v. *White*, 1885, 29 Ch. Div. 358.

[2] *Shaw* v. *Woodcock*, 1827, 7 B. & C. 73.

[3] *Middleton* v. *Brewer*, 1790, Peake's Cases, 15; see also *Evans* v. *Duncan*, 1831, 1 Tyr. 283.

[4] See Lord M'Laren's Note on Mercantile Law Amendment Act, Bell, *Com.* i. 403; see opinion of Lord Wellwood in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, at 58. *Vide supra*, p. 684 *et seq.*

[5] 1852, 22 L. J. C. P. 1.

[6] *Carrington* v. *Roots*, 1837, 2 M. & W. 248.

[7] *Leroux* v. *Brown*, 1852, 22 L. J. C. P. 1. This is on the ground that the writing is necessary as *evidence*.

purporting to contain a guarantee, was simply addressed "Sir," there being no name or description of the person who was to be the creditor in the obligation, the letter was held not to be a sufficient writing within the meaning of the Statute.[1] On the other hand, although no creditor is actually named in the writing, it will suffice if the terms of the document leave no doubt as to who the person is in whose favour the right is constituted. In a Scotch case, where certain persons had signed an obligation to become cautioners for an instalment of a composition on the bankrupt estate of a named debtor, it was argued that the document containing the obligation was not a writing within the requirements of sec. 6 of the Mercantile Law Amendment Act, by reason of the creditors in the obligation not being named. The Court, however, repelled the objection, upon the ground that on the face of the writing there was no doubt as to who the persons were in whose favour the obligation was undertaken.[2]

The writing must make the obligation of the granter reasonably clear; if it is so vague that the nature of the undertaking cannot be made out from its terms, it will not constitute a sufficient memorandum of the obligation.[3] In the case referred to, the agreement for the guarantee had been entered into orally, and the writing founded on by the plaintiff was silent as to all the essential points of the agreement, and indeed was unintelligible without proof of the previous communings between the parties. The Court held that, in these circumstances, the promise was not in writing as the Statute required that it should be, and, further, that parole evidence of the previous oral communings was inadmissible to supply the promise.[4] Parole evidence, on the other hand, is always admissible to identify the subject-matter of the obligation,[5] and to explain ambiguities in the written instrument.[6] As regards the writing necessary to establish a representation as to the credit of another, it has been held, in a case where there were both written and verbal representations, that it is enough to satisfy the Statute

[1] *Williams* v. *Lake*, 1859, 29 L. J. Q. B. 1.

[2] *Clapperton, Paton, & Co.* v. *Anderson*, 1881, 8 R. 1004. *In Burnett* v. *Burnett*, 1859, 21 D. 813, in which no creditor was named, it was doubted whether even *rei interventus* could make a person the creditor (see per Lord Curriehill, at p. 818).

[3] *Holmes* v. *Mitchell*, 1859, 28 L. J. C. P. 301; 7 C. B. (N. S.) 361.

[4] See in particular the opinion of Byles, J., in *Holmes* v. *Mitchell*, 1859, 28 L. J. C. P. 301; 7 C. B. (N. S.) 361.

[5] *Shortrede* v. *Cheek*, 1834, 1 A. & E. 57; *Bateman* v. *Phillips*, 1818, 15 East. 272.

[6] *Wade* v. *Tatton*, 1855, 25 L. J. C. P. 240. As to the admissibility of parole evidence in construing guarantees, see *infra*, p. 736 *et seq.*

if the written representation be a material part of the inducement to give the credit.

The writing, in order to be available in an action to enforce the contract, must have been in existence at the date when the action was brought.[1] "As the Statute," observed Lindley, L.J., "affects only the mode of proof, this rule must be considered anomalous; but it is founded on the wording of the Statute."[2] Since the wording of sec. 6 of the Mercantile Law Amendment Act is different in this respect from that of sec. 4 of the Statute of Frauds,[3] it is probable that this anomalous rule would not be followed in Scotland. A written offer of guarantee, duly signed, which the creditor has subsequently accepted, is sufficient to meet the requirement of the Statute.[4]

Form of the writing required by the Statute.

As regards the form of the writing, much latitude is allowed. The obligation, for example, need not be evidenced by a single paper; it is enough if it can be read out of a number of separate papers, provided that there exists sufficient connection in sense between the several documents to enable the Court to couple them together.[5] Thus the obligation may be read out of a series of letters;[6] and even telegrams, where the instructions for the messages have been signed by the party, may be used along with signed correspondence to show the terms of the obligation.[7] The connection in sense, however, cannot be set up by parole evidence; it must appear on the face of the documents themselves.[8] The writing need not be addressed to the creditor; it may be contained in a letter to a third person.[9] It may consist of an affidavit which had been sworn in a previous action, but not in the action on the guarantee;[10] for, as has been pointed out, an action cannot be supported in England by a memorandum obtained after its commencement.[11]

[1] *Sievewright* v. *Archibald*, 1851, 17 Q. B. 103, at 107; *Lucas* v. *Dixon*, 1889, 22 Q. B. D. 357.

[2] Per Lindley, L.J., *In re Hoyle* v. *Hoyle* [1893], 1 Ch. 84, at 97.

[3] The words of sec. 4 of the Statute of Frauds are, "No action shall be brought"; the words of sec. 6 of the Scots Act are simply, "otherwise it," *i.e.* the obligation, "shall have no effect."

[4] *Reuss* v. *Picksley*, 1866, L. R. 1 Ex. 347; *Smith* v. *Neale*, 1854, 2 C. B. (N. S.) 67.

[5] *Ridgway* v. *Wharton*, 1857, 6 H. L. C. 238.

[6] *Wylson* v. *Dunn*, 1887, 34 Ch. D. 569.

[7] *Godwin* v. *Francis*, 1870, L. R. 5 C. P. 295.

[8] *Crane* v. *Powell*, 1868, L. R. 4 C. P. 123; *Taylor* v. *Smith* (1893), 2 Q. B. 65.

[9] *Bateman* v. *Phillips*, 1818, 15 East, 272; *Gibson* v. *Holland*, 1865, L. R. 1 C. P. 1.

[10] *Barkworth* v. *Young*, 1856, 4 Drew, 1; *Lucas* v. *Dixon*, 1889, 22 Q. B. D. 357.

[11] *Vide* previous paragraph.

The purpose for which the writing was made is quite immaterial. If it embodies the obligation, and is signed by the person to be charged, it matters not what may have been the intention with which the document was originally made and signed. Thus it has been held[1] that a recital in a will was a good memorandum, the observation being made that "the question is not one of the intention of the party who signs the document, but simply one of evidence against him."[2] The existence of a writing, signed as required by the Statute, does not necessarily establish the existence of a valid contract. "The memorandum need not have the character of a contract."[3] This is clear from the fact, already mentioned, that a written offer, duly signed, is sufficient to satisfy the Statute.[4] In determining whether a valid contract has been constituted, it may be necessary to look at more than the mere writing and subscription of the guarantor.[5] As was observed by Lord Selborne, the statutory provision requiring writing is a weapon of defence, not offence.[6] It is, in short, fundamental that the Statute, while it regulates the evidence by which the obligation is proved, does not deal with the constitution of the contract.[7]

The subscription.

As regards the signature, it is enough if the writing be signed by the person who undertakes the liability, or by his agent; and it need not be signed by the party seeking to enforce it.[8] Parole evidence is admissible in certain cases to show whether the obligant signed the document, and in what capacity he signed it. Thus where a contract between the plaintiff and J. A. & Co. contained what purported to be a guarantee by J. O. Schuler, who, acting under a power of attorney, signed as follows: "P.P.A.—J. A. & Co., J. O. Schuler," it was held competent to lead evidence to show that Schuler signed not only as attorney for A. & Co., but for himself as a contracting party.[9] In Scotland, where the writing is neither holograph nor tested, the *onus* lies on the creditor to show that the obligant signed the document as it stood, or gave authority to

[1] *Hoyle* v. *Hoyle* [1893] 1 Ch. 84.

[2] Per Lindley and Bowen, L.J.J., in *Hoyle* v. *Hoyle* [1893], 1 Ch. 84; cf. also *Jones* v. *Victoria Graving Dock Co.*, 1877, 2 Q. B. D. 314, in which case an entry in a minute book was held a sufficient writing, though it had been signed merely for the purpose of verifying the accuracy of the entry.

[3] Per Willes, J., in *Gibson* v. *Holland*, 1865, L. R. 1 C. P. 1.

[4] See *supra*, p. 726.

[5] See *supra*, p. 695, as to the constitution of the contract.

[6] Per Lord Selborne in *Jervis* v. *Berridge*, 1873, L. R. 8 Ch. App. 351, 360; *Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311, 323.

[7] See *supra*, pp. 685, 723.

[8] *Laythoarp* v. *Bryant*, 1836, 2 Bing. N. C. 735, at 744.

[9] *Young* v. *Schuler*, 1883, 11 Q. B. D. 651.

write over his signature what has been written; and parole evidence may have the effect, even in a case in which the obligant admits the genuineness of his signature, of materially altering the obligation contained in the written document.[1] Where an alteration was made in the contract after the memorandum had been signed by the guarantor, and a note of the alteration, written by the guarantor, but not signed by him, was indorsed on the paper which contained the original memorandum and signature, it was held that the obligation in its altered form was sufficiently authenticated by the obligant's signature to the writing in its original form.[2]

In construing sec. 4 of the Statute of Frauds, the English Courts hold that it is immaterial in what part of the document the "signature" is placed—whether at the beginning or end of the writing; all that is necessary is that the signature be so introduced as to authenticate and affirm the contents of the writing.[3] The use of the more definite term "subscribed" in sec. 6 of the Scotch Mercantile Law Amendment Act, in place of the more general term "signed" in the English Statute, might be held to imply that in Scotland the subscription must stand at the foot of the writing. In England the initials of the obligant, or his mark, are held to be a sufficient signature within the Statute.[4]

Subscription by person duly authorised.

In sec. 6 of the Mercantile Law Amendment Act, as in sec. 4 of the Statute of Frauds, it is enacted that the writing, instead of being subscribed by the obligant himself, may be subscribed by some person duly authorised by him. Authority to subscribe a written obligation of guarantee on behalf of another, so as to bind that other, may be the result of an express authorisation; or it may be implied by law from the relative situation and previous course of dealing of the parties. In dealing with the powers of a partner in a firm, directors of a company, and an agent generally, to effect contracts of guarantee, so as to bind their firm, company, or principal respectively, we have anticipated the more important questions as to what constitutes due authorisation, which arise under this section.[5] For when it is established that a person

[1] *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907. The competency of parole proof in connection with guarantees is discussed *infra*, in dealing with the construction of the contract, p. 736 *et seq.*

[2] *Bluck* v. *Gompertz*, 1852, 7 Exch. 862.

[3] *Caton* v. *Caton*, 1867, L. R. 2 H. L. 127, see per Lord Westbury, at p. 142; *Evans* v. *Hoare* [1892], 1 Q. B. 593; *Hoyle* v. *Hoyle* [1893], 1 Ch. 84.

[4] *Baker* v. *Dening*, 1838, 8 A. & E. 94; *Hubert* v. *Moreau*, 1826, 2 C. & P. 528, 12 Moore, 216.

[5] As to agents, see p. 692. As to partners, see p. 687 *et seq.* As to directors of a company, see p. 691. The

has power to bind another by giving a guarantee, it necessarily follows that he has also authority to subscribe a memorandum of the contract on behalf of the party for whom he acts. Authority to subscribe the written memorandum of the contract is in such cases necessary for, and incidental to, the effective execution of his larger authority.[1]

The authority to sign a memorandum pursuant to sec. 4 of the Statute of Frauds may be proved by parole.[2] Nor is it necessary, when an agent signs such a memorandum, that he should sign the name of his principal, or sign expressly as agent; if he signs in his own name, parole evidence is admissible to show the agency, and charge the principal on the contract.[3] The authority of an agent, who has power to bind another in a contract of guarantee, may, it would appear,[4] be effectually revoked at any time before the obligation of guarantee has been reduced to writing and subscribed.[5] On the other hand, where a person has subscribed a written obligation of guarantee on behalf of another, without authority from that other, the principal will be bound if he subsequently ratify the agent's act.[6] It is held in England that one of the parties to a contract cannot sign the name of the other party, as his agent, to the memorandum, so as to bind him; the agent signing must be a third person.[7] A solicitor who is instructed to prepare a formal draft contract, to be sent to the other party to the contract for perusal and approval, is not a person authorised to sign a memorandum so as to bind his client within the meaning of the Statute.[8]

There exists an important difference between the English Statute, Lord Tenterden's Act (9 Geo. IV. c. 14, s. 6), and the corresponding provision in sec. 6 of the Mercantile Law Amend-

Distinction between the Scotch and English Statutes as to the subscription of a representation by a person duly authorised.

signature of the chairman of a company to the minute book, has been held sufficient to bind the company within the Statute—*Jones* v. *Victoria Graving Dock*, 1877, 2 Q. B. D. 314. As to the signature of the secretary of a company, see *Beer* v. *London Co.*, 1875, 20 Eq. 412.

[1] *Durrell* v. *Evans*, 1862, 1 H. & C. 174.

[2] *Emmerson* v. *Heelis*, 1809, 2 Taunt. 38; *Mortlock* v. *Buller*, 1804, 10 Ves. 291, 311; see Evans on *Principal and Agent*, 2nd ed., p. 22; cf. *Reid* v. *Reid Bros.*, 1887, 14 R. 789.

[3] *Wilson* v. *Hart*, 1817, 7 Taunt. 295; *Wake* v. *Harrop*, 1861, 6 H. & N. 768.

[4] See notes in Smith's L. C., on *Wain* v. *Warlters*, 10th ed., vol. i. p. 322.

[5] *Farmer* v. *Robinson*, 1805, 2 Camp. 338, note.

[6] *M'Lean* v. *Dunn*, 1828, 4 Bing. 722; *Fitzmaurice* v. *Bayley*, 1856, 6 El. & Bl. 868.

[7] *Sharman* v. *Brandt*, 1871, L. R. 6 Q. B. 720. This decision, though having reference primarily to sec. 17 of the Statute of Frauds, is equally applicable to sec. 4.

[8] *Smith* v. *Webster*, 1876, 3 Ch. Div. 49.

ment Scotland Act, as to the persons by whom a writing embodying a representation as to the credit of a third party may competently be subscribed. In the English Statute, it is expressly enacted that the representation as to the credit of another must be "signed by the party to be charged therewith."[1] Under the Scotch Act, the writing containing a representation as to the credit of a third party may, like the writing containing a guarantee, be subscribed either by the person making such representation or assurance, "or by some person duly authorised by him." The difference in the statutory provisions on this matter in the two countries has important consequences. The effect of the English Statute is that in England a man is not liable for a representation as to the credit of another unless he acknowledges his responsibility for it by putting his own signature to the writing containing it. So closely bound are the English Courts by the statutory provision that the signature must be the signature of the actual party to be charged, that, even in a case where the party to be charged can sign in no other way than by an agent, the rule is nevertheless held to apply. Thus, in *Swift* v. *Jewsbury*, it was held that the signature of a bank agent to a representation as to the credit of a third person, made to a customer of the bank, while it bound the agent who signed, did not make the bank liable.[2] It is true that in this case the letter containing the representation was written without any express authority from the bank; but, at the same time, the writing of such a letter was shown to be an act done within the scope of the general authority conferred on the writer, as bank agent, and it was only the terms of sec. 6 of Lord Tenterden's Act that prevented the bank being bound. Seeing that the subscription by a person duly authorised is expressly recognised as competent by sec. 6 of the Mercantile Law Amendment Act, there can be little doubt that in Scotland a bank would be held answerable for a written representation as to the credit of a third person, subscribed by one of its agents, if, as was the case in *Swift* v. *Jewsbury*, the representation was made by the agent in the course of his employment.[3] Both in

[1] It is noteworthy that while the English Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 13) provides, in reference to two sections of Lord Tenterden's Act, that a writing signed by an agent of the party chargeable thereby, shall have the same effect as if the writing had been signed by such party himself, sec. 6 of Lord Tenterden's Act is *not* one of these two sections. Much stress was laid on this fact in *Swift* v. *Jewsbury*, 1874, L. R. 9 Q. B. 301.

[2] *Swift* v. *Jewsbury*, 1874, L. R. 9 Q. B. 301; see also *Williams* v. *Mason*, 1873, 28 L. T. 232.

[3] *Paton* v. *Clydesdale Bank*, 1895, 23 R. 38; see per Lord Trayner at p.

England and in Scotland a principal, who sets an agent to do a certain kind of business, is answerable for the manner in which he does the business,—and what is done by the agent in the course of his employment is within the scope of his authority, and this applies to false representations as much as to other acts.[1] So, even in England, where a false representation—not being a representation as to the credit of another—is made by a bank agent in the course of his employment, and for the bank's benefit, the bank is liable for such representation, though it was made without express authority, and was signed only by the agent.[2] In short, the English rule, as illustrated in *Swift* v. *Jewsbury*,[3] that a principal is not bound by a written representation as to the credit of a third party, which has been made by his agent in the course of his employment, and is signed by the agent, is based wholly on the words of sec. 6 of Lord Tenterden's Act. The operation of the rule in England is confined to representations of the character dealt with in sec. 6 of that enactment: it does not apply to guarantees or obligations of suretyship within the Statute of Frauds, nor to representations falling outwith Lord Tenterden's Act.[4] That being so, since the signature by an agent to a representation as to the credit of another is expressly recognised in sec. 6 of the Scotch Statute as competent to bind his principal, this rule cannot apply in Scotland.

Stamp.

By the Stamp Act, 1891,[5] every agreement or memorandum of agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument, is subject to a duty of 6d., unless the matter thereof is of a value less than £5.[6] It is settled that a guarantee is an agreement within the meaning of this provision.[7]

44. The reversal of the decision of the Second Division in this case by the House of Lords did not affect the point as to the implied authority of the agent. If an agent, *e.g.* a bank agent, is asked as to the credit of a third party, and answers as an individual, and not as agent for the bank, his personal knowledge being trusted to, his representation would not be made in the course of his employment.

[1] *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H. L.) 53, see per Lord Selborne at p. 57; *Mackay* v. *Commercial Bank of New Brunswick*, 1874, L. R. 5 P. C. Ap. 394, at p. 416; cf. also *National Exchange Co.* v. *Drew*, 1850, 12 D. 950; 1855, 2 Macq. 103.

[2] *Barwick* v. *English Joint Stock Bank*, 1867, L. R. 2 Ex. 259. In this case the writing is spoken of in the reports as a "guarantee," but the ground of the bank's liability was really the fraud of the bank agent.

[3] 1874, L. R. 9 Q. B. 301.

[4] *Barwick* v. *English Joint Stock Bank*, 1867, L. R. 2 Ex. 259.

[5] 54 & 55 Vict. c. 39.

[6] Schedule to Stamp Act, 1891, 54 & 55 Vict. c. 39, sub-tit. Agreement.

[7] *Glover* v. *Halkett*, 1859, 26 L. J. Ex. 416.

Till a guarantee is duly stamped in accordance with the law in force at the time when it was first executed, it is not admissible in evidence.[1] The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.[2] Agreements, letters or memoranda made for, or relating to, the sale of any goods or merchandise are exempted from the 6d. duty on agreements.[3] A liberal interpretation has been given to this exemption, and there is a series of English cases to the effect that a guarantee for the payment of goods sold, or to be sold, to a third person is an agreement relating to the sale of goods within this exemption.[4] Further, a guarantee is liable only to a 6d. duty, as an agreement, though it may relate to something chargeable at a higher rate, as a lease or a charter party. Thus a guarantee for the performance by the charterer of a charter party, or by the lessee of a lease, requires only a 6d. stamp; for any other rule would have the effect of imposing a double tax.[5] Of course, if the agreement is something more than a guarantee, and in itself amounts to a lease, charter party, or other document requiring a higher stamp, it must be stamped at this higher rate.

Delivery.

As long as the document containing the cautioner's undertaking remains in his own hands or in the custody of his agent, it is not obligatory; in order to render it operative and effectual in law to bind the cautioner, it must be delivered to the creditor, or to a third party for him, or to the principal debtor, with a view to its being acted on by the creditor. Delivery is the expression of the granter's final purpose; until delivery, that purpose is held not to be taken. Further, there is a broad distinction between the mere parting with possession of a written instrument, and a legal delivery, whereby the granter puts the instrument beyond his own power. Where the guarantee is gratuitous, a neutral party is presumed to hold for the guarantor.[6] This presumption, however, yields to contrary proof, it being in every case a question of fact and the intention of the parties whether a third party holds for the granter or the grantee. "The delivery of a deed is not a matter of law, but a matter of fact."[7] Where a guarantee is merely

[1] 54 & 55 Vict. c. 39, s. 14.

[2] *Ib.* s. 22.

[3] Schedule to Stamp Act, 1891, sub-tit. Agreement, Exemption 3.

[4] *Warrington* v. *Furbor*, 1807, 8 East, 242; *Sadler* v. *Johnson*, 1847, 16 M. & W. 775; *Chatfield* v. *Cox*, 1852, 18 Q. B. 321.

[5] *Rein* v. *Lane*, 1867, L. R. 2 Q. B. 144.

[6] Ersk. iii. 2. 43, 44; *Ker* v. *Ker*, 1677, M. 3248.

[7] Per Lord Pres. Inglis in *Life Association of Scotland* v. *Douglas*, 1886, 13 R. 910.

delivered to the principal debtor, it appears that it may be withdrawn before it is acted on;[1] but if a person hands a guarantee, duly signed, to the principal debtor, who has acted for the bank in getting it signed, this is delivery to the bank, and the cautioner is bound for any transactions entered into by the creditor on the faith of it.[2] This is an example of the general rule that an act, which in itself does not necessarily amount to a legal delivery, may be coupled with such circumstances, or be followed by such results, as will bar a party to the instrument from denying the delivery of it. Where there are several co-obligants, the transmission of the instrument among the co-obligants themselves—for the purpose, for example, of signature—does not destroy the right of any of them to resile or cancel his subscription, so long as the grantee has not received delivery.[3] Where a letter of guarantee was sent by the granter to his brother, the principal debtor, and by him transmitted to his partner with this note: "Enclosed is letter of guarantee to D. H. & Co. I send it to you for your approbation; you can, if you approve, make K. deliver it,"—it was held by the House of Lords that the bankruptcy of the principal debtor, happening before the letter reached the hands of the creditors, entitled the granter to recall his guarantee. In this case, in point of fact, the letter never reached the hands of the creditors, though they had previously arranged for a guarantee being got by the principal debtor, and, on the faith of the guarantee, had remitted the money, for which the guarantor became security, to the firm of which the principal debtor was a member.[4] If the granter of an obligation, having signed it, hands it to his agent for delivery, the implied mandate, which he has given to the agent to deliver it, falls, if the granter die before the instrument is actually delivered. Thus where one of a number of co-obligants, having signed a bond, returned it to the agent for himself and his co-obligants, but died while the bond was still in the hands of the agent, and before money had been advanced on it, it was held that the implied mandate to deliver fell by the mandant's death, and that his executors were not liable for the money which was subsequently advanced on the bond.[5]

[1] Cp. *Sewart* v. *Mitchell*, 7 Feb. 1786, F. C. See observations by Lord Eldon in *Grant* v. *Campbell*, 1818, 6 Dow, 239.

[2] *National Bank of Scotland Lim.* v. *Campbell*, 1892, 19 R. 885.

[3] *M'Gill* v. *Edmonston*, 1628, M. 16991; *Glendinning* v. *Wyllie*, 1634, M. 16992; *Cheyn* v. *L. Rosehill*, 1679, 2 B. Supp. 242.

[4] *Douglas, Heron, & Co.* v. *Grant*, 1774, 3 Pat. App. 351.

[5] *Life Association of Scotland* v. *Douglas*, 1886, 13 R. 910. As to the effect of verbal agreements or conditions accompanying the delivery, see p. 701.

CHAPTER XXII

EXTENT OF CAUTIONER'S LIABILITY

Rules of construction.
Admissibility of parole evidence.
Conditions in guarantees.
Proof of extrinsic agreement.
Implied conditions.
Extent of cautioner's liability.
Limitation as to subject-matter.
Limitation as to person.
Limitation as to time.
Continuing and limited guarantees.
Cash-credit bonds.
Bills or notes as guarantees.

Rules of construction of cautionary obligations: —where the obligation is in a formal bond.

It has frequently been laid down as a general rule, applicable at least to obligations constituted by formal bond, that the obligation of a cautioner, being *stricti juris*, is to be strictly interpreted.[1] The strict interpretation of a bond of caution, however, means little more than that the obligation of the cautioner will not be extended to any other subject,[2] to any other person,[3] or to any further period of time,[4] than is expressed or necessarily implied in the contract.[5] In short, the obligation of a cautioner will not be in any way extended by mere latitude of interpretation beyond the precise terms of his engagement;[6] and where there is doubt or ambiguity in the construction of the obligation, the cautioner has the benefit of the doubt.[7] This principle is illustrated in *Napier* v. *Bruce*,[8] where the extent of a cautioner's liability, as expressed in the obligatory part of the bond, was held to be limited by the narrative of the bond. In that case a bond of caution was granted for the good conduct of a principal debtor, who was described in the narrative as "agent for the sale of our ale in London." This reference to a particular agency was held to qualify all the subsequent

[1] Bell, *Prin.* ss. 251, 285, and cases there referred to.

[2] *Rennie* v. *Smith's Trs.*, 1866, 4 Macp. 669. *Vide infra*, p. 760.

[3] *Murdoch* v. *M'Kirdy*, 1826, 4 S. 479; *Bowie* v. *Watson*, 1840, 2 D. 1061. *Vide infra*, p. 767.

[4] *University of Glasgow* v. *Earl Selkirk*, 1790, M. 2104. *Vide infra*, pp. 762, 845.

[5] Numerous illustrations of this statement will be found in the discussions of the extent of cautioner's liability. *Vide infra*, p. 760 *et seq.*

[6] *Napier* v. *Bruce*, 1840, 2 D. 556; see per Lord Gillies.

[7] *Baird* v. *Corbett*, 1835, 14 S. & D. 41.

[8] 1840, 2 D. 556; affd. 1842, 1 Bell's App. 78.

clauses of the bond; and, in spite of the general terms of the other clauses of the bond, the cautioner was found liable only for the omissions and intromissions of the principal debtor in the character of agent, and in pursuance of the particular agency, and not for his actings as an individual, or outwith the specified agency.[1] A similarly strict principle of interpretation is applied to bonds of suretyship in England. Thus it has been laid down that "a contract of guarantee is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt or on his own behalf; but it is a contract which he is entering into for a third person; and it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself."[2] In no case, however, will the rule that bonds of caution are to be strictly construed—opposed as it is to the ordinary canon of interpretation, *Verba fortius accipiuntur contra proferentem*[3]—be carried so far as to evade the true and fair meaning of the cautioner's engagement. A cautioner, while not liable beyond the fair scope of his engagement, is bound by his contract; and the Courts, in this as in other contracts, adopt the principle, that effect is to be given to the instrument if possible, *Ut res magis valeat quam pereat*.[4]

—in mercantile guarantees.

While the principle that a cautioner's obligation is to be construed strictly is applicable to formal bonds of caution, it does not appear that any such rule holds in the construction of ordinary mercantile guarantees. In an obligation of this class there is no presumption either way in regard to the construction of the document; but it must be fairly construed according to its terms, read in the light of the subject-matter of it and of the surrounding circumstances.[5] So in *Veitch* v. *Murray*,[6] the Court construed a mercantile guarantee "according to its plain meaning as a letter in reference to a mercantile transaction." "Letters of guarantee," says Brodie in his *Supplement to Stair*, "must be considered as informal productions, by which the writers of them are merely anxious to express their meaning in intelligible terms, and where

[1] *Napier* v. *Bruce*, 1840, 2 D. 556, affd. 1842, 1 Bell's App. 78; see also *Peppin* v. *Cooper*, 1819, 2 B. & A. 431.

[2] Per Bayley, B., in *Nicholson* v. *Paget*, 1832, 1 C. & M. 48, at p. 52.

[3] This maxim was expressly adopted by the Courts in construing a guarantee, both in the English case, *Mason* v. *Pritchard*, 1811, 12 East, 227, and in the Scotch case, *Bayne* v. *Russel*, 1869, 7 S. L. R. 101, at p. 104.

[4] *Broom* v. *Batchelor*, 1856, 1 H. & N. 255.

[5] Per L. J. C. Moncreiff in *Caledonian Bank* v. *Kennedy*, 1870, 8 Macp. 862.

[6] 1864, 2 Macp. 1098.

the mere intention of the granter, as it is deducible from the whole documents or words used, and would be understood by the class of persons among whom the thing occurred, ought to be the only principle of construction."[1] Where the intention of the writer of a letter is not free from doubt, and the receiver puts on it a certain construction of which the letter is fairly susceptible (though capable of other possible interpretations), and the writer of the letter accepts that construction as the right one, by allowing it to be acted on, the Court will hold that the true meaning of the letter in question was that which was accepted and acted on by both parties to the transaction at the time the letters passed between them.[2] So in England mercantile guarantees are governed by the same rules of construction as other contracts, no specially strict principles of interpretation being applied to them. Thus in *Wood* v. *Priestner*,[3] a case of informal guarantee, the applicability of the doctrine of Bayley, B., in *Paget* v. *Nicolson*,[4] was questioned, and the Court construed the document on the principle that "a contract of guarantee should be read in the same way as any other contract."[5]

Evidence of surrounding circumstances in construing guarantees.

Seeing that mercantile guarantees are to be fairly and reasonably construed to attain the purpose which the parties had in view, parole evidence of surrounding circumstances is admissible, and is frequently necessary. Very often the writing containing a guarantee is of the most informal description, and its language highly elliptical, so that it is impossible to get any definite meaning out of it by construing the document by itself. In these circumstances it is necessary to ascertain the exact subject-matter to which the contract refers;[6] the relative position of the parties at the date when the transaction was entered into; the object, to attain which the instrument was designed; and the purposes to which it was to be applied. Whenever, in short, a guarantee is in any respect ambiguous, a proof of the *res gestæ* out of which it arose is competent, to enable the Court to examine the document as nearly as possible from the point

[1] Brodie, *Supplement to Stair*, p.924.

[2] See per Lord Kinnear in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56, at p. 62; also per Lord Benholme in *Bayne* v. *Russell*, 1869, 7 S. L. R. 101.

[3] 1866, 2 L. R. Ex. 66.

[4] 1832, 1 C. & M. 48.

[5] Per Martin, B., in *Wood* v. *Priestner*, 1866, 2 L. R. Ex. 66.

[6] The admissibility of parole evidence to identify the subject-matter of a guarantee is illustrated in *Shortrede* v. *Cheek*, 1834, 1 A. & E. 57, in which the particular promissory note referred to in the guarantee was identified by parole; and in *Bateman* v. *Phillips*, 1812, 15 East, 270, where evidence was led to show what particular debt was guaranteed.

of view from which the granter saw it.[1] Very often a document, which in itself is meaningless or vague, becomes lucid and definite when viewed in the light of the circumstances—the occasion and purpose—in which it was granted. In construing guarantees, the principle frequently applies that, "when the stipulations in a contract are expressed in terms which are to be understood, as logicians say, not *simpliciter sed secundum quid*, the extent of the obligations cast upon the party may vary greatly, according to what the parole evidence shows the subject-matter to be; but this does not contradict or vary the contract."[2] So in England it is quite settled that surrounding circumstances may be competently proved to aid in the construction of a guarantee.[3] An illustration of the effect of evidence of extrinsic circumstances in varying the extent of the liability of guarantors is found in the different interpretations put by the Courts on very similar guarantees in the two cases of *Montefiore* v. *Lloyd*[4] and *Leathley* v. *Spyer*.[5] In each of these cases the principal debtor, whose debts were guaranteed, went into partnership with a third party after the date of the guarantee, and, in each case, the question was whether the guarantee covered only the debts incurred by the principal debtor as an individual, or whether it also covered the transactions of the firm, of which he subsequently became a member. Owing to differences in the surrounding circumstances in the two cases, it was held that, in the one case, the guarantee was limited to debts incurred by the principal as an individual, and did not apply to debts incurred by him as a partner; in the other case the guarantee was held not to be so limited, and to cover the partnership debts.[6]

—of trade usage.

Upon a similar principle, the usages of the trade in respect to which a mercantile guarantee is granted may be proved by parole. Such evidence may attach a special meaning to expressions in the document; and further, since the parties to a guarantee are presumed to contract with reference to the known usages of the

[1] *Barr* v. *Downie*, 1840, 3 D. 59; *Caledonian Banking Co.* v. *Kennedy*, 1870, 8 Macp. 862. Such aid is allowable in construing contracts of all sorts; cf. per Lord Pres. Inglis in *Gray* v. *Gray's Trs.*, 1878, 5 R. 820. See also *Welsh's Tr.* v. *Forbes*, 1885, 12 R. 851.

[2] Per Blackburn, J., in *Burges* v. *Wickham*, 1863, 3 B. & S. at 698.

[3] The following cases are instances:—*Hoad* v. *Grace*, 1861, 7 H. & N. 494, where "goods supplied" was construed to mean goods to be supplied; *Heffield* v. *Meadows*, 1869, L. R. 4 C. P. 595; *Laurie* v. *Scholefield*, 1869, L. R. 4 C. P. 622; *Newell* v. *Radford*, 1867, L. R. 3 C. P. 52; *Coles* v. *Pack*, 1869, L. R. 5 C. P. 65.

[4] 1863, 15 C. B. (N. S.) 203.

[5] 1870, 5 L. R. C. P. 595.

[6] *In Montefiore* v. *Lloyd*, the person guaranteed was a broker at Lloyds; in *Leathley* v. *Spyer*, a bank agent.

trade to which the guarantee refers, evidence of such usages is of the highest importance in determining the nature and extent of the liability incurred.[1]

Limits to admissibility of parole evidence.

Parole evidence, whether of surrounding circumstances or of trade usage, cannot, however, avail either to contradict or vary the language of the written contract; it only serves to expound the language and ascertain the real intention of the contracting parties as expressed in the writing. Thus it has been doubted whether evidence even of the usage of trade can be used in construing a guarantee whose language is unambiguous,[2] and it certainly cannot avail to import a meaning inconsistent with the express terms of the contract.[3] Similarly, an inquiry into surrounding circumstances can be made only "for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee."[4] So while facts and circumstances of real evidence, to show the position of the parties, may be ascertained by parole testimony in aid of the construction of the written document, proof of verbal communings or statements, made at the time of giving the guarantee, is incompetent.[5] The limits of parole proof were concisely stated by Thesiger, L.J., as follows:—"In determining the construction of the document the Court is entitled to look at the surrounding circumstances, *i.e.* it is entitled to consider (1) who the parties were; (2) in what position they were; (3) what was the subject-matter of the agreement."[6] Where there are no words of

[1] *Maclaggan* v. *Macfarlan*, 19 Nov. 1813, 17 F. C. 451; *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74, per Lord President. *Note.*—As to the inadmissibility of parole evidence to connect different documents containing the agreement of the parties, see *supra*, p. 726.

[2] See per Lord Adam in *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74, at p. 84.

[3] *Calder* v. *Aitcheson*, 1831, 9 S. 777, affd. 5 W. & S. 410; *Tancred, Arrol, & Co.* v. *Steel Co. of Scotland Lim.*, 1890, 17 R. (H. L.) 31.

[4] Per Willes, J., in *Heffield* v. *Meadows*, 1869, 4 L. R. C. P. 595, at p. 599.

[5] See per Lord Deas in *Thorburn* v. *Howie*, 1863, 1 Macp. 1169; and per Byles, J., in *Laurie* v. *Scholefield*, 1869, L. R. 4 C. P. 622; *M'Phersons* v. *Haggarts*, 1881, 9 R. 306. The cases in which a supplementary or collateral agreement, qualifying, or importing a condition into a written contract, may be proved by parole are considered *infra*, p. 750 *et seq.*

[6] Per Thesiger, L.J., in *Morrell* v. *Cowan*, 1877, 7 Ch. D. 151—the case of a guarantee given by the wife of a retail trader, who had separate estate, in order to obtain credit for her husband from a wholesale merchant. Cf. the opinions in House of Lords in *Calder* v. *Aitcheson*, 1831, 5 W. & S. 410.

doubtful trade meaning, and the extrinsic facts are not in dispute, the construction of a guarantee, as of any other written contract, is a question for the Court alone; and any examination of witnesses as to the construction which they would put upon the instrument is wholly incompetent.[1]

Conditions in guarantees.

The liability of a cautioner, like any other liability arising from contract, may be made to attach only on the happening of some event, or the performance of some act; or the contract may be so drawn that the liability of the cautioner at once ceases on the happening of some stipulated event. In other words, the obligation of a cautioner may be subject to conditions, either precedent or resolutive. In contracts of guarantee both undertakings preliminary to the contract and stipulations in the contract are readily—more readily, it appears from the cases, than in other ordinary mercantile contracts—construed by the Courts as essential conditions, especially when the obligation is gratuitous; and when once an undertaking or stipulation in the contract is ascertained to be a condition, any breach or non-fulfilment of it entitles the guarantor to be at once discharged from his liabilities under the contract. Even though the creditor has acted in good faith, and with no idea of neglecting the reasonable interests of the cautioner, and though it cannot be shown that the latter has sustained loss by the non-performance of the condition, yet such non-performance *eo ipso* liberates him.[2] So when once it is established that a statement or stipulation is to be construed as a condition, inquiry whether it is material is wholly irrelevant.[3] On this principle the Courts make no attempt to estimate the damage sustained by the injured party through the failure of the creditor to implement a condition, but simply discharge the cautioner. Thus where it was a condition of a guarantee that the creditor should rank on certain bankrupt estates, it was held, on the creditor omitting so to rank, that the cautioners were free, and that inquiry into what might have been the result of ranking, with a view to estimating the loss actually sustained by the cautioners, was irrelevant and inadmissible.[4] Similarly, in an English case, where a guarantee contained a stipulation that the creditor should insure certain work as it proceeded, it was urged that the omission to insure could only discharge the surety in so far as he was injured thereby;

[1] *Kirkland* v. *Nisbet*, 1859, 3 Macq. 766; *Bank of Montreal* v. *Munster Bank*, 1876, 11 Ir. R. C. L. 47.

[2] *Grieve* v. *Dow*, 1839, 1 D. 738; *Haworth* v. *Sickness and Accident Assur. Assoc.*, 1891, 18 R. 563; *Moor* v. *Roberts*, 1858, 3 C. B. (N. S.) 830.

[3] *Anderson* v. *Fitzgerald*, 1853, 4 H. L. Cas. 484

[4] *Drummond* v. *Rannie*, 1836, 14 S. 437.

but the Court held that the question *quantum damnificatus* could not be considered, and discharged the surety *in toto*.[1]

Conditions imported by express stipulation in the written instrument of contract.

The intention of the parties to make something a condition of the contract is usually and most simply manifested by an express stipulation embodied in the written instrument of guarantee. With regard to conditions in this form, little difficulty can arise. The acts or events which may, by express stipulation, be made conditions precedent to the cautioner's liability are, of course, infinitely various. "Parties may think some matter, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one."[2] A common instance of conditions precedent to the cautioner's liability are stipulations of a precautionary nature, made with a view to guard the granter against loss,—as, for instance, that a policy of insurance be effected;[3] that an invoice and note of the price of the goods, whose payment is guaranteed, should be sent;[4] that the principal debtor should periodically account to the creditor;[5] that bills of lading and invoices for the goods be regularly forwarded;[6] that satisfactory references be given;[7] or, in a guarantee for the rent of a farm, that the creditor, the landlord, should exercise his right of hypothec before calling on the cautioners.[8] Any such precautionary stipulation in a letter of guarantee will receive full effect as a condition precedent, and must be specifically implemented by the creditor

[1] *Watts* v. *Shuttleworth*, 1861, 17 H. & N. 353. The fact that conditions require specific performance to the letter differentiates them from representations, which only require to be substantially implemented, and which, in order to have any effect, must be shown to be material to the interests of the surety. Contrast *British Guarantee Assoc.* v. *Western Bank*, 1853, 15 D. 834 (a case of representation) with *Haworth & Co.* v. *Sickness and Accident Assurance Assoc.* (*supra*), where, certain statements being construed as conditions, specific performance was held necessary, and inquiry into their materiality was regarded as irrelevant. Whether statements are conditions or mere representations is in each case a question of construction.

[2] Per Blackburn, J., in *Bettini* v. *Gye*, 1876, 1 Q. B. D. 183, at 187.

[3] *Coyte* v. *Elphick*, 1874, 22 W. R. 541; *Watts* v. *Shuttleworth*, 1861, 7 H. & N. 353.

[4] *Thomson* v. *Breadalbane*, 1854, 16 D. 943.

[5] *Hamilton* v. *Calder*, 1706, M. 2091; *Forbes* v. *Saltoun's Exrs.*, 1735, Elch. Caut. 4; *Dick* v. *Nisbet*, 1697, M. 2090. In the absence of such a special stipulation for periodical accounting, neglect of the creditor, in the nature of passive inactivity to demand payment or accounting will not liberate the cautioner—*Wallace* v. *Lauder*, 1707, M. 2096. *Vide infra*, p. 865.

[6] *Grieve* v. *Dow*, 1839, 1 D. 738.

[7] *Morten* v. *Marshall*, 1863, 33 L. J. Ex. 54.

[8] *Mackenzie* v. *Fraser*, 1827, 5 S. 559; revd. *sub nom. M'Tavish* v. *Scott*, 1830, H. L. 4 W. & S. 410.

before he can sue the cautioner. Thus in the last-mentioned instance,[1] where the guarantee contained a stipulation that the creditor should exercise his right of hypothec, the House of Lords held that the creditor, having accepted a guarantee containing this stipulation, had his rights limited thereby, and, consequently, that before he could call on the cautioner to fulfil his obligation, he must specifically implement the condition by actually carrying out a sale of the tenant's effects under his right of hypothec.[2] So where a guarantee is accepted, subject to a condition, the guarantor is not bound till the condition is purified; and if the acceptor means to dispense with the condition, and act on the guarantee without it, he must give notice of this intention to the surety.[3] A stipulation relating to things to be done after payment is due under the guarantee cannot, of course, be construed as a condition precedent to the surety's liability. Thus a stipulation, described as a condition precedent, in a guarantee of the good conduct of an employee, that the employer should give all assistance to enable the guarantors to obtain reimbursement, could not be a condition precedent, since the claim for reimbursement could not possibly arise till the liability had emerged.[4]

Conditions read out of the terms of the guarantee,

Again, conditions, though not introduced in the form of express stipulations, may be effectually read out of the terms of the guarantee, or arise from the nature of the obligation undertaken by the cautioner, as described in the instrument of guarantee. Thus, for example, if a guarantee bears to be undertaken in consideration of something being done by the creditor, the doing of that thing is a condition precedent to the creditor's right to enforce the guarantee. In such a case, the promise of the guarantor and the undertaking of the creditor, each of which forms the sole consideration of the other, are, in the absence of clear indication to the contrary, construed as concurrent conditions; and if the creditor omits to perform that which was agreed to be done by him, then, inasmuch as this performance on the creditor's part is a condition of the liability of the surety, the surety is discharged.[5] A common instance of this is where a guarantee is granted in

[1] See Note 8, p. 740.

[2] Apart from a special stipulation, there is no implied condition that the landlord-creditor shall exercise his right of hypothec—*M'Queen* v. *Fraser*, 11 June 1811, F. C.; *Grant* v. *MacDonald*, 1827, 5 S. 294.

[3] *Morten* v. *Marshall*, 1863, 33 L. J. Ex. 54.

[4] See per Blackburn, L.J., in *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911, at 916; also *Laird* v. *Securities Insur. Co. Lim.*, 1895, 22 R. 452.

[5] Per Earle, J., in *Lawrence* v. *Walmsley*, 1862, 31 L. J. C. P. 143.

consideration of time being given to the principal debtor. In such a case a right of action on the part of the creditor against the guarantor upon the guarantee is conditional on his forbearing to sue the principal debtor till the expiry of the period named in the guarantee.[1] The principle is, that one party is not entitled to enforce performance of a contract if he has himself violated an express condition thereof.[2] Similarly, where, by the terms of the guarantee, a certain course of conduct is clearly expected to be followed by the creditor, the creditor must carefully observe it. Thus where A. granted to B. a promissory note for £29, payable on 11th September, and C. granted to B. a guarantee in these terms: "13th August. A. has asked me to say that I will see the £29 paid at the rate of £10 per month from this date, and I undertake that it will be so paid by him," it was held that the guarantee imported a condition that B. should not enforce payment from A. except at the rate of £10 per month. A. having failed to pay the first instalment, B., instead of demanding payment from the guarantor, protested the note for non-payment of the full contents, and on 8th October poinded the principal debtor's goods. The Court held that this departure from the course of conduct marked out in the guarantee was a violation of the conditions on which the cautioner undertook his obligation, and he was therefore liberated.[3]

The manner in which conditions may be read out of the terms of the instrument of guarantee is illustrated in many cases; and the conditions set up in this way are of the most varied description. Thus a guarantee to pay to a bank the balance of a bill that might remain "after their ranking upon the estates" of the acceptors, was construed as importing a condition that the bank should rank and claim dividends from the bankrupt estates of the acceptors. The bank having violated this condition by neglecting to rank, it was held that the cautioners were free.[4] In *Cochrane* v. *Mathie*,[5] the words of the guarantee were construed as importing that a reasonable belief on the part of the creditor in the principal debtor's solvency was a condition precedent of the cautioner's liability, so that the guarantee ceased to operate as soon as the creditor became cognisant of the debtor's insolvency. Again, where the vendor of a business to a company guaranteed to the shareholders of the company a minimum dividend for five years, it was

[1] *Rolt* v. *Cozens*, 1856, 18 C. B. 673.

[2] See *M'Bride* v. *Hamilton*, 1875, 2 R. 775.

[3] *Murray* v. *Lee*, 1882, 9 R. 1040.

[4] *Drummond* v. *Rannie*, 1836, 14 S. 437.

[5] 1820, Hume, *Decisions*, 115.

held an implied condition that the company should carry on the whole concern as it existed at the first; and the company having failed to fulfil this condition, the guarantor was discharged.[1] Again, in a guarantee of a certain composition to all the creditors of a debtor, who should, before a fixed day, execute a release of their debts, it is a condition of the agreement taking effect as regards a particular creditor, that he shall have executed a release of his debt to the debtor before the date named.[2] Similarly, where a party undertook that, if A. supplied goods to B. to enable him to carry out a contract with the Government, he would see the goods paid when the Government paid B. the amount due under the contract, it was held that the payment by the Government to B. was a condition precedent to the guarantor's liability.[3] Upon the same principle, a party who bound himself to relieve cautioners for a composition, on certain terms, was held not to be liable in respect that different terms were agreed to, although the difference was in no degree material.[4] Where, however, a cautioner desires to bind himself, subject only to some condition, it is advisable for him, with a view to rendering himself safe, to see that the condition is clearly expressed; for it is always dangerous to allow a condition, on which one is relying, to be inferred. The rule is, that where an obligant intends to bargain for something that is unusual, or that tends to qualify the terms of his obligation, he is bound to stipulate for it in distinct and express terms, and not to leave it to implication.[5]

Conditions, contained in separate writings, imported into the instrument of guarantee by reference.

Conditions are none the less effectual, though they do not appear on the face of the instrument of guarantee, if they are embodied in a separate writing and imported into the guarantee by reference. The reference in the guarantee connects the other document with it, so that the two instruments together express the contract between the parties. The reference connecting the two instruments ought to be explicit and unambiguous; otherwise it may be doubtful whether the document containing

[1] *Brown* v. *Brown*, 1876, 35 L. T. 54.

[2] *Emmet* v. *Dewhurst*, 1851, 3 Mac. & G. 587; see also *Hill* v. *Nuttall*, 1864, 17 C. B. (N. S.) 262; *Jupp* v. *Richardson*, 1857, 26 L. J. Ex. 261. Whether provisions in contracts of guarantee are intended to constitute conditions is often a difficult question of construction; see *Kinross* v. *Clelland*, 1677, 3 Bro. Supp. 212; also opinions in *Tennant* v. *Bunten*, 1859, 21 D. 631.

[3] *Hemming* v. *Trenery*, 1835, 2 C. M. & R. 385.

[4] *Taylor & Paterson* v. *Scoular*, 1816, Hume, *Decisions*, 108. See *infra*, p. 873 *et seq.*, as to the discharge of sureties by an alteration of the contract.

[5] Per L. J. C. Inglis, *Tennant* v. *Bunten*, 1859, 21 D. 631.

the conditions has not been superseded by the unconditional obligation embodied in the instrument of guarantee. A common case in which a separate document containing conditions is referred to in a guarantee, is where the guarantor desires to make the exact terms of the agreement between the principal debtor and the creditor the basis of his own liability. A simple and effectual method of carrying out this purpose is to refer in the instrument of guarantee to the document containing the agreement between the debtor and creditor. The terms and conditions of the principal contract are thus made part of the cautioner's accessory contract, with the result that if there is any alteration in, or departure from, the arrangement between the principals, however slight or unimportant it may be, the cautioner is liberated.[1] In determining whether a cautioner is discharged by an alteration in the original contract between the principals, it is, as we shall see, always of the highest importance to inquire whether, by reference in the guarantee, the terms of the principal contract were made part of the cautioner's contract.[2]

Example of this in guarantee policies.

Another common instance of conditions being imported into a guarantee by reference occurs in connection with guarantee policies. Many public companies now make it their exclusive business to guarantee the fidelity of persons holding public offices or places of trust, as well as the performance of pecuniary obligations by debtors; and not a few insurance offices unite this business with a general insurance business. The guarantee is usually embodied in a "policy," known as a guarantee policy. The conditions of the guarantee may be set forth in the form of provisoes in the policy itself.[3] In most cases, however, there is, in addition, a reference in the policy to a separate document, the proposal, containing questions and answers; and it is declared that the statements and answers in the proposal form the basis of the contract, or that they are to be read as part of the policy. Whether the statements in the proposal are conditions of the guarantee, or merely representations inducing it, depends upon the form of the reference to the proposal in the

[1] Cf. *Walker* v. *Fraser*, 1837, 15 S. 526, where the guarantee referred to stipulations contained in a previous minute of agreement between the principal debtor and creditor, and the cautioners were liberated by a contravention of these stipulations. For other illustrations, see *infra*, p. 880 *et seq.*

[2] See *infra*, p. 875.

[3] Cf. *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911, where there was a proviso in the policy that the employer should take legal proceedings against the principal debtor, which was construed as a condition precedent to the guaranteeing company's liability.

policy.[1] If the statements are made part of the contract, they cease to be representations, and become conditions.[2] They do not merely affect the formation of the contract, but are a substantive part of it. Statements which are in this way made part of, or conditions of, the contract, may either relate to existing facts or be of the nature of undertakings for the future; in other words, a condition may either be a statement that a thing is or a promise that a thing shall be. In either case, its untruth or inaccuracy in the one instance, or its breach or non-performance in the other instance, discharges the contract. A condition, since it is part of the contract, may, if broken, be pleaded either as a defence to an action on the policy or in a separate action of reduction.[3]

In *Dundee Shipping Co.* v. *National Guarantee Assoc. Lim.*,[4] the bond of guarantee expressly declared that the questions and answers in the proposal were the basis of the contract. One of the questions put to the employer was: "How often will the employer balance the applicant's accounts, and what checks will he use to secure accuracy?" and the answer was: "The accounts are balanced monthly." On its being proved that no monthly balance-sheets were ever rendered, it was held that the failure to perform this undertaking within its fair meaning liberated the defenders from liability under their guarantee. Similarly, in *Haworth & Co.* v. *Sickness and Accident Insur. Assoc. Lim.*,[5] where a guarantee for a traveller was granted "on the condition that the business of the employer shall be conducted in every particular in accordance

[1] The usual form of reference in the policy to the proposal is, that "it shall be the basis of the contract"—*Dundee and Newcastle Steam Shipping Co.* v. *National Guarantee and Suretyship Assoc. Lim.*, 1881, 18 S. L. R. 685; but it is less ambiguous to refer to it as part of the policy, and to the statements it contains as conditions precedent to any right accruing under the guarantee. The effect of a general declaration in the policy, that all the conditions shall be conditions precedent, is precisely the same as if a similar declaration had been repeated at the commencement of each proviso, and of each separate condition contained in each proviso—see per Lord Watson in *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911.

[2] The effect of statements, which, being mere representations inducing a party to enter into the contract, give rise to questions relating to the formation of the contract, is discussed in dealing with the formation of the contract; see *supra*, p. 706 *et seq.*

[3] A misrepresentation, going as it does only to the formation of the contract, can be pleaded in an action of reduction only.

[4] 1881, 18 S. L. R. 685; *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911; *Young* v. *Trustee Assets and Invest. Insur. Co.*, 1893, 21 R. 222—where the debt insured was a deposit receipt.

[5] 1891, 18 R. 563.

with" the statements contained in a proposal and declaration, it was held, on it being proved that the employer did in fact neglect to take certain steps which he had undertaken, that the guarantors were free, although the employer acted in good faith, and with no idea at all of neglecting the reasonable interest of the insurers.[1] At the same time, conditions must be construed with reference to the guarantor's obligation, and in a manner which shall not nullify that obligation; so that if the conditions be performed in a way which is fair and reasonable in the circumstances, the guarantor is not discharged. Thus an insurance company guaranteed to the holder of a deposit receipt payment of the deposit, if the bank made default for a certain time, on condition that upon a claim being made under the guarantee the company should be entitled to require the holder to transfer "the deposit, and all his rights in respect thereof." Before the due date of the deposit receipt, the bank issuing the receipt had suspended payment, and a scheme of reconstruction had been approved, subject to alteration by a higher Court, under which the bank's liabilities passed in a modified form to a new bank. The guarantors pleaded that they were not liable, as the holder of the receipt was unable to comply with the condition of the policy by transferring the deposit with his rights as they existed at the date of the policy; but the Court held that an assignation by the holder of such rights as he had was a sufficient compliance with the condition of the policy.[2] Again, where a person undertook to be cautioner to an arrester for the debt claimed by the arrester, if the arrestment was withdrawn and the money paid to another creditor of the debtor, it was held that the condition that the money should be paid to this creditor had been purified by the arrester departing from the arrestment, so as to permit the application of the money in payment of the debt in question; accordingly, the cautioner was found liable to the arrester for the debt due to him.[3]

[1] Compare the cases in the text with *British Guarantee Assoc.* v. *Western Bank*, 1853, 15 D. 834, in which case no reference was made in the guarantee to an alleged undertaking of the bank to periodically check the teller's cash. This undertaking, not being made part of the contract, was construed to be one "not requiring specific performance to the letter, but only that it should be substantially implemented or fulfilled"—per Lord Wood, at p. 839.

[2] *Laird* v. *Securities Insur. Co. Lim.*, 1895, 22 R. 452; *Dane* v. *The Mortgage Insur. Incorporation*, L. R. (1894) 1 Q. B. 54.

[3] *Simpson* v. *Fleming*, 1857, 20 D. 77; *Lochruan Distillery Co.* v. *Anderson*, 1870, 8 S. L. R. 111; and *Annan* v. *Marshall*, 1887, 25 S. L. R. 94, are cases of guarantees, in which it was

Proof of agreements between the parties, extrinsic to and qualifying the written instrument of guarantee, and not referred to therein—as a rule, parole inadmissible.

It is a general rule applying to all written contracts, that where parties agree to embody, and do actually embody, their contract in a formal writing, the Court must look to the formal writing, and to it alone, to determine what the contract between the parties was.[1] All that passes in the course of the preliminary negotiations leading to the contract is superseded by the written agreement, and that document constitutes the only true and final exposition of the intentions of the parties.[2] "It is the only instrument of evidence which law will recognise as the interpreter of their intentions; and nothing which does not appear in the written agreement will be considered as part of the contract."[3] On this principle, the averment of a verbal agreement qualifying a guarantee is regarded as an attempt to substitute a different contract from that which is expressed in the written instrument; and the general rule is clear, that it is incompetent to prove verbal undertakings or agreements between the parties, to the effect of modifying, qualifying, or importing conditions into the obligation undertaken to the creditor in the written instrument.[4] Thus where certain persons had bound themselves as cautioners to a bank in *ex facie* absolute terms, for advances to be made to a third party, it was held incompetent for them to prove a verbal arrangement between themselves and the principal debtor, to which the bank was alleged to have agreed, that they should be bound only until a certain event.[5] "This is a written obligation," said Lord Justice Clerk Moncreiff in the case referred to, "and it is proposed to vary the effect of that document by parole proof that the pursuers, when they adhibited their names, did not intend to be bound, except *qualificate*. This is not a competent course."[6] Where,

held that the conditions of the obligation had been substantially performed.

[1] *Inglis* v. *Buttery & Co.* 1877, 5 R. 58; revd. 5 R. (H. L.) 87—see per Lord Blackburn, at p. 102; *M'Phersons* v. *Haggarts*, 1881, 9 R. 306.

[2] Bell, *Com.* i. 457.

[3] *Ib.*

[4] Dickson on *Evidence*, s. 214 *et seq.*; *Drysdale* v. *Johnstone*, 1839, 1 D. 409. Cf. *Turnbull & Co.* v. *National Bank of Australasia*, 1891, 18 R. 629, per Lord President. The Courts act on the maxim, *de non apparentibus et non existentibus eadem est ratio.*

[5] *M'Phersons* v. *Haggarts*, 1881, 9 R. 306; cf. *Ellice* v. *Finlayson*, 1832, 10 S. 345.

[6] Per Lord Justice Clerk Moncreiff in *M'Phersons* v. *Haggarts*, 1881, 9 R. 306, at p. 317. In England a collateral agreement, made contemporaneously with a written contract as part of the transaction, without being incorporated in it, may be proved by oral evidence, to the effect of subjecting the contract to a term unexpressed in its contents. Thus an agreement that a contract should, till a certain event, be suspended altogether, has been allowed to be proved by parole —*Pym* v. *Campbell*, 1856, 6 El. & Bl. 370. The following statement of the English law on the subject by

then, a creditor holds a written guarantee, unqualified in its terms, and not referring to other documents importing qualifications, he can meet any allegation of an extraneous verbal arrangement introducing a condition by appealing to, and taking his stand on, the written contract.[1]

Kinds of evidence of extrinsic agreement, which are admissible.

An agreement, importing a condition into a written instrument of guarantee, can be proved by the oath of the creditor, whose right is limited by the alleged condition.[2] Also where the party who founds upon the written document admits, either on record or in a reference to his oath, that the written instrument on which he founds gives an untrue account of the agreement, or does not give a full account of it, he loses his position of advantage, and opens the way for the true or full agreement being ascertained by parole evidence.[3] Further, the presumption that the written instrument contains the whole contract between the parties may be rebutted by the production of written evidence.[4] This written evidence, however, in order to prove undertakings by

Mellish, L.J., has been frequently approved:—"No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved"—per Mellish, L.J., in *Erskine* v. *Adeane*, 1873, 8 Ch. at p. 766. In Scotland, also, an original independent agreement, not contradicting the deed, can be proved orally, provided it has been acted on by the parties; but an alteration, extension, or qualification of the creditor's right can be proved only by writ or oath — *Commercial Bank of Scotland* v. *Pattison's Trs.*, 1891, 18 R. 476; *Wark* v. *Bargaddie Coal Co.*, 1859, 3 Macq. 467; *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327; *Garden* v. *Earl of Aberdeen*, 1893, 20 R. 896.

[1] His position corresponds to that of a person who holds an *ex facie* absolute title of property, but who is alleged to be really a trustee; and the kind of evidence competent to qualify his right is in the main that competent to prove a trust.

[2] *Jackson* v. *M'Iver*, 1875, 2 R. 882, at 885. As to how, in an examination under a reference to oath, documents may be made available, see *Broatch* v. *Dodds*, 1892, 19 R. 855.

[3] *Hotson* v. *Paul*, 1831, 9 S. 685; *Miller* v. *Oliphant*, 1843, 5 D. 856; *Grant's Trs.* v. *Morison*, 1875, 2 R. 377; *Blackwood* v. *Hay*, 1858, 20 D. 631.

[4] Similarly, of course, an agreement between the creditor and the obligants, extending or adding to the obligation undertaken, and defined in a written contract, may, if sufficient, be proved by the oath of the obligants, whose obligation is thereby extended, or by written evidence—cf. *Commercial Bank of Scotland* v. *Pattison's Trs.*, 1891, 18 R. 476.

the creditor, or agreements between the creditor and cautioner, which shall be effectual to constitute conditions of the cautioner's liability, and limit the creditor's right of enforcing the obligation, must be definite, and capable of being read with the document without absolutely contradicting it.[1] While statements or stipulations in preliminary letters may be important in setting up representations inducing the contract, and so be relevant in a question relating to the formation of the contract; yet, if they are not referred to in the final written instrument so as to be imported into it, they are not conditions in the proper sense, *i.e.* they are not a term in, or a part of, the contract between the parties as finally adjusted, and so are not relevant in a question relating to the performance or breach of the contract. Sometimes, however, statements or stipulations, preliminary to the contract, are spoken of as constituting conditions, though in reality they were merely representations, on the faith of which the contract is made.[2] Thus where cautioners undertook a guarantee on the faith of a statement made to them by the principal debtor, and held out to them as correct by the creditor, that a consignment of whisky was still extant, it was held, both by the Court of Session and, later, by the House of Lords, that the correctness of the statement was a condition precedent to the creditor's right to enforce the obligation.[3] Again, where a party, at a meeting of the creditors of a firm, granted a missive, agreeing, in the event of the firm obtaining the assent of their creditors to an arrangement for paying their debts by instalments, to guarantee the last instalment, and later, on the faith of there being a general accession of the creditors to the arrangement, gave to one of the creditors an *ex facie* unconditional letter of guarantee, it was held that the consent of all the creditors, though unmentioned in the guarantee, was a condition precedent to the cautioner's liability, and, this

[1] *British Guarantee Assoc.* v. *Western Bank*, 1853, 15 D. 834.

[2] Their violation is not so much a breach of the contract as a fact rendering it voidable. The distinction is of great practical importance for these reasons: (1) Representations, going to the formation of a written contract, can be proved by parole; conditions, forming part of a part of the written contract, cannot be proved by parole. (2) Representations require only to be substantially true or to be substantially implemented or fulfilled; conditions must be specifically performed to the letter. (3) Representations must be material; conditions need not be so. As to the effect of representations on the formation of the contract, see *supra*, p. 706 *et seq.*

[3] *Stein's Assignees* v. *Brunton*, 1833, 11 S. 373, affd. 1834, 7 W. & S. 489; see also *Grant* v. *Campbell*, 1818, 6 Dow, 239.

condition not having been implemented, the cautioner was discharged.[1] In *Wilson* v. *More*[2] a promissory note was signed by one party to an arbitration, with three cautioners, in favour of the other party to the arbitration, and lodged with the clerk of the arbitration. It was provided by the submission that the note should be subject to the orders of the arbiter, and should not be exigible unless its amount should be found to be due and payment ordered. An interim decreet-arbitral was pronounced against the principal debtor in the note for an amount exceeding the amount of the note, but in the end the arbitration lapsed without any final decree. It was held that the creditor could not enforce the obligation in the note, since he could not show that the precise conditions specified in the submission had been purified.[3] Again, where a cautioner guarantees the good conduct of an employee, a minute setting forth the conditions of the employment may, though not referred to in the cautioner's bond, be read along with it, to the effect of importing conditions into it.[4] In *British Guarantee Assoc.* v. *Western Bank*[5] an *ex facie* absolute bond of guarantee for the intromissions of a teller in a bank was granted in reliance upon a statement signed by the bank manager that the teller's cash would be checked periodically in a certain manner. The fact that no reference was made to any such undertaking in the bond of guarantee was held immaterial; and in an issue whether the bank had failed to implement the undertaking, evidence as to the mode of checking adopted in other banks, in order to show that the bank had acted up to the general practice, was held inadmissible.

Whenever it is proved, either from the instrument of guarantee itself, or from documents referred to therein, or by evidence altogether extrinsic, that the cautioner's obligation was subject to some condition, it is always competent to lead parole evidence to show that the condition in question has not, in point of fact, been fulfilled.[6]

Cases in which conditions may competently be proved by parole: —where the delivery of the instrument was conditional.

Certain distinctions are taken which materially limit the application of the rule that conditions cannot be proved by parole evidence. Thus the conditions of an obligation are distinguished from the conditions of the delivery of the written instrument: the former cannot, while the latter can, be proved by parole. Consequently, the question whether parole evidence

[1] *Culcreuch Cotton Co.* v. *Mathie*, 1823, 2 S. (N. E.) 450.

[2] 1833, 11 S. 345.

[3] Compare the English case, *Lawrence* v. *Walmsley*, 1862, 31 L. J. C. P. 143.

[4] *Dalzell* v. *Menzies*, 1831, 9 S. 434.

[5] 1853, 15 D. 834.

[6] Dickson on *Evidence*, s. 1036.

of a condition is competent frequently resolves itself into the question whether there was an absolute delivery of the instrument, or whether the delivery was conditional. In *Grant* v. *Campbell*,[1] A. handed to B. a letter, addressed to B., binding himself as cautioner for advances made to B. This letter was granted under an agreement between A. and B., by which certain contemporaneous conditions were to be performed by B. Later, A. granted B. another letter, increasing the sum for which he was to be cautioner. B. showed this second letter to C., who advanced money to him; but it was proved that before he advanced the money, or became bound to advance the money, to B., he had notice of the existence of some agreement relative to the obligation of A., though that agreement was not formally executed at that date. The Court of Session held that C. had no concern with the agreement between A. and B. The House of Lords, however, reversed this decision, holding that the notice which C. was proved to have had of the agreement between A. and B. imposed upon him the duty of inquiring into the conditions on which A.'s obligation was undertaken, when he would have discovered that in point of fact A. delivered the letters of guarantee to B. subject to certain conditions which had not been fulfilled. Where an *ex facie* absolute undertaking, contained in a probative writing, is delivered subject to conditions, a party who acts on it in good faith, and in ignorance of the conditions attached to the delivery, can enforce it against the granter who was imprudent enough to let it out of his hands.[2]

—to regulate claims of relief among the obligants *inter se*.

Again, though it is incompetent, as between the creditor and the obligants in a deed, to qualify the written instrument by parole evidence, yet agreements between the obligants, regulating their rights and liabilities *inter se*, may be proved by parole. This is on the principle that the deed is intended to fix the obligations of the obligants to the creditor, and is not meant to embody the mutual contracts between the obligants regulating their mutual interests, or their claims to relief *inter se*.[3] Such mutual agreements between the obligants, while they may found rights different from the equities which arise under the deed by implication of law, do not actually contradict the terms of the deed.[4] Thus

[1] 1818, 6 Dow, 239.

[2] As to the danger of acting on an improbative writing, *vide supra*, p. 722; *Wylie & Lochhead Lim.* v. *Hornsby*, 1889, 16 R. 907.

[3] *Kilpatrick* v. *Kilpatrick*, 1841, 4 D. 109; and cases cited in Dickson on *Evidence*, s. 1034.

[4] *Drummond* v. *Nicolson's Crs.*, 1697, M. 12329; *Smollett* v. *Bell & Rannie*, 1793, M. 12354. See also per Lord Cunninghame in *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.

an extraneous agreement between the obligants in a cash-credit bond, providing for a special security to be held by one of the cautioners, and not to be communicated by him to the others, was allowed to be proved by parole. The principle was explained by Lord Rutherfurd Clark as follows:—"The parole evidence is not adduced for the purpose of contradicting or altering the conditions of any written document, but to prove a separate agreement which was acted on, and which was the condition of the pursuers becoming parties to the cash-credit bond. An agreement so made and so acted upon can, in my opinion, be proved by parole."[1] Similarly, where it was proved by parole evidence that a letter of guarantee to a bank for advances had come in place of a loan which the guarantor had undertaken to make to the principal debtor in a letter written some years earlier, it was held that the terms and conditions contained in this earlier letter applied to the transaction in its ultimate form of a guarantee to a bank; and on its being shown that the conditions under which the principal debtor was bound to repay the earlier loan had not been fulfilled, the Court held that the cautioner, on paying the sum due to the bank under the guarantee, had no claim for relief against the principal debtor.[2] But in order that such an oral agreement may be effectual, it must amount to a clear and specific agreement between the parties[3]—not mere verbal communings;[4] to it all the parties immediately concerned must be parties;[5] and it must itself be of such a nature that it is proveable by parole evidence.[6]

Agreements importing conditions, when the cautionary obligation is constituted by a bill or note.

Similarly, where the cautionary obligation is contained in a bill or note, it is competent to prove verbal agreements under which the bill or note was delivered by one party to the other, qualifying the obligation on the bill, provided the effect of the alleged agreement is not to set aside the obligation on the bill altogether.[7] Subject to this proviso, a verbal agreement on the delivery of the bill, qualifying the obligation on the bill, will be given effect to between the immediate parties;[8] though, of course, it will not be applied to the injury of a holder for

[1] *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022, at p. 1027.

[2] *M'Murray* v. *M'Farlane*, 1894, 31 S. L. R. 531.

[3] *Garden* v. *Earl of Aberdeen*, 1893, 20 R. 896.

[4] *Thorburn* v. *Howie*, 1863, 1 M. 1169, per Lord Deas.

[5] *M'Phersons* v. *Haggarts*, 1881, 9 R. 306.

[6] *E.g.*, not an innominate contract of an unusual kind—*Garden* v. *Earl of Aberdeen*, 1893, 20 R. 896.

[7] The practical effect of 45 & 46 Vict. c. 61, s. 100, is to make proof by parole competent where it is so in England.

[8] *Davis* v. *Jones*, 1856, 17 C. B. 625; *Walker* v. *Jones*, 1865, L. R. 1 Pr. C. 50.

value, who has taken the bill without notice of the agreement. In *Gibson's Trs.* v. *Galloway*,[1] indeed, Lord M'Laren reserved his opinion on the competency of an obligant on a bill proving, in a question with the creditor's executors, a verbal agreement between himself and the creditor that the bill should be renewable for a definite time, or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment. In England, however, the rule is clear that verbal agreements of this nature, qualifying the obligation of the bill or note, subject to which the instrument was delivered, are effectual between the immediate parties.[2] Thus on the holder of a promissory note suing the maker for payment, it is admissible for the latter to show that the bill or note was given as collateral security for a current account, and what the state of that account is.[3] As an instance of a parole agreement qualifying a contract of suretyship constituted by a promissory note, we may take *Lawrence* v. *Walmsley*.[4] There the defendant signed a joint and several promissory note on demand as surety for the other maker, at the same time verbally agreeing with the payee that the latter should demand payment of the note from the other maker within three years. It was held that this agreement constituted a condition precedent to the surety's liability under the note. Accordingly, on the payee failing to demand payment within three years, and the other maker becoming insolvent, the surety was discharged.[5]

Implied conditions precedent to the liability of cautioners.

It is always an implied condition of the liability of a cautioner that there should exist, or come into existence, a valid obligation on the part of a third party, the principal debtor, to the creditor;[6] and further, it is necessary, before a cautioner can be made liable, that the principal debtor shall have made default.[7] It is not now necessary, however, since the abolition of the benefit of discussion,[8] that the creditor should take legal proceedings against the principal, or even send notice to the cautioner of the principal's default,[9] unless there is an express stipulation that this should

[1] 1896, 23 R. 414. There was no cautionary obligation in this case.

[2] See cases collected in Chalmers on *Bills*, 5th ed., pp. 56 and 57.

[3] *Ex parte Twogood*, 1812, 19 Ves. 227; *re Boys* (1870), L. R. 10 Eq. 467.

[4] 1862, 31 L. J. C. P. 143.

[5] *Lawrence* v. *Walmsley*, 1862, 31 L. J. C. P. 143. In this case there was indeed a written memorandum on the note by the creditor, signed by the surety,—"This note is to be paid off within three years,"—which aided the proof of the verbal agreement.

[6] See *supra*, p. 645.

[7] See *infra*, p. 788; *Walker* v. *British Guarantee Assoc.*, 1852, 18 Q. B. 277.

[8] 19 & 20 Vict. c. 60, s. 8; see *infra*, p. 787 *et seq.*

[9] *Wallace* v. *Lauder*, 1707, M. 2096; and *infra* p. 865 *et seq.*

be done.[1] Again, it is always a condition of the continuance of the liability of a cautioner, that in transactions subsequent to his contract the creditor preserve intact all the cautioner's remedies.[2]

The execution of the instrument by other cautioners may be a condition precedent to the signing cautioner's liability.

When several persons have agreed to join in a cautionary obligation, any one of the parties who signs the obligation is presumed to do so on the faith of its being subsequently signed by the other co-cautioners; consequently the execution of the bond by the other co-cautioners, in pursuance of their undertaking, is an implied condition precedent to the liability of the party who has executed it. To hold the person, or persons, signing to be responsible would be to deprive them of the right of relief against the co-cautioners who have not signed, upon which they are taken to have relied. Thus where a person signed a guarantee on the faith that another was to sign it,—it being expressed in the plural number,—he was held not to be bound on its turning out that he was the only guarantor.[3] Again, where a bank charged upon a bond of cash credit, it was held that, as one of the cautioners named in the bond had not subscribed the bond, the others were not liable for the advances made under it, although it was not proved that the bank came under any special obligation to get it subscribed by the whole number.[4] Similarly, where the principal debtor handed over a bond *ex facie* containing five signatures,—those of the principal debtor and four cautioners,—on its turning out that, as one of the signatures was forged, the bond was really only signed by three cautioners, it was held that the creditor could not enforce the bond against any of the cautioners.[5] In this case the bond was engrossed, and given by the agent of the lender to the borrower to procure the signatures of the cautioners. In both of the last-mentioned cases the ground of the decision was that, as the duty was laid on the creditor to see that the bond was duly signed before he lent money on it, it was a condition precedent to the liability of each signatory that the creditor should get it signed by all.[6] On the other hand, where there is no evidence

[1] *Lawrence* v. *Walmsley*, 1862, 31 L. J. C. P. 143; *Fearnley* v. *London Guarantee Co.*, 1886, 5 App. Cas. 911.

[2] See *infra*, p. 916 *et seq.*

[3] *Loudon* v. *Jackson*, 1825, 3 S. 558.

[4] *Paterson* v. *Bonar*, 1844, 6 D. 987.

[5] *Provincial Assur. Co.* v. *Pringle*, 1858, 20 D. 465; compare the English cases, *Bonser* v. *Cox*, 1841, 4 Beav. 379; *Evans* v. *Bremridge*, 1856, 8 De G. M. & G. 101.

[6] In bonds of judicial caution there is no duty on the creditor to see that the bond is duly signed; and accordingly, in this class of bond, *e.g.* a bond of caution in a suspension, the fact of one of the cautioner's signatures turning out to be forged does not prevent the bond being enforced against the others who have signed—*Simpson* v. *Fleming*, 1860, 22 D. 679.

that the creditor agreed, or was cognisant of the agreement, that the obligation should be signed by a certain number of obligants, a plea in defence to an action on the instrument, that the instrument was not executed by one of the co-cautioners, will be ineffectual.[1] In cases of this sort a distinction must obviously be taken between an instrument complete in all respects upon its face, and an instrument carrying on its face marks of incompleteness such as would put a reasonable man on his guard. On the one hand, where, for example, a cautioner executes a guarantee, to all appearance a completed instrument, on the faith of its being subsequently executed by another person as co-cautioner, and entrusts it to the principal debtor to secure the additional signature, if the principal debtor, nevertheless, delivers the instrument to the creditor without getting the other signature, or informing the creditor that another was intended to be got, the signing cautioner would be bound; for it is the rashness of the signing cautioner himself in trusting the principal debtor, and not any imprudence on the part of the creditor, that has brought about the result. On the other hand, if in the case figured there are marks of incompleteness about the instrument as delivered to the creditor,—as where persons are named in the body of the instrument, as cautioners, whose signatures are not affixed,—it will not be binding on the signing cautioners who conditionally delivered it to the principal debtor for completion. It has been held in England, that, if there is no evidence that a surety executed a guarantee on the faith of others doing so, the mere fact that the instrument, though signed by one surety only, is drawn up in the plural number, and concludes, "Witness our hands," does not prevent the surety who signed from being bound.[2] Again, a person who subscribes a deed as cautioner, after hearing another person, who was named in it as a co-obligant, refuse to subscribe, is barred from pleading that he is discharged because the deed was not subscribed by all the proposed parties to it.[3]

In a similar manner, where a person executes a cautionary obligation on the faith of its being at some subsequent time executed by the principal debtor himself, its execution by the principal debtor is a condition precedent to the liability of the

[1] *Horne* v. *Ramsdale*, 1842, 9 M. & W. 329; *Blair* v. *Taylor*, 1836, 14 S. 1069; *MacDonald* v. *Stewart*, 1810, 15 F. C. 736; *Bank of Scotland* v. *Durie's Trs.*, 1 July 1836, F. C.

[2] *Norton* v. *Powell*, 1842, 4 M. & G. 42; but see *Loudon* v. *Jackson*, 1825, 3 S. 558.

[3] *Brown's Trs.* v. *Paton & Craig*, 1865, 1 S. L. R. 70.

person who thus executes. At the same time, a cautioner in these circumstances will not be released, although the principal debtor does not sign the bond as was intended, if it turn out that the principal debtor has executed an instrument on which the signing cautioner may sue him for relief, just as much as if he had executed the bond.[1] It is the interference with the signing cautioner's rights of relief, involved in the non-signature of the other parties that is at the foundation of the claim to liberation in all these cases.

Extent of cautioner's liability.

The extent of the liability of a cautioner or guarantor is, in a question with the creditor, wholly regulated by the terms of the instrument by which he binds himself. All questions as to the duration and extent of a guarantee are thus really questions of the construction of the written instrument. The principles followed by the Courts in construing instruments of guarantee, in so far as these principles are susceptible of general discussion, have been already dealt with.[2] In addition to the general doctrines as to the interpretation of guarantees, however, there are certain principles affecting the measure and extent of a cautioner's obligation, which may be stated in the form of special rules.

Cautioner is not liable for more than the principal debtor.

Thus it is fundamental in cautionry that while a cautioner may be bound for the whole of the principal debt, he can in no case be liable for a greater sum than that due by the principal debtor.[3] Cautionry is an accessory obligation, and the accessary can never be liable for more than the principal. In Roman law, if the obligation of a cautioner was undertaken for a larger sum than was due by the principal debtor, or if he was bound under more onerous conditions as to the time or place of payment, his obligation was void.[4] This doctrine has not been accepted in our law; for while the obligation of the cautioner in such a case is void, *quoad* its excess beyond the amount of the principal debt, it receives effect to the extent of the sum actually due by the principal debtor. So an indorsee of a promissory note, who admittedly had not given full value for it, was not allowed to claim on the sequestrated estate of the maker, who was really cautioner for the payee, for a larger sum than he had advanced on it to the payee.[5] Again, where A. lent £300 to B., taking in security from him a blank promissory note, signed by him, and indorsed by four other persons, known to be

[1] *Cooper* v. *Evans*, 1867, L. R. 4 Eq. 45.

[2] *Supra*, p. 734 *et seq.*

[3] Ersk. *Inst.* iii. 3. 64.

[4] *Dig.* 46. 1. 8. 7; *Dig.* 46. 1. 16. 1 and 2.

[5] *Peek* v. *Fleming*, 1849, 12 D. 122. In this case the amount of the note was £500, and the extent to which the creditor was onerous holder was only £39.

cautioners, it was held, upon the bankruptcy of B., the principal debtor, and also of one of the cautioners, that A., the creditor, who meantime had filled up the note for £2000, was not entitled to rank on the estate of the bankrupt indorser for £2000, but only for £300—that being the sum lent, and therefore the only sum which he could have required the indorsers to pay had B., the principal debtor, been the only party insolvent.[1] While the obligation of a cautioner cannot be more onerous than that of the principal debtor, it may be, in any degree, less onerous, either in respect of its amount,—as, for example, where it is for the payment only of the interest on the sum due by the principal,—or in respect of the time, place, and manner of its performance.

Liability under a general guarantee of payment or performance.

In the ordinary case, the liability of a cautioner in a general guarantee of payment or performance is simply coextensive with that of the principal debtor, the cautioner being presumed to know the transaction or course of dealing of the principal for which he is undertaking. "The rule to be deduced from the cases, especially from the English cases, and I think it is a salutary rule, is that where there is no limitation or restriction in the guarantee itself, the guarantor must be held to have undertaken the actual transaction as arranged between the principal parties."[2] Accordingly, the measure of the cautioner's obligation is just the loss sustained by the creditor through the default of the principal debtor. In other words, in order to estimate the claim of a creditor under a guarantee expressed in general terms, it is necessary only to ascertain the total actual loss sustained by him from the debtor's failure to perform his obligation; and this gives the amount of which he is entitled to be relieved by the guarantor.[3] All that falls fairly within the terms of the guarantee is included. Where, for example, the principal debtor is liable to pay interest on what he owes to the creditor, the cautioner, on the principal's default, is also liable for interest.[4] Thus, for example, a person who guarantees the due payment of a bill of exchange by the acceptor is liable for interest thereon if it be not paid when due.[5]

[1] *Jackson* v. *M'Iver*, 1875, 2 R. 882; see *ex parte Newton*, 1880, 16 Ch. Div. 330.

[2] Per Lord Shand in *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74, at 82.

[3] See opinions in *Anderson* v. *M'Kinnon*, 1876, 3 R. 608; *Dick & Son* v. *Keith*, 1871, 8 S. L. R. 334; *Wright* v. *O'Henly*, 1827, 5 S. 311; cp. *infra*, p. 788.

[4] *Hay* v. *Falconer*, 1711, M. 2097; *Buchanan* v. *Mackersy*, 1847, 9 D. 700. A cautioner, *e.g.* for a judicial factor, is not liable for penal interest beyond the date of the factor's removal from office; *Maxwell's Trs.* v. *Jeffs*, 1862, 24 D. 1181.

[5] *Ackerman* v. *Ehrensperger*, 1846, 16 M. & W. 99.

While the liability of a cautioner for the performance of a contract by a third party only extends to loss strictly due to the principal debtor's default, and will not be extended, by construction, so as to include transactions or cover expenses not within the manifest intention of the parties, yet his liability may extend to matters incidental to the main subject-matter of the guarantee. Thus a cautioner in a sequestration for rent is liable in the expense of the process, as such expense arises strictly out of the subject-matter of his undertaking.[1] So where a surety agreed to indemnify the pursuer against all liability which he might incur in giving a certain bond to the Crown, and an Act was subsequently passed enabling the pursuer, on making a certain payment, to have his bond cancelled, it was held that the payment made by the pursuer under the Act to obtain the cancellation of his bond was a liability incurred by him in giving the bond, for which the surety was liable to indemnify him.[2] Similarly, where a guarantee was given to A. to secure payment of "such sums of money as B. should from time to time become indebted in to A. for goods," it was held that the guarantee covered money which B. had got from A. to enable him to take up a bill which he had given to A. in the usual course of business, in payment for goods supplied, and which had been dishonoured while in the hands of a third party.[3]

Liability for law expenses incurred by creditor.

Upon the same principle, the question whether a cautioner is liable for the expenses incurred by the creditor in legal proceedings depends upon whether such legal proceedings strictly and properly arose out of the default guaranteed against. A creditor, to whom a guarantee has been given, must be cautious in incurring incidental expenses in reliance upon being recouped by the guarantor; and in the matter of suing or defending an action, it has been laid down that a creditor has no right, merely because he relies on making another responsible for the costs, to sue or defend actions which have the effect of putting the guarantor to useless expense.[4] In other words, in determining whether a cautioner is liable for expenses incurred in law proceedings, the Court will consider whether, in the circumstances, these proceedings were reckless and unreasonable, or whether they were undertaken pro-

[1] *Clark* v. *Duncan*, 1833, 12 S. 158.

[2] *Webster* v. *Petre*, 1879, 4 Ex. Div. 127.

[3] *Davey* v. *Phelps*, 1841, 2 M. & G. 300.

[4] Per Lord Tenterden, C.J., in *Gillett* v. *Rippon*, 1829, 1 M. & M. 406; also per Lord Justice Clerk in *Struthers* v. *Dykes*, 1847, 9 D. 1437. See also the English cases, *Colvin* v. *Buckle*, 1841, 8 M. & W. 680; and *Howard* v. *Lovegrove*, 1870, L. R. 8 Ex. 43.

perly and in good faith. In *Struthers* v. *Dykes* an action was brought against a messenger, the principal debtor, and his employer, on the ground of alleged irregularity in the proceedings of the messenger in the execution of duties intrusted to him. The messenger and his employer, without giving notice to the cautioner for the messenger, defended the action, maintaining that the proceedings in question were regular, with the result that a protracted and costly litigation ensued, in which they were ultimately defeated and found liable in expenses. It was held in a subsequent action by the employer of the messenger against the cautioner of the messenger, that the latter was liable for the expenses of the defence.[1] In the case referred to, it happened that the messenger, the principal debtor, died during the litigation, and some time elapsed before intimation was sent to the cautioner, with the result that the latter escaped liability for that part of the expenses of the defence which were incurred during the period between the messenger's death and the date at which it was intimated. If a cautioner, upon default of the principal debtor, stands aloof when called on, and refuses to admit liability or declines to interfere, he clearly has himself to blame if the creditor is forced into expensive litigation. On the other hand, if the creditor, without calling on the cautioner, plunges into a litigation, with a view to enforcing performance by the principal debtor, the cautioner is not liable for the expense of this proceeding. An illustration of this principle is found in *Grant* v. *Fenton*,[2] where a cautioner had undertaken a subsidiary liability for the rents payable by a tenant, the principal debtor, during the currency of a lease. The landlord, before making any demand on the cautioner, sued the tenant for payment of the rent. On his failing to obtain payment from the tenant, it was held that he was not entitled to come on the cautioner both for the rent and for payment of the expenses he had incurred in his action against the tenant. "The cautioner," Lord Cockburn remarked, "does not undertake to guarantee the litigious reasonableness of the tenant, over whom he possesses no control whatever."[3] At the same time, if, in such a case, anything is recovered by the creditor from the principal debtor, the creditor would probably be entitled to pay the expenses incurred *primo loco* out of the fund recovered, charging the cautioner for the

[1] *Struthers* v. *Dykes*, 1847, 9 D. 1437. A reference to all the earlier cases on this subject will be found in this report; cf. also *Fraser* v. *Barnetson*, 28 Jan. 1836, F. C.

[2] 1853, 15 D. 424; cf. *Berry* v. *Dalgleish*, 1829, 7 S. 681.

[3] Per Lord Cockburn in *Grant* v. *Fenton*, 1853, 15 D. 424.

balance of the debt still remaining due. Again, in an action for payment against a principal debtor and his cautioner, who were bound in a joint obligation, separate appearance was made for each. The case went to trial before a jury as against the principal debtor, but was sisted as regards the cautioner. On decree being granted in favour of the creditor against both defenders, the Court refused to find the cautioner liable conjunctly for the expenses, but found him liable for so much only of the expenses as was occasioned by his appearance and pleading.[1]

Limitations in the extent of cautioner's liability.

The amount of the principal debtor's obligation is, as we have seen, the superior limit of a cautioner's liability, and, in the case of a general guarantee, expressed in unqualified terms, marks the exact extent of the accessory obligation. The liability of the cautioner may, however, be restricted as regards subject-matter, or amount, or duration, either by express stipulation, or by necessary implication from the terms of the obligation, or the nature of the undertaking. On the one hand, a cautioner's obligation is not to be extended by construction beyond the terms of his contract, and incidental matters strictly within its scope;[2] on the other hand, if his undertaking is couched in general terms, no limitation or restriction can be raised up by mere implication.[3]

Limitation of subject-matter in guarantees of debts.

The parties may agree beforehand on an estimate of the amount to which the guarantor shall be liable by way of liquidated damages, on the default of the principal; and if this is done, and the agreement is proved,[4] the amount so agreed on will form the measure of the surety's liability, without reference to the real damage which may have been incurred by the creditor.[5] In every case, in estimating the scope of the cautioner's liability, the precise terms of his obligation are looked to, and any restriction therein indicated is given effect to against the creditor. Thus where, in a guarantee of indemnity, the undertaking was to relieve

[1] *Logan* v. *Gibson & Kennedy*, 1852, 15 D. 94.

[2] See *supra*, p. 734 *et seq.*

[3] Per L. J. C. Inglis in *Tennant* v. *Bunten*, 1859, 21 D. 631; see also per Lord Shand in *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74, at 82.

[4] See as to mode of proof of such extrinsic agreements, *supra*, p. 747 *et seq.*

[5] Per Patteson, J., in House of Lords, *Irving* v. *Manning*, 1848, 6 C. B. 391, at 422. At common law the Courts have no power to receive a bond of caution, *e.g.* for a judicial factor, wherein the liability of the cautioner is limited to a fixed sum (*Keating*, petr. 1862, 24 D. 1266); but see Pupils Protection Act (12 & 13 Vict. c. 51, s. 27). An inventory lodged by a judicial factor does not put a limit on the liability of his cautioner, but the liability of the cautioner in a confirmation is limited by the inventory (*Murdoch* v. *M'Kirdy*, 1826, 4 S. 479).

a trust estate, and the trustees personally, from loss which might result from the trustees continuing to hold and retain certain deposit receipts, or appropriating them to meet certain legacies, it was held, on the bank issuing the deposit receipts suspending payment before the receipts matured, that the guarantors were not liable for the loss sustained by the bank suspending payment. The ground of decision was that the loss was not occasioned by either of the causes the consequences of which the trustees were guaranteed against,—that is, neither by the appropriation of the receipts to pay legacies, nor by the retention of the receipts,—but solely by the failure of the bank.[1] Again, where a bond of caution for the faithful discharge of the duties of a bank agent contained a clause rendering the cautioner liable for loss in connection with overdrafts allowed by the agent to customers of the bank, it was held that the cautioner was not liable, under this clause, for advances by the bank to their agent on his own account as an individual. The argument that the agent made the advances to himself, in his capacity of tenant of a firm, just as if he were a customer of the bank, was rejected as carrying the liability of the cautioner beyond that which would naturally be contemplated by him in guaranteeing the faithful discharge of the agent's duties.[2] So where a party for whom certain tenements were being built granted to the builder an obligation to pay six instalments of £100 at certain stages of the work, "and the balance when the work is completed," and the architect appended to the obligation these words: "Dear Sir, I hereby agree to see you paid the above instalments.—I am, etc"—it was held that a distinction was to be taken between what was referred to in the principal obligation as the instalments and what was called the balance; and the architect's guarantee was limited to the payment of the instalments, the amount of which was precise, and did not extend to the balance, the amount of which was unascertained.[3] The extent of liability which a cautioner intends to undertake is often very loosely expressed. The only general rule is that, if the guarantee relate to the performance of a particular contract, the surety is only liable for such damages as are occasioned strictly by the failure of the principal to

[1] *Scott's Trs.* v. *Scott*, 1895, 23 R. 52.

[2] *North of Scotland Bank* v. *Fleming*, 1882, 10 R. 217. So cautioners are not liable for the advances of a bank in violation of the Stamp Acts, *Swan* v. *Bank of Scotland*, 1855, 13 S. 403; 1855, 2 S. & M. 67; 1839, 2 D. 78; cf. *Lawson* v. *Coldstream*, 1837, 15 S. 930.

[3] *Rennie* v. *Smith's Trs.*, 1866, 4 M. 669.

perform his contract;[1] but the principal must perform the contract strictly, otherwise the surety will be liable.[2]

In guarantee of conduct.

In a guarantee of the conduct of a person holding a certain office, while the cautioner is liable for all the intromissions of the principal debtor in that office, and for all damage and expense consequent upon his negligence in the execution of the duties intrusted to him within the scope of his employment,[3] his liability does not extend beyond the principal debtor's intromissions or negligence in that particular office. Thus the cautioner for a principal debtor in his capacity of notary is not liable for the carelessness of the debtor in his capacity of town clerk.[4] Similarly, where a person, who was appointed factor *loco tutoris* to certain children, had been in partnership with the deceased father of the children, it was held in a factorial accounting—the factor having been removed from his office and sequestrated—that the liability of the factor's cautioners was strictly confined to what the principal debtor did as judicial factor, and to funds realised by him as factor and brought into the factory estate, all intromissions by the debtor in his capacity of surviving partner in the children's father's firm being excluded.[5] Also a cautioner for a *curator bonis* was held not liable for a bill, as forming part of the curatorial estate, which, after the expiry of the curatory, was delivered to the curator as trustee under a deed of settlement executed by the party who had been under curatory, and the contents of which were recovered by the curator in his capacity of trustee.[6] So cautioners in a confirmation do not warrant the right of the party confirmed to the sum confirmed;[7] and further, are only liable to the extent of the sum confirmed, and that it be duly applied to the purposes of the executry, but not for other sums intromitted with by the executor.[8]

Limitation of time in guarantee for the holder of an office.

The liability of cautioners for a person who is appointed to an office or engaged in some employment is coextensive, as regards time, with the duration of the office or employment. If it is a life-

[1] *Warre* v. *Calvert*, 1837, 7 A. & E. 143.

[2] *London and Brighton Rwy. Co.* v. *Goodwin*, 1849, 3 Ex. 736; cf. *Walker* v. *Davidson*, 1821, 1 S. 21.

[3] *Ferguson* v. *Menzies*, 1830, 8 S. 782; *Simpson* v. *Doud*, 1855, 17 D. 314.

[4] *Stevenson* v. *Tweddell*, 1818, Hume, *Decisions*, 111; *Cowan's Hospital* v. *Robertson*, 1832, 11 S. 81.

[5] *Maxwell's Trs.* v. *Jeffs*, 1862, 24 D. 1181; a cautioner for a tutor-at-law has been held liable for debts which were due by the tutor himself to the pupil, and which were payable during his lifetime—*Bogle* v. *Bogle*, 1794, M. 2107.

[6] *Morland* v. *Sprot*, 1831, 9 S. 478.

[7] *Brown* v. *M'Kinley*, 1836, 14 S. 767.

[8] *Murdoch* v. *M'Kirdy*, 1826, 4 S. 479.

appointment, the liability of the cautioner, if not revoked, continues during the life of the employee. If, on the other hand, the office is an annual one, the cautioner's liability—apart from express words manifesting a contrary intention[1]—will not extend beyond the current year of office.[2] In England this holds though no reference is made in the bond to the duration of the office, or to the period of service being limited.[3] On the same principle, a cautioner for rents due under a lease is not liable for the rents payable by the tenant after the expiry of the lease, under tacit relocation or under any renewed lease.[4]

Similarly, if a change is made in the office held by, or in the nature of the duties performed by, the principal debtor, the cautioner's undertaking will not, unless in special circumstances, extend to his intromissions in his new character. Thus if, on entering on his new duties, the principal debtor ceases to hold his former office, the liability of the cautioner is ended.[5] So where an employee of a bank, whose intromissions were guaranteed by cautioners, was originally employed as a teller, and afterwards sent to another town as a bank agent, with an increased salary, but under a liability to the bank for a fourth of losses upon discounts, which was not in the original agreement, the Court held that the old bond of caution could not be extended to this new employment.[6] If, on the other hand, the employee does not cease to be employed in his former capacity, the liability of his surety continues, unless he can show that he became surety on the terms that no fresh duties should be undertaken by the principal debtor.[7] Much depends in each case on the terms of the guarantee. On the one hand, if either directly by narration or reference, or indirectly by notice to the cautioner, or by clear implication, it is shown that the original arrangement between

[1] *Oswald* v. *Mayor of Berwick*, 1856, 5 H. L. Cas. 856.

[2] *Bamford* v. *Iles*, 1849, 3 Ex. 380; *Mayor of Cambridge* v. *Dennis*, 1858, El. B. & E. 660; *Kitson* v. *Julian*, 1855, 4 El. & Bl. 854.

[3] *Peppin* v. *Cooper*, 1819, 2 Barn. & Ald. 431. But see opinions in *Nicolsons* v. *Burt*, 1882, 10 R. 121.

[4] *University of Glasgow* v. *Earl Selkirk*, 1790, M. 2104. *Vide infra*, p. 845.

[5] *Malling Union* v. *Graham*, 1870, L. R. 5 C. P. 201; *Pybus* v. *Gibb*, 1856, 6 El. & Bl. 902; *Leigh* v. *Taylor*, 1827, 7 B. & C. 491.

[6] *Bonar* v. *M'Donald*, 1847, 9 D. 1537, affd. 7 Bell's *App.*, 379; see also *Forsyth* v. *Wishart*, 1859, 21 D. 449. Cf. *infra*, p. 874, on the liberation of cautioners by alteration of the original agreement.

[7] *Anderson* v. *Thornton*, 1842, 3 Q. B. 271—the case of a "clerk" to a banker being appointed "manager"; see also *Skillett* v. *Fletcher*, 1867, L. R. 2 C. P. 469, per Lord Blackburn, J., at p. 474; see also *Waugh* (*Shaw's Tr.*) v. *Clark*, 1876, 14 S. L. R. 125.

the creditor and his employee is made the basis of the obligation of the cautioner, the cautioner's liability will be strictly confined to any limit of time marked out by the contract of the principals. On the other hand, if the cautioner binds himself in general and unqualified terms, without reference to the agreement between the creditor and his employee, or to the tenure or terms on which the latter holds office, he will be bound for the intromissions of the employee so long as the service lasts.[1] It is the practice, when curators, or other officers, petition the Court for special powers, to order intimation of the petition to their cautioners.[2] This, however, is not necessary to secure the liability of the cautioners. Thus, in *Eaton* v. *Cowan*,[3] a curator, in an action of cognition and sale, to which his cautioners were not parties, obtained a special power to sell heritable property belonging to the ward. The question arose, whether the curator's cautioners were liable for the sum received by the curator as a result of the sale. The cautioners urged that the application for special power to sell implied that the sale was a matter which their bond, conceived in the ordinary terms, did not cover; but the Court rejected this view, and held that, even if the special powers had been wrongly granted, the cautioners would have been liable.

Guarantee presumed to refer only to future dealings.

As a general rule, a guarantee is presumed to refer only to future dealings, and existing debts or past intromissions are not covered unless the words of the guarantee are clearly broad enough to include them.[4] Thus where a bank, having opened an account with a customer under a cash-credit bond, proceeded of its own accord, without order or authority from the principal debtor under the cash credit, to transfer a sum, due to them under a former and separate account by the principal debtor, to the debit of the new account opened under the cash credit, the Court found that this sum could not thus be brought in effectually against the sureties, and it was struck out as not being covered by the bond.[5] But a cautioner for a person who has been intromitting with money belonging to third parties may be liable for sums with which the principal debtor has intromitted before the cautioner undertook his obligation.[6] Thus a person who became

[1] *Nicolsons* v. *Burt*, 1882, 10 R. 121.

[2] *Grant*, 1844, 7 D. 182; *Rutherford*, 1845, 17 *Scot. Jur.*, 152; *Accountant of Court* v. *Geddes*, 1858, 20 D. 1174.

[3] 1826, 4 S. 695; 1828, 3 W. & S. 246; cf. *Kerr* v. *Bremner*, 1835, 14 S. 180; 1837, 2 Sh. & M. 895; 1839, 1 D. 618; 1842, 1 Bell's *App.*, 280.

[4] Bell, *Prin.* s. 285; Bell's *Com.*, i. 384; *Dykes* v. *Watson*, 1825, 4 S. 69.

[5] *Paterson* v. *Bonar*, 1844, 6 D. 987, at p. 995.

[6] *Kinnear*, 1676, 3 Brown's *Suppl.*, 102; *Mags. of Edinburgh* v. *Gardiner*, 1776, Hume, *Decisions*, 109; see *Napier* v. *Bruce*, 1842, 1 Bell's *App.*, 78.

cautioner for a trustee in a sequestration, after the latter had been some time in office, was found liable for money in the hands of the trustee, at the date of the bond, which he ought to have lodged in bank, and for penal interest due by the trustee in respect of such money from the date of the bond.[1]

Guarantee for "goods furnished" or "liabilities incurred."

Whether a guarantee for "goods furnished" or "liabilities incurred" covers furnishings made or debts incurred before, as well as after, the date of the guarantee, depends upon what appears to be the intention of the parties, looking to the circumstances in which the obligation was undertaken.[2] Thus a guarantee in these terms: "In consideration of your having furnished to Mr. D. A. goods to the value of £50, on credit for fifteen months, I guarantee payment of that sum on the expiry of fifteen months from the date hereof," — was construed as rendering the guarantor liable to the extent of £50 for the balance of an account of furnishings made prior to the date of the guarantee, not only to the person in whose favour he interposed, but also to a third party on that person's order.[3] In an English case, an undertaking expressed as follows: "I hereby engage to be responsible for liabilities incurred by M. to the extent of £50 to C.,"—was construed as creating a liability only for the amount due to C. at the time the guarantee was made, and such sum as was immediately after credited by C., together making a total of £50.[4] Referring to the argument in favour of extending the guarantee in this case to future transactions, Byles, J., said: "The words of the guarantee are for 'liabilities incurred,' and we are to give it a literal construction, unless that would lead to an absurdity, or something plainly alien to the intention of the parties. . . . We are asked to extend the words as if they were 'incurred or to be incurred'; but we cannot do so without manifest reason, especially in the case of a surety."[5] In a guarantee in these terms: "If you give A. B. credit, we shall be responsible that his payments shall be regularly made,"—the expression "give credit" was interpreted to mean fair and reasonable credit, and not to confine the guarantee to the strictly customary credit given in the trade.[6] Similarly, a guarantee in general terms for the

[1] *Grant* v. *Kennedy*, 1828, 6 S. 982; cp. *Paisley Bank* v. *Hamilton*, 1831, 9 S. 488.

[2] It is not necessary, unless specially stipulated, to intimate the furnishings or advances made on the faith of a guarantee — *Wilson & Corse* v. *Woods*, 1797, Hume, *Decisions*, 85.

[3] *Raimes* v. *Galloway*, 1842, 4 D. 1167; compare with this case that of *Barr* v. *Downie*, 1840, 3 D. 59.

[4] *Chalmers* v. *Victors*, 1868, 18 L. T. (N. S.) 481.

[5] Per Byles, J., in *Chalmers* v. *Victors*, 1868, 16 W. R. 1046.

[6] *Simpson* v. *Manley*, 1831, 2 Cr. & J. 12. The expression "credit given"

price of goods sold, or the repayment of cash advanced to the principal debtor, is taken as having reference to the actual course of dealing between the creditor and the debtor; and the guarantor is liable although credit is given beyond the strict trade usage, provided the time allowed for payment is not unreasonable. If he desires to protect himself, his course is to stipulate in the guarantee that the goods be sold upon the usual credit.[1]

Inquiry into the period of credit usual in the trade.

What constitutes an unreasonable time for the repayment of cash advances depends on circumstances.[2] Thus in a guarantee of cash advances to be made by a bank, a period allowed for repayment may be unreasonable which would not be so considered in the case of a guarantee of money advanced by one trader to another with reference to the supply of goods at the same time.[3] In an English case, where it was proved that the period of credit customarily given in the trade was six months, and that a bill was then sometimes taken at two months, it was held that the allowance of eleven months' credit to the principal debtor was unreasonable, and discharged the guarantor.[4] In a Scotch case, however, the Court expressed doubt whether the fact that five, seven, and twelve months' credit was given to a principal debtor, while the ordinary period of credit in the trade was three months, was sufficient in law to liberate the cautioner.[5]

Effect of a clause limiting the amount of dealings.

The effect of a clause in a guarantee limiting the amount of the advances for which the surety is to be liable depends in each case upon the exact terms in which the limitation is expressed. If the limitation of amount is so expressed as to constitute a stipulation that the dealings shall be confined within this limit, the observance of the specified limit is a condition precedent to the surety's liability under the guarantee. In other words, if the parties make it clearly a condition that the dealings between the principal debtor and creditor shall not exceed a certain amount, the *bona fides* of the transaction will be destroyed

in a guarantee was the subject of judicial interpretation also in *Wood* v. *Priestner*, 1866, L. R. 2 Ex. 66. In *Prest* v. *Hotson*, 109, Hume, *Decisions*, 97, the cautioner alleged that he contracted on the faith of a special agreement between the creditor and the debtor as to the date of payment; but as this agreement was not referred to in the guarantee, the guarantor's obligation was construed as if there had been no such special agreement.

[1] *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74. *Vide infra*, p. 891.

[2] Cf. *Griffith* v. *Wylie*, 1809, Hume, *Decisions*, 96; *Brown & Co.* v. *Wylie*, 1809, Hume, *Decisions*, 97.

[3] See opinions in *Calder*, *supra*.

[4] *Combe* v. *Woolf*, 1832, 8 Bing. 156.

[5] See per Lord Adam in *Johnston* v. *Duthie*, 1892, 19 R. 624, at 628. In this case the cautioner was liberated upon another ground.

and the liability of the surety extinguished if the amount in question is exceeded.[1] In the ordinary case, however, a guarantee for a certain amount of goods, or for advances to a certain extent, is held not to restrict the dealing, but to cover it to that amount; and the fact that the goods supplied or the advances made exceed the limit named does not prevent the obligation from receiving effect up to that limit.[2] The English rule, as stated in Addison on *Contracts*,[3] and approved by the Courts in subsequent cases, is similar: "If a bond or guarantee is given by a surety to secure the repayment of advances of money to the principal, provided these advances do not exceed in the whole, at any one time, a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but it does not render the obligation void if the advances go beyond it, unless that clearly appears to have been the intention of the parties." Thus a guarantee in these terms: "In consideration of the Union Bank agreeing to advance, and advancing, to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole £1000, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months,"—was held to be a continuing guarantee; and the clause "not exceeding in the whole £1000," in spite of its position in the context, was held not to restrict the dealing between the bank and R. & Co., but merely to limit the liability of the sureties.[4]

Limitation as to person.

If a guarantee bears to be granted to or for any particular person or firm, the liability of the cautioner is limited to advances made, or goods furnished by or to, the particular person or firm named. Thus in *Stewart* v. *Scott*,[5] a letter of guarantee, addressed to a particular person, was granted for the dealings of three persons jointly. It turned out, however, that the creditor dealt with only two of the three named principal debtors; and on this ground the Court held that the cautioner was not bound, pointing out that the one of the three who was not dealt with might be the most solvent of the three, and the one to whom the cautioner chiefly trusted for his relief, if he had to pay. In the

[1] *Kinross* v. *Clelland*, 1677, 3 Bro. Supp. 212; see also opinions in *Tennant* v. *Bunten*, 1859, 21 D. 631.

[2] Bell, *Prin.* s. 285; Smith, *Merc. Law*, 10th ed., i. 579; *Tennant* v. *Bunten*, 1859, 21 D. 631.

[3] 9th ed., p. 1002.

[4] *Laurie* v. *Scholefield*, 1869, L. R. 4 C. P. 622. *Note.*—The important questions which arise in bankruptcy in connection with limits set to liability under guarantees are treated later. *Infra*, p. 833.

[5] 1803, Hume, *Decisions*, 91.

same case, moreover, the goods were furnished, not by the person to whom the guarantee was addressed, but by another party. On this ground, also, the Court indicated that the cautioner was entitled to be liberated. A cautioner, it was observed, who addresses a guarantee to a particular person, is taken to have relied on the prudence and judgment of that particular person to check rash purchasing, and prevent the principal debtor going too far on the credit derived from the guarantee; and "where the credit is unlimited, it is the more necessary that, in using the letter of guarantee, the parties should strictly adhere to its terms." These principles are illustrated in many cases. Thus where a guarantee in these terms, "Munro, Watson, & Co. I guarantee to you the payment of any yarn you may supply R. B. with, from this date, to the extent of £150," was delivered to a different firm, Watson, Macknight, & Co., it was held that the latter firm were not authorised in making advances on the security of the guarantee.[1] The case is a strong one, as the new firm had come in place of the old one, carrying on the same business in the same premises; and further, at the date of the guarantee, the new firm had been formed for eleven days, and had been formed merely by adding a third person to the two persons who composed the old firm. So a letter of credit, addressed to and authorising a particular person to trust the bearer, cannot, without the granter's consent, be handed over to any other person so as to bind the granter.[2] Again, if a guarantee be given of debts owing by A., it will not be extended so as to apply to debts incurred by A. jointly with B., whom he had afterwards taken into partnership;[3] but it has been held that a guarantee of goods furnished to A. covers furnishings made, not to A., but to a third party on A.'s order.[4] Upon similar grounds, a guarantee that a bill drawn by A. upon B. would be honoured by the latter was held not to cover a bill drawn by C. upon B. in favour of A.[5] At the same time, a cautioner for all bills "whereon the name of C. F. stands as drawer, acceptor, or indorser," is liable for bills accepted by C. F. under the firm-name of C. F. & Co., he being the sole partner of the firm.[6]

On the other hand, where a guarantee is not addressed to any

[1] *Bowie* v. *Watson*, 1840, 2 D. 1061.

[2] *Philip* v. *Melville*, 21 Feb. 1809, 15 F. C. 204.

[3] *Montefiore* v. *Lloyd*, 1863, 12 W. R. C. P. 83; also per Willes, J., in *Leathley* v. *Spyer*, 1870, L. R. 5 C. P. 595; *Christie* v. *Royal Bank*, 1841, 2 Rob. App. 118.

[4] *Raimes* v. *Galloway*, 1842, 4 D. 1167; and see *Miller* v. *Thorburn*, 1861, 23 D. 359.

[5] *Ross* v. *Greig*, 1834, 12 S. 427.

[6] *Booth* v. *Commercial Banking Co.*, 1823, 2 S. (N. E.) 273.

particular creditor, the guarantor will be liable to anyone who furnishes goods or makes advances on the faith of it. A general guarantee of this kind is often employed where a person of known reputation wishes to obtain credit for, or facilitate purchases by, another, leaving it to him to choose, as he may find most to his advantage, the persons with whom he is to deal; and in such a case the guarantee extends to any person who has sold goods, relying on it.[1] In determining, indeed, any question as to the persons to whom a guarantee extends, everything depends on the form and nature of the cautioner's undertaking. Thus a cautioner in a bond of caution, presented with a bill of advocation, guaranteeing "the whole expenses before the Sheriff" in the process against the advocator, and "whatever sums shall be awarded against" him in the Court of Session, has been held liable for the whole expenses in the process, although the advocator died during the process, and the case was carried on by his eldest son, as executor, against whom decree was ultimately given for a large sum of expenses; and this, too, although the cautioner denied that any notification of the advocator's death had ever been made to him.[2] Where, in an action at the instance of a party wronged by a faulty diligence against the messenger and the person employing him, decree for expenses was, with the consent of the pursuer's executors, given in the name of an agent, who had disbursed the expenses of the process, the agent holding the decree for expenses was held entitled to recover from the cautioner of the messenger.[3] Again, where four parties bound themselves and "their respective heirs, executors, and successors whomsoever, as cautioners and full debtors," for payment of a ground-annual, although the obligation to pay the ground-annual did not subsist against the principal debtor after he had disponed the subjects, the cautioners continued liable notwithstanding the conveyance to the new disponee, for the disponee was a "successor" within the meaning of the cautionary obligation.[4] Also where a party gave the payee of a bill a letter of guarantee binding

[1] *Ewing* v. *Wright*, 1808, 14 F. C. 172; *Rose, Murison, & Thomson* v. *Wingate, Birrel, & Co.'s Tr.*, 1889, 16 R. 1132, a guarantee granted on admittance to an association of underwriters. Cp. liability under general letter of credit, *supra*, p. 586.

[2] *Wilson* v. *Ewing*, 1836, 14 S. 262; contrast with *Low* v. *Earl of Rosebery*, 21 May 1812, More, *Lectures*, p. 241, where principal debtor left no heirs. As to the effect of the death of the principal debtor, see *infra*, p. 863.

[3] *Cullen* v. *Dykes*, 1852, 1 Stuart, 327.

[4] *Small* v. *Millar*, 1849, 11 D. 495. As to effect on the liability of a cautioner by a change in the firm, to or for which he has intervened, see *infra*, p. 928 *et seq.*

himself to see the bill regularly retired when due, it was held, on the payee indorsing the bill and delivering it, along with the letter of guarantee, to bankers, who discounted the bill, that the guarantor was liable in payment of the bill, on its becoming due.[1]

Cautioners for judicial factors are liable only to persons who are *in titulo* to demand an accounting for the estate and payment of the balance due. Where the father of a pupil took up the estate in the pupil's name by confirmation, his cautioners were found to be bound for the father to the pupil.[2] A cautioner for the trustee in a sequestration is responsible to, and may be sued by, the bankrupt, although the bond of caution is conceived in favour of the creditors only.[3]

Extent of liability as regards time—continuing and limited guarantees.

A question frequently arises, in the construction of guarantees, as to the extent of time during which the guarantor is liable for the transactions of the principal debtor, or, in other words, whether the engagement of the cautioner is a guarantee of a particular transaction or set of transactions, or whether it is a general guarantee for a course of dealing, without limit as to the time over which it may extend, or for a series of successive transactions, which may be from time to time entered into between the creditor and the principal debtor, without limit to their number. If the engagement of the cautioner is meant to cover a course of dealing, as for the price of goods to be sold or for money to be advanced from time to time, or the like, to which—though a limit may be set in point of amount—no limit of time is set, either expressly or by implication, it is a standing or continuing guarantee; and, though the principal debtor may have made many payments to general account, the cautioner is liable for any balance that may ultimately remain due. If, on the other hand, a particular transaction, or definite set of transactions, is referred to, or where the liability of the guarantor is definitely limited to a specified time, it is a limited or non-continuing guarantee;[4] and payments made generally to account by the principal debtor to the creditor after the particular transactions referred to, or after the expiry of the specified time, go to reduce the extent of the liability of the cautioner to the extent of these payments. Though the distinction between a continuing and a limited guarantee is clear, yet, in construing actual guarantees, drawn in many cases in haste and without much consideration of the exact force of the language employed, it is frequently doubtful what the

[1] *Forbes* v. *MacNab*, 29 May 1816, F. C.

[2] *Scott*, 1750, M. 2080.

[3] *Biggar* v. *Carstairs*, 1842, 5 D. 318.

[4] Bell, *Com.* i. 390.

intention of the parties was. Nor is much assistance derived from precedents in construing such doubtful documents; for, though there are in the books very many cases turning on this distinction, each case is necessarily to a large extent special, being decided, not only upon the actual words used, but also largely on the circumstances in which they were used.[1] "Authorities do not help one to the construction to be put on the guarantee," said Bovill, J.C., in a case where the point at issue was whether a guarantee was limited or continuing; "for it is difficult to apply decisions on language used in documents under one set of circumstances to similar language used in other documents given under other and different circumstances."[2] The question whether a given guarantee is continuing or limited must be determined by getting at the intention of the parties at the time, as shown by the terms and nature of the undertaking, the narrative on which it proceeds, the purpose in view, the course of dealing of the principals, and the custom of the business to which it relates. In particular, the course of dealing between the creditor and the principal debtor, with reference to which the guarantee was given, must be looked to. For if there is no limitation or restriction in the guarantee itself, the guarantor who gives a guarantee having reference to a course of dealing is presumed to have known the course of dealing between the principals, and to have undertaken responsibility for any default of the principal debtor in the course of that dealing.[3]

Guarantees given with reference to current accounts are construed as continuing, unless the instrument indicates a contrary intention.

On this principle, where a guarantee in general terms is given in reference to a current cash account, or for goods supplied in a course of trade, the guarantee, even though *primâ facie* and apart from surrounding circumstances it may appear to refer to an existing debt, will be construed as continuing, and extend to any balance due from time to time. In such a case no restriction or limitation of the guarantee will be implied, and the rule stated by Lord Ellenborough[4] is applicable: "If a party means to be surety only for a single dealing, he should take care to say so." Thus a guarantee, given in reference to a cash-credit account with a bank, in these terms: "Mr D. has mentioned to me that he may have occasion to overdraw his account to the extent of £3000; and if he should do so, I hereby become bound to repay the same to you in the event of his failing to do it,"—

[1] See per L. J. C. Inglis in *Caledonia Banking Co.* v. *Kennedy*, 1870, 8 M. 862.

[2] Per Bovill, C. J., in *Coles* v. *Pack*, 1869, L. R. 5 C. P. 65.

[3] *Calder & Co.* v. *Cruikshank's Trs.*, 1889, 17 R. 74, at 82.

[4] *Merle* v. *Wells*, 1810, 2 Camp. 413.

was held to remain in force, as a standing guarantee, until recalled, and the guarantor was found liable for the ultimate balance on the account, not exceeding the specified sum of £3000.[1] The same presumption in favour of continuance holds in the case of a guarantee given in reference to an account current never previously overdrawn.[2] So in England a guarantee, given to a bank in these terms: "In consideration of the Union Bank agreeing to advance, and advancing, to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole £1000, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of eighteen months,"—was construed as continuing. The bank, as usual in such cases, debited R. & Co. with £1000 in a separate loan account, and placed £1000 to R. & Co.'s credit in their drawing account. In the course of their operations on the drawing account, R. & Co. paid considerable sums into that account, so that when the account was finally closed R. & Co. were not debtors therein, though they remained debited with £1000 in the loan account; yet, being a continuing guarantee, the liability of the guarantors was not discharged by the payments made by R. & Co. into the drawing account, but subsisted up to the limit of £1000.[3]

Even if not given in reference to a current account, a guarantee to a bank may be continuing, if the obligation is undertaken in general and unlimited terms. Thus in *Burgess* v. *Eve*,[4] a father, desiring to obtain from a bank further advances for his son, gave the son a promissory note for £2000 payable to his order, and, in order to enable him to get the note discounted, also gave the bank a guarantee, which, proceeding on the narrative that it was granted in consideration of the bank discounting the promissory note for £2000, referred to certain documents deposited by the guarantor with the bank as security for the payment of "all sums due or to become due" from the son to the bank, and continued, "and I agree to pay you upon demand all such money." The question in the case was whether the guarantor was liable only for the particular debt of £2000 contained in the note, or whether he had made himself liable for whatever his son should afterwards owe to the bank. The Court, construing the guarantee as con-

[1] *Forbes* v. *Dundas*, 1830, 8 S. 865.

[2] *Caledonian Banking Co.* v. *Kennedy's Tr.*, 1870, 8 Macp. 862; see also *Houston's Exrs.* v. *Speirs*, 1834, 12 S. 879.

[3] *Laurie* v. *Scholefield*, 1869, L. R. 4 C. P. 622.

[4] 1872, L. R. 13 Eq. 450.

tinuing, found the father liable not only for the money actually due by the son at the time, but for all future advances. Similarly, a general guarantee of a person's "trade" is continuing, covering all transactions in the course of dealing between the principals, the last as well as the first.[1] In an English case,[2] the plaintiffs, who held weekly sales of hides, skins, etc., had sold certain goods to A., but, on learning that A. had executed a bill of sale, they refused to make delivery of the goods sold, unless the defendants engaged to be responsible for the price. On A. communicating this to the defendants, the latter wrote a letter to the plaintiffs in these terms: "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call on us for a cheque and have it with pleasure for any account he may have with you. When to the contrary, we will write you." The plaintiffs thereupon went on dealing with A. till his indebtedness to them increased to threefold its former amount, but the Court held that the defendant's letter, being a continuing guarantee, covered the whole amount of what was due.

In *Scott* v. *Mitchell*[3] there were two guarantees, one continuing and the other limited to a single loan; and the contrast is instructive. A letter granted by the pursuer to the Clydesdale Bank in these terms: "I request you will allow J. W. a credit account with your bank to the extent of £150, and I bind and oblige myself to see you repaid the balance due, with interest thereon,"—was held, in virtue of the reference to the credit account, to import a continuing liability. On the other hand, a letter, granted by the defender to the pursuer a week earlier, in these terms: "As you have become security to the Clydesdale Bank for £150 on account of J. W. for the purpose of assisting him in his business, I hereby guarantee you against any loss by your so doing,"—was construed, owing to their being no reference to a credit account such as occurred in the letter of the pursuer to the bank, as referring to a single transaction, and as being a guarantee from loss by one advance of £150. The occurrence of the word "any" in the latter guarantee makes the decision that it was limited noteworthy; for

The word "any" points to a guarantee being continuing.

[1] *Veitch* v. *Murray & Co.*, 1864, 2 M. 1098; cf. the English cases, *Hargreaves* v. *Smee*, 1829, 6 Bing. 244; *Simpson* v. *Manley*, 1831, 2 Cr. & J. 12, 13, note; *Allan* v. *Kenning*, 1833, 9 Bing. 618; *Mayer* v. *Isaac*, 1840, 6 M. & W. 605; *Martin* v. *Wright*, 1845, 6 Q. B. 917; *Hitchcock* v. *Humphrey*, 1843, 5 M. & G. 559—in all which cases the guarantee was held to be continuing.

[2] *Nottingham Hide, Skin, and Fat Market Co.* v. *Bottrill*, 1873, L. R. 8 C. P. 694.

[3] 1866, 4 Macp. 551.

there is a stream of authorities, both in England and in Scotland, to the effect that the word "any" in a guarantee points strongly to the guarantee being continuing.[1] In two other Scots cases, however, guarantees, in spite of the use of the word "any," have been held to be limited. In one of these, where the guarantee was for "the payment of any quantity of malt furnished by you to the Loggieside Distillery Co. to the extent of £98, 6s. 8d.," the Court, in holding that the guarantee was limited, were influenced chiefly by the fractional specification of the amount guaranteed.[2] The other case was that of a guarantee, given to a seed merchant, in these terms: "5th March. On receipt of this, please advise M. & W. the prices of your clover and other seeds; and any orders he shall give you, we shall guarantee same." This guarantee was held to be limited to the goods furnished under the prices of that season, and not to include orders given in October, the decision being based largely upon the nature of seed as a commodity commissioned by season, and upon the implication that the orders referred to in the guarantee were orders under the price-list of that particular season.[3] Both these cases are very special, and do not disprove the statement that, in the ordinary case, the word "any" in a guarantee points to its being continuing. Thus in a modern English case, where a guarantee, though proceeding on the narrative that A. was indebted to the plaintiff in £2000 and was being pressed for payment, and stating, as consideration, that the plaintiff should forbear to take immediate steps to recover that sum, bound the guarantor for "any sum of money for the time being due from A. to you, whether in addition to the said £2000 or no," it was held to be a continuing guarantee, unlimited both as to time and amount.[4]

Examples of limited guarantees.

On the other hand, a guarantee, not containing the word "any" or other similar expression, and not given with reference to a course of dealing or trade which is in its nature continuing, will readily be held to apply only to the first specific transactions or advances, and not to cover a balance resulting from successive transactions. The following are instances of guarantees so construed:— "I hereby agree to be answerable to K. for the amount of five sacks of flour, to be delivered to W. T., payable in one month."[5] "I agree to be answerable for the payment of £50 for T. L., in case

[1] Bell, *Prin.* i. s. 284; *Merle* v. *Wells*, 1810, 2 Camp. 413; *Mason* v. *Pritchard*, 1810, 2 Camp. 436; *Coles* v. *Pack*, 1869, L. R. 5 C. P. 65.

[2] *Baird* v. *Corbet*, 1835, 14 S. 41.

[3] *Slade* v. *Black & Knox*, 1808, Hume, *Decisions*, 95.

[4] *Coles* v. *Pack*, 1869, L. R. 5 C. P. 65.

[5] *Kay* v. *Groves*, 1829, 6 Bing. 276.

T. L. does not pay for the gin which he receives from you; and I will pay the amount."[1] "I guarantee Mr. J.'s account with you for wine and spirits to the amount of £100."[2] "You may let L. have coals to £50, for which I will be responsible at any time."[3] Also, whenever a guarantee bears to be given in consideration for advances then made, and it is shown that, simultaneously with the giving of the guarantee, advances were made or brought up to that limit, the guarantee will be read as applicable only to those particular advances, and will not be held to cover a balance arising on successive transactions, taking place from time to time.[4]

A limit on the amount does not make a guarantee non-continuing.

It is important to observe that the mere fact that a guarantee bears to be for a fixed sum does not make it a limited guarantee in the sense of being non-continuing. The mention of the fixed sum, while it limits the amount for which the guarantor is responsible, does not limit in any way the amount to which the dealings or advances are to extend, and does not prevent the guarantor from being held liable for successive transactions, however numerous, entered into from time to time, between the creditor and principal debtor. In other words, continuing guarantees limited in amount are engagements to pay any ultimate balance which may be due on the transactions between the principal parties up to the amount of the sum specified; and the liability of the guarantor for this balance is not affected by intermediate payments to the creditor by the principal debtor. Thus a guarantee in the terms, "I engage to see you paid for stuffs furnished to John Barr to the extent of £200," being given with reference to a continuing trade, was held to cover the sum due, on Barr's bankruptcy, to the creditor up to £200, though payments had meanwhile been made by Barr for certain of the goods furnished; whereas if, as was contended, the guarantee had been limited to goods furnished up to £200, each payment made by Barr would *pro tanto* have extinguished the cautioner's liability.[5] Again, where a party guaranteed payment of "any purchases S. & Co. may make from you, not exceeding £200 in all, within four months of this date," it was contended that, so soon as purchases had been made and paid for by the principal debtor to the extent of £200, the obligation of the guarantor was at an end, no

[1] *Nicholson* v. *Paget*, 1832, 1 C. & M. 48.

[2] *Allnutt* v. *Ashenden*, 1843, 5 M. & G. 392.

[3] *Bovill* v. *Turner*, 1815, 2 Chitty, 205; see also *Kirkby* v. *Duke of Marlborough*, 1813, 2 M. & S. 18, in which case the narrative of the bond was held to show the limited nature of the surety's undertaking; and *Pearsall* v. *Summersett*, 1812, 4 Taunt. 593.

[4] *Chalmers* v. *Victors*, 1868, 18 L. T. (N. S.) 481.

[5] *Barr* v. *Downie*, 1840, 3 D. 59.

matter how many more purchases might have been made by the debtor within the specified period of four months. Within that period purchases had been made to the extent of £347, and payments had been made by the debtor to the amount of £234; so that the liability of the guarantor would, on the theory that the guarantee was limited to purchases up to £200, have been entirely extinguished. The Court, however, rejected this contention, and, construing the letter as a continuing guarantee to be acted on from time to time until the expiry of the four months, held that the payments made by the debtor did not go to extinguish the guarantor's liability, and that the latter must pay the balance ultimately due.

Cash-credit bonds are illustrations of continuing guarantees limited in amount.

The ordinary cash-credit bond is an example of a continuing guarantee, in which the liability of the cautioners is, nevertheless, limited to a certain fixed sum. Not infrequently the continuing character of the cautioner's obligation is made clear by the insertion in the bond of a clause in such terms as these:—"It being the express meaning of these presents that this bond shall, to the extent foresaid, be a covering security to said bank against any ultimate loss that may arise on the transactions of the said A. B. with said bank." Whether or not, however, such a clause is inserted, this is the nature of the obligation undertaken by the cautioners in such bonds. As the principal debtor operates on such a credit as if he actually had money lying to his credit in the bank, the debt is usually in a state of perpetual fluctuation; and the cautioners are liable for the balance actually due at the stoppage of the account, up to the amount which the bond specifies as forming the limit of their liability, with interest from the date of the last annual balance.

Extent of cautioner's liability under cash-credit bonds.

In bonds of cash credit the granters bind themselves, their heirs, executors, and representatives whomsoever, conjunctly and severally, to pay to the bank on demand all such sums, not exceeding the amount of the credit, as are, or shall be, due to the bank from the party operating on the account, whether drawn out by him, or for which he is liable, by any drafts, orders, bills, promissory notes, indorsements, etc., with interest. The effect of the wide terms of the bond is that the bank may bring under the bond, and comprehend in the balance of the account, practically the whole of their customer's liabilities, including even such bills, notes, and engagements as were not at the time specifically brought into the account, or directly undertaken on the security of the bond.[1] Thus, in one case, two bills discounted by the bank, which were current

[1] Bell, *Com.* i. 386.

while the account was still running, but which were not discounted under the credit, or, at least, were not entered in the account at the time, were allowed to be brought into the account, with the effect of turning the balance in favour of the bank on their being dishonoured.[1] The successive operations on the account are evidenced by the books of the bank[2] and the customer's pass-book, together with the corresponding vouchers. Accounts in bank books do not, however, prove themselves; for while entries of payments made to the bank by the customer are proof against the bank, entries of payments made by the bank to the customer do not prove such payments, unless supplemented by other evidence.[3] Even as regards payments to the bank, entries in a customer's bank pass-book of sums paid into the bank, duly initialed by a bank official, are only *primâ facie* evidence against the bank that the money has been paid in, and may be rebutted.[4] For every operation on the account, the bank should be able to produce a voucher, in the shape of an order or authority from the obligant who operates on the account. Transfers to the debit of the account of sums due by the principal debtor may, in certain cases, not be binding on the cautioners unless the bank is able to show that they were made by the authority of the debtor. Thus where a bank, at its own hand, and without order or act by the principal debtor, transferred a sum due to it by the principal debtor, under a previously existing credit, to the debit of a new cash credit kept in the name of the principal debtor, the cautioners in the new cash credit were held not to be liable for the sums transferred.[5] Had the principal debtor, by means of a cheque or other mandate, extinguished the old debt by drawing on the new credit, the cautioners would undoubtedly have been liable. A debtor has a right to employ a new credit to pay off his old debts to the bank if he chooses; and a bank is not bound, nor indeed entitled, to inquire into the purpose to which a draft on a cash credit is to be applied. The sole point of concern to the bank is that it be able to produce the voucher or mandate by the debtor for the operation.

[1] *Liddell* v. *Sir W. Forbes & Co.*, 16 July 1820, referred to in Bell, *Com.* i. 386.

[2] Banker's books used in the ordinary course of business need not be produced in evidence; copies of the entries in such books are sufficient, on certain conditions. See Banker's Books Evidence Act, 1879 (42 & 43 Vict. c. 11).

[3] See opinions in *British Linen Co. Bank* v. *Thomson*, 1853, 15 D. 314; *Commercial Bank* v. *Rhind*, 1860, 22 D. (H. L.) 2.

[4] *Couper's Trs.* v. *National Bank of Scotland*, 1889, 16 R. 412.

[5] *Paterson* v. *Bonar*, 1844, 6 D. 987, at 995.

Provision for stated account.

It is usual in cash-credit bonds to provide that an account or certificate, extracted from the bank books, and signed by the cashier, accountant, or other official of the bank, shall ascertain, specify, and constitute the sum or balance due on the account, and shall warrant summary diligence on the bond for the amount so ascertained, for which no suspension shall pass but on consignation only. This last clause, though almost invariable in cash-credit bonds, is not an effectual or legitimate stipulation, and, in spite of it, any charge by the bank on the account can, unless in special circumstances, be suspended without consignation.[1] Apart from this clause, the rest of the provision is effectual; so that in virtue of it and a consent to registration for execution,[2] the bond and signed account may be recorded, and a charge given to the obligants on the extract. While the account stated and signed, in accordance with this provision of the bond, is sufficient to fix the sum for which summary diligence may proceed, and to throw the burden upon the objector of proving it erroneous,[3] yet, as has been pointed out, the account is not conclusive against the cautioners, either as an acknowledgment of debt or otherwise.[4] The cautioners, in other words, not being bound by the account as stated, can always, either by way of a suspension, if a charge is made by the bank on the account, or by objecting to the claim, when a claim is lodged by the bank in bankruptcy, challenge the accuracy of the stated account, and force the bank back upon the particulars of the current account, the items of which can only be proved by the vouchers;[5] and if the drafts be not in legal form,—as, for example, where they contravene the Stamp Acts of the day,—the cautioners are not liable for them, although they appear in the stated account signed by the bank.[6]

Liability of cautioners in cash credit for interest.

In accordance with a practice which has long prevailed among banks in keeping such cash accounts, a balance is struck annually, and at each annual balance the interest arising for the preceding year is added to the principal, just as if a cheque or

[1] *Forrester* v. *Walker & Hunt*, 27 June 1815, F. C.; Bell, *Com.* i. 382; *Gilmour* v. *Finnie*, 1831, 9 S. 907. See *infra*, pp. 792, 794.

[2] It is important to notice that the signed account can only be recorded if the consent to registration includes the account, as is the case in the old and full form of the consent. The statutory short form of consent does not cover the stated account, but the bond itself only. See, however, *Fisher* v. *Syme*, 1828, 7 S. 97, and *infra*, p. 794.

[3] Bell, *Prin.* s. 293; *Fisher* v. *Stewart*, 1824, 2 S. 583, and 3 S. 607.

[4] *Swan* v. *Bank of Scotland*, 1835, 2 S. & M'L. 67.

[5] *Smith* v. *Drummond*, 1829, 7 S. 792.

[6] *Swan* v. *Bank of Scotland*, 1835, 13 S. 403; revd. 1835, 2 S. & M'L. 67; 1839, 2 D. 78; Bell, *Com.* i. 382.

draft had been passed for the amount by the principal debtor. The amount of principal and interest, thus accumulated and converted into principal, is then carried forward to the next year's account, and interest runs on it to the next annual balance, and so on from year to year till the account is finally closed. Where the debit balance exceeds the sum specified in the cash-credit bond, the cash account is said to be overdrawn. The obligant who operates on the account is, of course, always liable to the whole extent of the debit balance, although that debit balance exceeds the limit of the cash credit; but the obligants who do not operate, being merely cautioners, are liable for the principal sum due only to the extent of the limit stated in the bond, with interest from the date of the last annual balance before the stoppage of the account.

Reddie v. *Williamson.*

This is the result of the decision in *Reddie* v. *Williamson*,[1] which settles the principles on which the liability of cautioners in cash credits is estimated in cases where the cash account has been overdrawn. By the form of words invariably used in cash-credit bonds, the limitation of the cautioners' liability is made applicable only to the principal sum due, and not to the interest. Accordingly, the general practice of banks, before *Reddie* v. *Williamson*, was, in the case of a cash-credit account being overdrawn, to make the cautioners liable for the principal sum due, up to the limit of the bond, and also for interest on each advance from its date to the date of payment. This mode of construing the bond, by which the liability of the cautioners might clearly be indefinitely extended beyond the limit *ex facie* declared by their bond, was strongly urged upon the Court in *Reddie* v. *Williamson*, and indeed was adopted by the minority of the Court.[2] The majority of the Court, however, held that this mode of computing the cautioners' liability was "erroneous in principle" and "involved great injustice."[3] They took the view that when, in accordance with the invariable practice, the bank accumulated each year's interest with the principal, without communication with the cautioners, they dealt with the account, as far as the cautioners were concerned, in precisely the same way as if the leading obligant, at the end of the year, gave the bank a cheque for the interest due on the cash account, with which cheque the bank extinguished the claim for interest. The bank, in other words, by placing the amount due for interest to the debit of the cash account annually, convert it into an advance of principal,

[1] 1863, 1 Macp. 228.

[2] Lord Benholme's dissenting opinion in *Reddie* v. *Williamson* contains a full exposition of the principles on which the older mode of computing the cautioner's liability was based.

[3] Per L. J. C. Inglis in *Reddie* v. *Williamson*, 1863, 1 Macp. 228.

for which the principal debtor will be liable in any event, but for which the cautioners are liable only if the sum then due on the credit does not exceed the amount specified in the bond. If the debit side of the cash credit is thereby swelled beyond the limit specified in the bond, the cautioners are not liable for the excess, in name of principal; and they can no longer be answerable for it, in name of interest, after it has, by the action of the bank, been converted into principal.[1] Since the bank clearly benefits by the system of annually accumulating interest with principal, it is right that they should be compelled consistently to carry it out, and should not be allowed, when it comes to estimating the liability of the cautioners, to repudiate their own principles of accounting. Where, then, a cash account has been overdrawn, the cautioners are liable, as regards principal, only to the extent of the sum specified in the bond; while, as regards interest, since the interest for all the preceding years has been annually extinguished by being converted into principal, they are liable only for the interest on the sum specified in the bond as from the date of the last annual balance preceding the stoppage of the account.[2]

Closing of cash-credit accounts.

The bank has the power, unless there is a special stipulation in the bond fixing a definite period for the continuance of the credit, to stop further advances at any time, even though the advances have not reached the limit specified in the bond.[3] It is expedient, however, for the bank, in such a case, to give previous notice of their intention; for if the bank, without notice, stop advances capriciously and without good cause, the party operating on the credit, who has been led to rely on his draft being honoured, may have a good action of damages.[4] A cautioner in a cash credit, as in any continuing guarantee for future advances, may revoke his guarantee by giving notice to the bank. It is advisable, in the interest of the bank, when this occurs, to stop further advances and call for a settlement. If they do not, the liability of the withdrawing cautioner will be *pro tanto* extinguished by each payment thereafter into the account by the principal debtor. If the bank choose to let the credit go on, relying on the remaining cautioners, they should get the assent of those cautioners to this course, otherwise the remaining cautioners may be wholly released

[1] Per L. J. C. Inglis in *Reddie* v. *Williamson*, 1863, 1 M. 228, at p. 237.

[2] *Gilmour* v. *Bank of Scotland*, 1880, 7 R. 734.

[3] *Johnstone* v. *Commercial Bank*, 1858, 20 D. 790; *Parkinson* v. *Wakefield & Co.*, 1889, 5 T. L. R. 562.

[4] See opinions in *Johnstone* v. *Commercial Bank*, 1858, 20 D. 790.

from their liability.[1] In regard to the acts of the bank which have the effect of discharging the cautioners, and the circumstances which *per se* operate the stoppage of the account, a cash credit resembles any other continuing guarantee.[2] Thus, for example, in *Gilmour* v. *Bank of Scotland*,[3] the insolvency of the principal debtor, who granted a trust deed for his creditors, was regarded as rendering the account "inoperative"; and in *Reddie* v. *Williamson*, the death of the principal debtor had a similar effect.[4] It is not enough, however, to close a cash-credit account kept in the name of a company, that the company should resolve to go into a voluntary liquidation and appoint a liquidator, if the business go on as before. Thus, in 1877, certain persons granted a cash-credit bond to a bank for a limited company. The company, in November 1881, resolved to go into voluntary liquidation for the purpose of winding-up and reconstruction; but at the same time, for several years thereafter, it continued to be a going company, and the bank continued to treat the cash account as an open account, and annually accumulated interest thereon. It was argued by the bank that they were entitled to consider the account closed as at the date of the voluntary winding-up, and that, consequently, they were entitled to interest on the principal sum specified in the bond from the date of the annual balance preceding the winding-up, viz. the balance of date 31st October 1881. The Court, however, held that the voluntary liquidation did not have the effect *per se* of closing the cash account, and that, on the principle of *Reddie* v. *Williamson*, the bank, by continuing till 31st October 1887 to debit the account with the preceding year's interest, had in each year extinguished the claim for that interest, and converted it into an advance of principal. Accordingly, the cautioners were found liable in interest only from 31st October 1887, the date of the last balance struck.[5] The bankruptcy of a cautioner-obligant in a cash-credit bond has the effect of fixing his obligation under the bond as at the date of his bankruptcy, though it does not necessarily operate the stoppage of the account. If the bank do not claim against the estate of the bankrupt obligant, but continue the cash credit, then every unappropriated payment by the principal debtor into the current account, after the date of the obligant's

[1] See *infra*, p. 911 *et seq.*

[2] See *infra*, Chap. xxv.

[3] 1880, 7 R. 734.

[4] 1863, 1 M. 228. As to effect of death of cautioner, *infra*, p. 860 *et seq.* The date at which the account closes is very important in determining the amount of interest for which the cautioners are liable,—the interest running from the date of the balance immediately preceding the stopping of the account.

[5] *Commercial Bank* v. *Pattison's Trs.*, 1891, 18 R. 476.

sequestration, goes to reduce the debt owing by that obligant at the date of his sequestration until, when sums have been paid in equal to the amount for which the obligant was liable at the date of his sequestration, his debt is finally extinguished. It follows that if the other obligants be subsequently called upon to pay a balance due on the cash account, they cannot go against the sequestrated obligant for his share of the amount due on the account at the date of his sequestration; for as the balance then due has been extinguished by intermediate payments, the liability of that obligant is at an end.[1]

Guarantees in the form of bills or notes —whether a continuing or limited security.

Instead of taking a letter of guarantee, a creditor may take, as security for advances made or goods sold to a customer, a bill of exchange or promissory note signed by the customer and certain other obligants, who occupy the position of cautioners. The fact that the bill or note was given merely by way of security can probably be proved, as between the immediate parties, by parole evidence;[2] in any case, it can be established by writ or oath of the creditor. When once it is proved that the bill or note was granted only as a security, the creditor cannot stand upon the bill or note as constituting the debt against the cautioners: he must be able to show that there is a debt or balance actually due by the principal debtor, which is covered by the bill or note.[3] At this point the question frequently arises—akin to the question in reference to a regular guarantee, whether it is limited or continuing—whether the intention of the parties was to secure payment of certain specific transactions, which had been, or were about to be, entered into between the principals, up to the amount of the note, or whether the intention was to secure the fluctuating balance on a series of successive transactions which might be entered into from time to time, or at any time thereafter, between the principals, as long as they continued to deal together. The question is purely one of fact, and the same results follow as in the case of regular guarantees. If, for example, a promissory note, payable on demand, is given as a limited guarantee to secure payment of a specific debt, or of a definite balance due on a current account, then payments made by the debtor, subsequent to the giving of the note, go to reduce the extent of the liability of the granters of the

[1] See *infra*, p. 854.

[2] Bills of Exchange Act, s. 100; *Gibson's Trs.* v. *Galloway*, 1896, 23 R. 414; *ex parte Twogood*, 1812, 19 Ves. 227. See *supra*, p. 752 *et seq.*

[3] *British Linen Co. Bank* v. *Thomson*, 1853, 15 D. 314; *Jackson* v. *M'Iver*, 1875, 2 R. 882.

note to the extent of these payments; and when payments have been made by the debtor up to the amount of the debt, the liability of the granters of the note is extinguished.[1] Where, on the other hand, a note payable on demand is granted to operate as a security for a fluctuating balance on successive transactions, no amount of intermediate payments to the creditor will discharge the liability of the granters of the note for such balance as may be due to the creditor at the closing of the account.[2]

Similarly, where the note lodged as security is payable on a fixed day, payments made by the debtor after the date of the maturity of the note go to extinguish the guarantor's liability. Thus in *Lang* v. *Brown*,[3] Brown & Henderson granted to Lang a promissory note for £100, payable four months after date, Henderson being a principal debtor and Brown a cautioner, though *ex facie* they were co-debtors. Lang discounted the note, and entered the amount to the credit of Henderson in an account current of transactions between himself and Henderson. When the bill fell due no payment was made by the makers, but it was retired by Lang, and its amount, as having been paid on account of Henderson, was entered to his debit in the account. In the course of subsequent dealings between Henderson and Lang, as shown by the continuous current account, payments to general account were made by Henderson to Lang, which, though insufficient to turn the balance in the current account in favour of Henderson, or even to reduce the balance against him below £100, were greater in amount than the balance due on the account by Henderson to Lang at the date when the note was debited. The Court held that the note was not a continuing security, to be held by the pursuer for whatever balance might ultimately be due by the principal debtor, but that, in the most favourable view of the case for the pursuer, the note was merely a security for the particular balance due by the principal debtor at the time at which it fell due. Accordingly, as payments to a greater extent than was sufficient to pay that balance had been made by the principal debtor, there remained due no part of the debt guaranteed. Where a bill for £1500, at eighteen months, was deposited with a bank in security of a cash account in favour of the drawer, it was held that the bill was a security for such balance as might be proved to be due by the principal debtor at the date when the bill arrived at maturity. Some time before

[1] *Lang* v. *Brown*, 1859, 22 D. 113.

[2] *Pease* v. *Hirst*, 1829, 10 B. & C. 122; *Gray* v. *Seckham*, 1872, L. R. 7 Ch. at p. 683.

[3] 1859, 22 D. 113.

this date, the principal debtor—the drawer—docqueted an account bringing out a balance due by him to the bank greater than the sum in the bill; but as it was proved that he had subsequently made payments to the bank sufficient to extinguish the balance due at the date of the docquet, and the bank failed to prove that counter advances had been made to the debtor, the Court held that no debt was due to the bank by the drawer, and assoilzied the acceptors.[1]

[1] *British Linen Co.* v. *Thomson*, 1853, 15 D. 314.

CHAPTER XXIII

RIGHTS AND PRIVILEGES OF CAUTIONERS

Right of discussion.
Right of creditor against cautioners.
Right of division.
Right of total relief against debtor.
Right of mutual relief among co-cautioners.
Communication of benefits.

Rights and privileges of cautioners.

At common law there exist certain rights and privileges affecting the respective liabilities of the parties to a cautionary obligation. These rights and privileges vary to some extent, according as the cautioners are bound simply as cautioners for the principal debtor in proper cautionry, or as full debtors with the principal debtor in improper cautionry.[1] The common-law right of discussion belonged, and the right of division belongs, only to cautioners in proper cautionry; the right of total relief against the principal debtor, and the right of mutual relief or contribution among themselves, on the other hand, belong to all cautioners, proved to be such, whether bound in proper or improper cautionry.

Benefit of discussion.

Formerly simple cautioners, bound in a proper cautionary obligation, had what was known as the benefit of discussion, or the *beneficium ordinis*, in virtue of which they were entitled to insist that the creditor, before using diligence against them for the debt, should do his best to compel the principal debtor to perform his obligation. In other words, the creditor in proper cautionry was bound, in the first instance, to "discuss" the obligant, whose proper debt it was, and to give the cautioners the full benefit and relief that could be derived from the principal debtor's estate.[2] By "discussing" the principal debtor was meant not merely that the creditor should demand payment from him, but that he should enforce it. If the debt was not liquid, the creditor must constitute the debt against the principal debtor by judicial decree, and then proceed to do diligence both against his person and against

[1] The distinction between proper and improper cautionry is explained *supra*, p. 673.

[2] Bell, *Com.* i. 364; Ersk. iii. 3. 61.

his estate. The registration of the expired charge under 1 & 2 Vict. c. 114, s. 10, sufficed for the discussion of the debtor's person; and indeed an opinion was expressed in one case by Lord Neaves, that a creditor, who had thus given the principal debtor a charge to pay, and had recorded it, had done all that the law required him to do, in order to discuss the debtor.[1] The authority of the institutional writers,[2] however, along with a series of early cases,[3] establish that, in order to the proper discussion of the principal debtor, the creditor must, in addition to proceeding against the debtor's person, use diligence against his estate, *i.e.* against his moveables by poinding, or by arrestment and furthcoming, and against his heritage by adjudication. At the same time, in the case, for example, of a cautioner for the payment of rent by a tenant to his landlord, it was never necessary for the landlord, in order to preserve his claim against the cautioner, to enforce his right of hypothec against the principal debtor,[4] unless the exercise of this right was expressly stipulated for by the cautioner as a condition precedent to his liability.[5] The necessity for discussing the principal debtor was obviated by his bankruptcy. Bankruptcy, indeed, was in itself sufficient discussion; for, since the debtor's whole estate, heritable and moveable, is transferred to his creditors, there is nothing to be gained by diligence, either against his person or against his estate.[6] The absence of the principal debtor from the country, at least where he left no estate within the jurisdiction of the Court, also exempted the creditor from the necessity of discussing him;[7] and in a case where the cautioner was the agent of the principal debtor, and the latter could not be found by the creditor, it was held that there lay an *onus* on the cautioner to discover and communicate the address of his principal, and that, on his failing to do so, he could not insist on the creditor discovering and discussing the debtor.[8] The fact, however, that the principal debtor was dead did not exempt the creditor from discussing his heirs and estate.[9] It is to be noted that the necessity for discussing the principal debtor never prevented the

[1] *Macfarlane* v. *Anstruther*, 1870, 9 M. 117.

[2] Stair, i. 17. 5; Ersk. iii. 3. 61; Bell, *Prin.* ss. 252–3.

[3] *Milne* v. *Graeme*, 1684, M. 3588; *Douglas* v. *Lindsay*, 1662, M. 8125.

[4] *M'Queen* v. *Fraser*, 11 June 1811, F. C.; *Grant* v. *M'Donald*, 1827, 5 S. 317 (N. E.), 294.

[5] *M'Kenzie* v. *Fraser* (*M'Tavish* v. *Scott*), 1827, 5 S. 559; revd. 1830, 4 W. & S. 410.

[6] *Galloway* v. *Robertson*, 1825, 4 S. (N. E.) 134.

[7] *Elams* v. *Fisher*, 1757, M. 2110.

[8] *M'Ewan* v. *Donald*, 1852, 14 D. 809.

[9] *Wishart* v. *Wishart*, 1835, 13 S. 769; revd. 1837, 2 S. & M'L. 564.

creditor from suing the cautioners in the same action with the principal debtor. The usual plan was to sist execution against the cautioners until the principal had been discussed.[1]

Obligations in which discussion was unnecessary.

The benefit of discussion was always strictly confined to persons bound simply as cautioners in proper cautionary obligations. Where the cautioners were bound as co-principals, although the term "cautioner" or "guarantee" might be used in the obligation, the creditor had it always in his power to proceed at once against all or any of the obligants, as he chose.[2] Further, discussion had no place in judicial cautionry, as in caution given in a suspension or advocation, or for loosing of arrestments.[3] The tendency of the law, indeed, had long been to confine this benefit within the narrowest possible limits, and to exclude every case where the obligant could be held to have come under a primary obligation. Thus a guarantee in these terms:—"I guarantee you payment of the price of such goods as A. may get from you,"[4] and an obligation undertaken by a cautioner in a lease "to see the rents regularly paid during the period of the lease,"[5] were held, even before the Mercantile Law Amendment Act, 1856, to give the creditor a right to go directly against the cautioner, without the necessity of discussing the principal debtor. Similarly, a person who accepted a bill "as cautioner" was not entitled to this benefit, as his obligation was, by the custom of merchants, on the bill.[6]

Mercantile Law Amendment Act, 1856, s. 8.

The Mercantile Law Amendment Act (19 & 20 Vict. c. 60, s. 8) provides that: "Where any person shall become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them, which is competent according to the law of Scotland: provided always, that nothing herein contained shall prevent any cautioner from stipulating in

[1] *Douglas* v. *Lindsay*, 1662, M. 8125; *M'Donnell* v. *Rankin*, 1829, 7 S. 845; *Ross* v. *Greig*, 1834, 12 S. 427; cf. *Logan* v. *Gibson & Kennedy*, 1852, 15 D. 94.

[2] *Traquair* v. *Burrows*, 1815, 6 Pat. App. 99. In this case the cautioner bound himself "as surety" and "principal payer."

[3] Bell, *Prin.* s. 253.

[4] *Blackwood* v. *Forbes*, 1848, 10 D. 920.

[5] *Grant* v. *Fenton*, 1853, 15 D. 424; see per Lord Cockburn.

[6] Bell, *Com.* i. 474; *Sharp* v. *Hervey*, 1808, M. App. *voce* Bills of Exchange, No. 22. *Vide supra*, p. 682.

the instrument of caution that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor."

Effects of this enactment—the cautioner is still liable only on principal's default.

This enactment does not alter the essentially conditional character of a cautionary obligation at common law. The cautioner is still liable only on the failure of the principal debtor to meet his engagement at the maturity of his obligation. There must in every case be something to show default on the part of the principal debtor—as, for example, in the case of a debt payable on demand, something in the way of demand on the principal debtor, made but not obtempered, or, in the case of a debt payable on a fixed date, the expiry of the period of payment without payment having been made—before any liability can accrue to the cautioner. Thus decree can never pass against a cautioner while it is still in dependence whether any obligation attaches to the principal.[1] So, too, the cautioners for the treasurer of a building society, who undertook that their principal would faithfully pay over the moneys which he received, were held not to be liable for the principal debtor's failure to pay over certain moneys, upon the ground that a robbery committed upon the principal excused his non-payment, and that there was no default on his part.[2] Again, the cautioners for a messenger, who had been guilty of negligence in executing a summons against a debtor, were held, in an action by the creditor who employed the messenger, not to be liable in payment of the debt until it was shown by the creditor that a debt had really been due by the debtor in question, and that, accordingly, the creditor had suffered loss by the messenger's negligence.[3] Upon the same principle, where the traveller for a brewing firm became bankrupt, and the firm immediately brought an action against his cautioner for the amount of certain bills which had been granted by customers and were unpaid, it was held that the action was premature, as the creditor-firm was bound either to allow time for the customers to pay their debts, or to offer to assign its rights against its customers to the cautioner before raising the action.[4]

The terms of sec. 8 of the Mercantile Law Amendment Act plainly show that it applies only to cautioners for a money debt. It is clear that, since in an obligation *ad factum præstandum* the principal alone can perform the fact, no claim can arise against the cautioner until the principal debtor has failed, and this failure

[1] *Ross* v. *Greig*, 1834, 12 S. 427.

[2] *Walker* v. *British Guarantee Assoc.*, 1852, 18 Q. B. 277.

[3] *Wright* v. *O'Henly*, 1827, 5 S. 311.

[4] *Dick & Son* v. *Keith*, 1870, 8 S. L. R. 334; cf. *Antrobus* v. *Davidson*, 1817, 3 Meriv. 569.

has been proved by the creditor.[1] When this failure is established, the cautioner's liability at once emerges. Thus, long before the Mercantile Law Amendment Act, it was settled that a cautioner for an apprentice could, on the apprentice deserting his master's service, be sued for the penalty incurred by the terms of the indenture, without the creditor being under the necessity of first discussing the apprentice.[2]

Nor has this enactment made any difference in the duty incumbent upon the creditor to use every precaution in the way of preserving securities of the principal debtor coming into his hands, for the purpose of securing payment from the principal debtor and his estate; and it follows from this, that if the creditor has once set in motion a diligence against the debtor, he cannot arbitrarily cease from the diligence, as that would in effect be equivalent to the giving up of a security.[3]

Creditor's right at once to proceed against a cautioner.

The change made in the law by this enactment is, that in all forms of cautionry, immediately upon the default of the principal, the creditor may now proceed against the cautioner without being bound first to discuss the principal debtor, or even to constitute the debt against him in a separate action. Thus Lord Justice Clerk Moncreiff, referring to an argument that it was still necessary to constitute the debt against the principal debtor before suing the cautioner, expressed a clear opinion that sec. 8 is not limited merely to diligence and discussion, but confers on the creditor in a cautionary obligation the privilege of at once proceeding by action against either the principal debtor or the cautioner, as he chooses.[4] The law of Scotland, in short, is now assimilated to that of England, and in all cases the creditor has a direct right of action against a cautioner, immediately upon the default of the principal debtor. Whether the principal debtor is in default, or, in other words, whether he has failed to perform his obligation, is purely a question of fact; and the creditor has no concern with the causes that may have brought it about. It may be due to the debtor's inability to pay, or to his refusal to do so though he is really solvent, or to a great variety of other circumstances; but if he has, as a matter of fact, failed to pay, inquiry into the cause of his failure is irrelevant. Thus, in a recent case, an insurance company had guaranteed to the holder of a deposit receipt of an Australian bank payment of the deposit. Before the receipt

[1] *Wright* v. *O'Henly*, 1827, 5 S. 311; *Milne* v. *Graeme*, 1684, M. 3588; Ersk. iii. 3. 62.

[2] *Balfour* v. *Hutton*, 1708, M. 3585.

[3] Bell, *Prin.* s. 263; *Wallace* v. *Lord Elibank*, 1717, M. 3389; *infra*, p. 920.

[4] Per Lord Justice Clerk Moncreiff in *Morrison* v. *Harkness*, 1870, 9 M. 35.

became due the bank had been reconstructed under a scheme whereby it was freed from its obligations, and its liabilities passed in a modified form to a new bank. In an action brought by the holder of the deposit receipt against the guarantors, the latter urged that there had been no default, because, when the money fell to be paid, there was no subsisting obligation against the bank, since it had ceased to exist, and its assets were transferred to a new bank, with which the guarantors had nothing to do. The Court, however, had no hesitation in holding that the bank had "made default," for, as Lord Adam pointed out, these words mean nothing more nor less than that they failed to pay.[1] When default has occurred, it is not even necessary, in the ordinary case, and in the absence of special stipulation, that notice shall be given to the surety of the default of the principal debtor, or that the principal debtor be formally called on to pay, where such a demand for payment is not required to charge the debtor himself.[2] At the same time, it is obviously proper for the creditor to give notice to the cautioner of the debtor's default before taking action against him; and his omission to give such notice may be of importance in a question of expenses. Moreover, there may be special circumstances, *e.g.* where the cautioner's liability is dependent on some contingency, in which notice to the cautioner is necessary.[3] It is held in England—and the same would probably now be held in Scotland—that even where the creditor holds real securities from the principal debtor for his debt, in addition to the personal security arising from the cautioner's engagement, it is not necessary, in the absence of express stipulation to that effect, that he should first resort to these real securities before suing the cautioner.[4]

Constitution of the debt.

Where the ground of debt is not liquid, the debt must be constituted; and this may now be done as well by proceeding against the cautioner as by taking action against the debtor. If the creditor choose to constitute the debt by action against the principal debtor, he must be cautious in incurring needless expense, in reliance on being recouped by the cautioner;[5] and the most expedient course, in the ordinary case, is for the creditor to make both the debtor and his cautioner parties to the action. The

[1] *Laird* v. *Securities Insur. Co. Lim.*, 1895, 22 R. 452; *Young* v. *Trustee Insur. Co.*, 1893, 21 R. 222.

[2] *Rede* v. *Farr*, 1817, 6 M. & S. 121; *Price* v. *Kirkham*, 1865, 34 L. J. Ex. 35.

[3] Cf. *Morten* v. *Marshall*, 1863, 9 Jur. (N. S.) 651.

[4] *Ranelaugh* v. *Hayes*, 1683, 1 Vern. 189.

[5] *Grant* v. *Fenton*, 1853, 15 D. 424; *MacPherson* v. *Campbell*, 1825, 4 S. 21. The question of the liability of cautioners for law expenses incurred by the creditor is discussed *supra*, p. 758 *et seq.*

calling of the cautioner is not, however, necessary to the validity of the decree. Thus it has been expressly laid down that a person wronged by the negligence of a messenger who has executed a faulty diligence, is not bound to call the cautioner of the messenger in an action against the messenger and his employer, the creditor who caused the diligence to be done.[1]

When the debt is constituted against the principal debtor, this, in the ordinary case, suffices to fix the liability of the cautioner. If the one is liable, the other is equally liable; for in taking objection to the validity of the debt, the cautioner cannot stand in a better position than the principal debtor.[2] So Stair lays it down that cautioners are bound by the writ or oath of the principal, the proof of the accessory obligation following the proof of the principal obligation.[3] If, however, fraud and collusion be averred, this will enable a cautioner to get behind an obligation proved by the writ or oath of the principal debtor, by bringing an action of reduction.[4] Again, although, where the principal debtor has put forward a defence to the creditor's claim, and brought witnesses to prove it, the cautioner will not, on the failure of the principal debtor to establish the defence, be allowed again to put forward this defence, and attempt to prove it by the same or other witnesses;[5] yet, if the cautioner has not been called, he may subsequently aver that a material defence has been omitted, or that the proceedings were irregular. Accordingly, long before the Mercantile Law Amendment Act, it was usual for the creditor, in constituting his debt, to call the cautioner along with the principal debtor, to overlook the proceedings. "Whenever," said Lord Medwyn, "a creditor wishes not to be called a second time by the cautioner to establish his debt, he ought to bring him into the process. He has his right of relief against him, and is entitled to call upon him to overlook the process. If he does not appear, this is his fault, and the creditor in this case would not be bound to enter a second time into the investigation. If, however, the

[1] *Cullen* v. *Dykes*, 1852, 1 Stuart, 327, per Lord Justice Clerk, at 330; *Ross* v. *Mackenzie*, 25 June 1840, F. C.; *Mackenzie* v. *Mackenzie*, 1842, 15 Sc. Jur. 34, 5 D. 151. The cautioner may sist himself to the process if he pleases; and the decree does not affect the cautioner's rights on matters of accounting, *vide infra*, p. 792.

[2] *United Mutual and Mining Assur. Co.* v. *Murray*, 1860, 23 D. 69; *Atkinson* v. *Walls*, 1833, 11 S. 429, where it was held that, as a bankrupt debtor has no right to call on a creditor to constitute his debt after the composition is carried through, his cautioners in the composition cannot do so—*Balfour* v. *Millar*, 1822, 1 S. 501.

[3] Stair, i. 17. 9.

[4] *United Mutual and Mining Assur. Co.* v. *Murray*, 1860, 23 D. 69.

[5] Stair, i. 17. 9.

cautioner is not called, and everything is done behind his back, he is entitled to see that everything has been done regularly, and that there is a valid decree against him."[1] On the other hand, it has been observed that "if the cautioner is afraid of consequences, it is for him to watch the rolls of Court to observe what was done, and to provide accordingly."[2] Where a decree was pronounced against an executor, it was held that the executor's cautioner, although he had not been called as a defender, could not secure a re-trial by way of exception, unless he alleged that something necessary to the decision of the case had been omitted: he must bring an action of reduction of the decree which had gone out against the principal debtor.[3] Further, if the cautioner's pleas in the action of reduction are substantially the same as those advanced by the principal in the original action, the reduction is irrelevant.[4]

Cautioner is entitled to have the debt proved against him; evidence of debt competent against cautioners.

In the accounting or other proceedings, by which the extent of the liability is determined, there is no privity of contract between the cautioner and the principal debtor. He is entitled to have the liability proved against him in the same way as against the principal debtor. Thus while a cautioner is liable for any damage which can be shown by legal evidence to have been caused to the creditor by the default of the principal debtor, the fact that the debtor admits liability to a certain amount does not dispense with the necessity of proving the amount of damage in an action brought by the creditor against the surety.[5] "In an action against the surety, the amount of damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due, and which alone the surety was liable to pay."[6] Upon this principle, where a surety engaged to be answerable for any debt which a third party might owe for damage incurred by breach of a contract, it was held, on the creditor and principal debtor agreeing that the amount of damage should be

[1] Per Lord Medwyn in *Ross* v. *Mackenzie*, 25 June 1840, F. C.

[2] Per Lord Justice Clerk in *Mackenzie* v. *Mackenzie*, 1842, 15 Sc. Jur. 34, 5 D. 151.

[3] *Ross* v. *Mackenzie*, 25 June 1840, F. C. Compare on this subject the remarks of Mellish, L.J., in *Parker* v. *Lewis*, 1873, L. R. 8 Ch. 1035, at 1059.

[4] *Mackenzie* v. *Mackenzie*, 1842, 15 Sc. Jur. 34. He can take any valid objections open to him in the accounting.

[5] *Evans* v. *Beattie*, 1813, 5 Esp. 26; *Swan* v. *Bank of Scotland*, 1835, 2 S. & M'L. 67.

[6] Per James, L.J., *ex parte Young*, *in re Kitchin*, 1881, 17 Ch. Div. 668, at p. 671.

made the subject of an arbitration, that the surety was not in any way bound by the award in the arbitration, and that the award of the arbiter against the principal debtor was not even evidence against the surety.[1] Similarly, in Scotland, a cautioner is entitled to object to an arrangement between the creditor and the principal debtor, by which the amount of the debt is referred to arbitration.[2] Further, if the cautioner consents to the amount of the debt being submitted to arbiters, the proceedings in the arbitration must be perfectly regular, otherwise he is not bound.[2] Thus in *M'Dougall's Tr.* v. *Law*, a cautioner in a general loosing of arrestments[3] consented that the question in dispute should be disposed of by three arbiters. Subsequently, on a decree-arbitral being pronounced by only one arbiter, it was held that an averment that the decision of the matters referred to three arbiters had been delegated to one of their number was a relevant ground of reduction at the instance of the cautioner. As, however, the only matter of interest to the cautioner, which was disposed of by the irregular decree, had been settled, not by the arbiter, but by a joint minute between the creditor and the principal debtor, to which minute the decree-arbitral merely gave effect, the cautioner was held to be bound by it, inasmuch as he had not averred that there was any unfairness in the arrangement contained in the minute. Similarly, while a cautioner is not liberated from his obligation by the creditor coming to an arrangement with the principal debtor in regard to the value of certain securities, the creditor's title to which was disputed, a compromise of this sort would not be effectual to exclude the cautioner from subsequently pleading that the securities were of greater value than was assumed in the compromise.[4] So where the principal debtor in a cash-credit bond docqueted as correct the sum due as stated by the bank, it was held that this did not bind the cautioners, who were entitled to have the items proved, and to object to certain sums entered on the debit side of the account.[5]

[1] *Ex parte Young, in re Kitchin*, 1881, 17 Ch. Div. 668.

[2] *M'Dougall's Tr.* v. *Law*, 1864, 3 Macp. 68.

[3] The principles applied to a cautionary obligation of this sort are exactly those which would regulate the rights of parties in an ordinary cautionary obligation for the payment of money. "It is quite impossible to distinguish between the rights and obligations of an ordinary cautioner for payment of money, and the cautioner in such a bond as the present. . . . The equities in both cases are the same" (per L. J. C. Inglis in *M'Dougall's Tr.* v. *Law*, 1864, 3 Macp. 68).

[4] See per Lord Kinloch (Ordinary) in *White* v. *Robertson*, 1864, 2 M. 553; cf. *M'Dougall & Herbertson* v. *Northern Co.*, 1864, 2 M. 935.

[5] *Swan* v. *Bank of Scotland*, 1835, 2 S. & M'L. 67; cf. *Dalmahoy, Petr.*,

Manner of ascertaining the amount due by cautioners, whose liability is indeterminate in its nature.

In an English case, a bond, entered into by a guarantee association for an official liquidator, provided that the certificate of the chief clerk, on taking the accounts of the liquidation, should be conclusive evidence against the surety as to the amount due from the liquidator. It was held, after such certificate had been given, that the Court had power, upon certain terms, to allow the accounts to be reopened at the surety's request, on its being proved that the liquidator's accounts had been brought in and vouched without notice to the surety.[1] In a Scotch case, where a bond guaranteeing payment of the balance that might be due by a bank agent on his intromissions, provided that a stated account, certified by the accountant or cashier of the bank for the time being, should be sufficient to ascertain the balance due, it was held that this provision was effectual to render valid summary diligence against the cautioners on the recorded bond, and a relative stated account, certified but unrecorded.[2] In the absence of such a special stipulation as to how the balance due is to be ascertained so as to authorise diligence, the creditor must, in all cases where the amount of the cautioner's liability is necessarily indeterminate, as in a guarantee for an official, proceed against the cautioner by ordinary action.[3] The mere existence of a clause authorising summary diligence will not be allowed to interfere with the cautioner's right of fully investigating the accounts.[4] Proceedings before an auditor, and the auditor's report on the amount due by the principal, if not intimated to the cautioner, will not affect him.[5] Summary diligence is competent against the cautioners of a judicial factor, if the cautioners are made parties to the accounting under a petition for discharge, and have been decerned against therein; but in this case the diligence proceeds upon a decree of the Court, and not upon the registered bond.[6] In guarantees of the fidelity of officials, the decisions as to what

11 July 1835, F. C.; *British Linen Co.* v. *Thomson*, 1853, 15 D. 314; *Reid* v. *Hart*, 1869, 6 S. L. R. 255. *Vide supra*, p. 778.

[1] *In re Birmingham Brewing Co.*, 1883, 52 L. J. Ch. 358.

[2] *Fisher* v. *Syme*, 1828, 7 S. 97.

[3] Bell, *Com.* i. 382, 384.

[4] *Tate* v. *Pringle*, 1832, 10 S. 772; 1832, 11 S. 47; 1834, 12 S. 218; *Paisley Bank* v. *Hamilton*, 1831, 9 S. 488.

[5] *Tate* v. *Pringle*, *supra*. As to the effects of the audit and report by the Accountant of Court on the liability of cautioners in cases under the Pupils Protection Act, see 12 & 13 Vict. c. 51, ss. 15, 16, 17, 20.

[6] *Stewart* v. *Scott*, 1850, 12 D. 744. In a cautionary obligation for the amount due under a composition contract, a certificate of a creditor's ranking, together with an extract of the bond of caution, is sufficient ground for summary diligence by the creditor against the cautioners—*Atkinson* v. *Walls*, 1833, 11 S. 429. As to cash credits, see *supra*, pp. 777, 778.

is good evidence against sureties of the amount of the loss resulting from their principal's default, are difficult to reconcile. Thus, on the one hand, an entry, by a deceased collector of taxes, of monies received by him, made in *private* note-books, which he kept for his own convenience, has been held to be good evidence against his surety, though the persons from whom the money was collected were alive and might have been called as witnesses;[1] while, on the other hand, it has been held, in an American case, that a surety for the faithful discharge of an office may contest the correctness of a voluntary *official* report made by the principal debtor as to the amount of money in his hands at the commencement of the term for which the bond was given.[2] In a recent Irish case, where a surety had undertaken that an official would keep correct accounts in certain books of the monies received by him in the discharge of his duties, it was held that the entries made by the official in the books referred to in the contract were evidence against the surety.[3]

Benefit of division.

The right of division[4] arises where there are several cautioners, bound simply or conjunctly for the debtor in a proper cautionry. The effect of this right is that when the obligation in the bond is divisible, as for a sum of money, each of the cautioners is, in the first instance and so long as his co-cautioners are solvent, liable only for his own proportionate share. In other words, none of the cautioners can be sued by the creditor for more than his respective *pro ratâ* share of the sum due.[5] Whether it is competent for the creditor in a proper cautionry to sue certain of the cautioners for their respective *pro ratâ* shares, without calling the others, is not altogether free from doubt. It is laid down by Professor Bell, that where co-obligants are bound jointly, each may refuse to pay till all the co-obligants are called;[6] but it has been held competent for a creditor to bring an action against two of three obligants in a bond for payment of their respective shares, without calling the representatives of the third, who was deceased.[7]

[1] *Middleton* v. *Melton*, 1829, 5 Macl. & R. 264.

[2] *Van Sickel* v. *County of Buffalo*, 1882, 42 American Reports, 753.

[3] *Abbeyleix Guardians* v. *Sutcliffe*, 1890, 26 L. R. Ir. 332.

[4] So called from the *beneficium divisionis* of Hadrian (*Cod.* 4. 18. 3; *Dig.* 3. 46. 1. 28).

[5] Ersk. iii. 3. 63; Bell, *Prin.* s. 267. The statement by Bell (*Com.* i. 362) that, even where parties are bound simply, "if the bond bears that the money is for the use of one of the parties, the rest are held to be cautioners, and liable for the whole," is not borne out by the case quoted,—*Grant* v. *Strachan*, 1721, M. 14633,—which was a case where the obligation was indivisible.

[6] Bell, *Prin.* s. 62.

[7] *Macarthur* v. *Scott*, 1836, 15 S. 270.

When the obligation is indivisible, such as a bond for the performance of an act,—as, for example, to retire a bond,[1]—each of the co-cautioners is, even in a proper cautionry, liable for the whole,[2] unless and until the liability thereunder takes the form of a claim by the creditor for damages, when the right of division again emerges.[3] Also, the rule suffers exception when the co-obligants, though bound simply, are in the position of partners,[4] or when the obligation is on a bill or note, in which case the liability of the obligants to the creditor is regulated wholly by the law merchant. Further, of course, even in a proper cautionary obligation for a sum of money, each cautioner may ultimately become liable to the creditor for an amount exceeding his proportionate share—up, indeed, to the whole amount due by the principal debtor; for, on the insolvency of one of the obligants, the creditor can compel the other obligants to make up his share in equal parts; and, if there is only one solvent obligant, he thus becomes liable *in solidum* to the creditor.[5]

Cautioners, on the other hand, who are bound in improper cautionry,—that is, bound as co-obligants with the principal debtor, or as full debtors, or conjunctly and severally,—never have the benefit of division. By binding themselves in this form, they renounced the benefit of division. The result is that the creditor may, on the arrival of the term of payment, at once proceed against any one of the co-obligants, whom he may select, for the whole sum due, or against the several obligants in such sums or proportions as he pleases.[6] The only limit set to his discretion in the manner of dealing with them, is that he must see to it that none of the rights of contribution or relief belonging to any of the obligants are taken away or injuriously affected by his acts.[7]

Right to total relief against the principal debtor.

Unlike the rights of discussion and division, the remaining privileges of cautioners—their right to total relief against the principal debtor, and their right of mutual relief or contribution—belong to all cautioners, proved to be such, whether bound in proper or improper cautionry. Cautioners, on making payment of the debt, or of any portion of the debt,[8] have a right to relief and

[1] *Grant* v. *Strachan*, 1721, M. 14633.

[2] *Grott* v. *Sutherland*, 1672, M. 14631; *Dickson* v. *Turner*, 1697, M. 14632.

[3] *Dennistoun* v. *Semple*, 1669, M. 14630.

[4] *Mushet* v. *Harvey*, 1710, M. 14636; *Morton's Trs.* v. *Robertson's Jud. Factor*, 1892, 20 R. 72.

[5] Bell, *Prin.* s. 267, and authorities there cited.

[6] *Richmond* v. *Graham*, 1847, 9 D. 633.

[7] As to this, see *infra*, p. 910 *et seq.*

[8] *Davies* v. *Humphreys*, 1840, 6 M. & W. 153, per Parke, B.

indemnification against the principal debtor, to the full extent to which they have been made answerable for him. This right of relief on the part of a cautioner against the principal debtor, on whose account he has made payment, arises *de jure* without any formal assignation by the creditor.[1] There is, in point of law, an implied mandate by the principal debtor to his cautioner to pay, if the former make default; so that money paid by the cautioner, for the purpose of discharging the claim against the principal debtor, is money paid at the desire and on account of the principal debtor, which may be recovered from him. Even where a surety pays the principal debt, in whole or in part, indirectly by the transfer of property, or of a security possessing a certain marketable value, this is, so far as his right of relief from the principal debtor is concerned, the same as if he had made a money payment to the amount of the value of the property or security in question.[2] Wherever the relation of principal and cautioner subsists, in whatever manner it has been constituted, this right of relief subsists.[3] Further, where there are several cautioners who have each paid a portion of the principal's debt, they have each a claim for relief to the extent of the sum each has paid; and where there are two or more principal debtors, the cautioner may recover from any one of them the whole amount which he has been compelled to pay.[4]

Extent of right of relief.

The obligation of the principal debtor to relieve the cautioner extends not only to the amount which he has actually paid, but also to all loss which he may have sustained directly through the default of the principal. Thus the cautioner is entitled to recover from the debtor interest on the sum actually paid to the creditor,—though that sum itself consisted partly of interest due by the debtor to the creditor,—as well as the expenses of obtaining an assignation of the creditor's security.[5] So where the principal debtor is a company, a surety who has paid money for the company is entitled, on the winding up of the company, to interest at five per cent. on his debt.[6] Similarly, a drawer or indorser who pays a bill is entitled to recover from the principal debtor on the bill the expenses of noting,

[1] Ersk. iii. 3. 65.

[2] *Fahey* v. *Frawley*, 1890, 26 L. R. Ir. 78, at p. 90. There may be circumstances in which a cautioner's negligence has been so gross as to disentitle him to relief from the principal debtor for money paid. See, *e.g.*, *Lyon* v. *Lizars*, 1848, 10 D. 1366.

[3] As to the right of relief, where the cautionary relation arises on a bill or note, see Bills of Exchange Act, 1882, s. 57.

[4] Pothier, *Oblig.* (Evans) i. p. 280.

[5] *Inglis & Weir* v. *Renny*, 1825, 4 S. 113; see also per Erle, C.J., in *Petre* v. *Duncombe*, 1851, 20 L. J. Q. B. 242.

[6] *In re Beulah Park Estate* (*Sargood's Claim*), 1872, L. R. 15 Eq. 43.

or, when protest is necessary, and the protest has been extended, the expenses of protest.[1] It is, in short, a principle of general application, that if a surety can prove that by reason of the non-payment of the debt he has suffered damage beyond the principal and interest, which he has been compelled to pay, he will be entitled to recover that damage from the principal debtor.[2] In such damage are included all reasonable expenses legitimately incurred by the cautioner in consequence of the principal's default, or for his own protection, but not loss sustained through his own fault, *e.g.* in suspending the debt upon frivolous grounds, or allowing diligence to proceed upon it against his estate.[3]

Limits to right of relief.

While the cautioner is entitled to be indemnified against the whole loss which he has sustained through the principal debtor's default, his claim of relief can never exceed the amount which he has actually paid. Accordingly, if a surety succeeds in discharging the obligation to the creditor at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt, with interest.[4] Further, in order that a cautioner may recover from the principal debtor money which he has paid, he must have been under a reasonable obligation and necessity to pay the money. Thus if he pay money not due by the principal debtor, or against the payment of which the principal debtor had a sufficient defence, such as compensation, no claim of relief will accrue to him, even though, in making the payment, he only yielded to pressure brought on him by the creditor.[5] His duty in such circumstances is to notify to the principal debtor the action of the creditor, so that the debtor may state his defence. Similarly, if the cautioner chooses to pay the principal debt before the date when it is actually due, he will not be able to enforce a claim for immediate relief.[6]

[1] *Pierce* v. *Williams*, 1854, 23 L. J. Exch. 322; Bills of Exchange Act, 1882, s. 57.

[2] Per Stirling, J., in *Badeley* v. *Consolidated Bank*, 1886, 34 Ch. Div. 556.

[3] Ersk. iii. 3. 65 and 86. The claim for relief extends to payments made by the cautioner after the principal debtor is discharged under a composition—*Hutchison* v. *Stevenson*, 1833, 11 S. 429. As to claim for relief for law expenses incurred by the cautioners, see *infra*, p. 799.

[4] *Reed* v. *Norris*, 2 My. & C. 1837, 361, 375; cf. *Brodie* v. *Keith*, 1672, M. 3393.

[5] Ersk. *Inst.* iii. 3. 67; *Maxwell* v. *Nithsdale*, 1632, M. 2115; *Young* v. *Campbell*, 1851, 14 D. 63. If he has paid under a mistake as to facts supposed to constitute his liability, he may recover from the creditor what he has paid—*Mills* v. *Alderbury Union*, 1849, 3 Exch. 590.

[6] *Owen* v. *Bryson*, 1833, 12 S. 130.

Relief of law expenses.

The question frequently occurs whether a cautioner's claim of relief from the principal debtor covers expenses which he has incurred in defending an action by the creditor. The determination of this question turns in each case upon whether, as a matter of fact, the cautioner, in incurring the expenses sought to be recovered, pursued the course which a reasonable and prudent man would pursue in his own case.[1] If he defends an action without reasonable ground, there is no duty on the part of the principal to reimburse him the expenses, unless the action was defended at the principal's request.[2] "No person," observed Lord Denman in one case, "has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action he cannot defend."[3] On the other hand, where the surety has reasonably and in good faith defended an action, the principal will be liable to the surety for expenses, although the defence was unsuccessful.[4] So where the creditor's claim is of an illiquidated nature and needs investigation, the cautioner may recover from the principal the expenses reasonably incurred in investigating it.[5] If the cautioner makes a reasonable and prudent compromise, he is justified in doing so, and can recover from the principal debtor the amount paid under the compromise.[6] Of course, if under the compromise he pays to the creditor less than the full amount, he cannot recover the entire debt from the principal; for that would be to allow him to speculate upon his principal. In every case it is advisable for a cautioner, before he agrees to a compromise, or incurs expense by entering on a litigation, to give notice to the principal debtor of the creditor's claim or threats, and request directions as to the course he is to pursue. If no notice is given, there is the risk that the principal debtor may urge that the cautioner made an improvident bargain, or that he himself could have obtained better terms if an opportunity had been given him, or that he had incurred useless expense by defending an action which he

[1] *Hannay* v. *Miller*, 1840, 16 Fac. Déc. 42; 3 D. 98; *Le Blanche* v. *Wilson*, 1872, 21 W. R. 109; Ersk. iii. 3. 65 and 86; *Fraser* v. *Barnetson*, 28 Jan. 1831, F. C.

[2] *Smith* v. *Compton*, 1832, 3 Barn. & Ald. 407.

[3] Per Lord Denman in *Short* v. *Kalloway*, 1839, 11 A. & E. 28.

[4] *Smith* v. *Compton*, 1832, 3 Barn. & Ald. 407; *Straiton Estate Co.* v. *Stephens*, 1880, 8 R. 299.

[5] *Blyth* v. *Smith*, 1843, 5 M. & G. 405. Where the cautioner advances the expenses of litigation carried on in the principal's name and succeeds therein, he can appear in the process and have decree therefor in his own name—*Henderson* v. *Young*, 1828, 7 S. 142.

[6] *Dixon* v. *Fawcus*, 1861, 30 L. J. Q. B. 137. As to compromises by principal debtor with creditor, *vide supra*, p. 793.

ought not to have defended. The general effect of notice to an indemnifying party was stated by Buller, J., in *Duffield* v. *Scott*,[1] in language that has been frequently approved,[2] as follows: "The purpose of giving notice is not in order to give a ground of action; but if a demand is made, which the indemnifying party is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money."

Effect of a bond of relief.

The common-law right of relief can be enforced only by ordinary action, there being no warrant for summary diligence at the instance of the cautioner in working out his claim against the principal debtor. Accordingly, if the cautioner desires more immediate and direct means of making effectual his right of relief, his course is to take from the principal debtor a bond of relief, which—besides binding the debtor to pay, at a certain date, the debt due to the creditor, and to deliver up the obligation discharged, or otherwise to pay the sum to the cautioner, so that he may pay it to the creditor—contains a clause of registration for execution, and so enables the cautioner, at the date mentioned, to enforce relief by summary diligence, even though he has not at that date been in any way pressed by the creditor for payment.[3] Bonds of relief are favourably construed by the Courts, and have been sustained nothwithstanding errors in their recital of the primary obligation, or in their description of the ground of debt.[4]

The right of relief at common law is based on an implied mandate by the debtor: results of this principle.

The common-law right of a cautioner to total relief against the principal debtor is based on the principle that there is, in point of law, an implied mandate by the latter to the cautioner, who has intervened on his behalf. On this principle, at any moment after the debt becomes payable, the cautioner may himself pay off the creditor, and proceed against the debtor for the money so paid.[5] The implied mandate takes effect from the time when the cautioner becomes responsible for the debt of the prin-

[1] 1789, 3 T. R. 374.

[2] See *Jones* v. *Williams*, 1841, 7 M. & W. 493; *Parker* v. *Lewis*, 1873, L. R. 8 Ch. 1035, at 1058; Cp. *Carrick & Co.* v. *Manford*, 1854, 16 D. 410.

[3] If such a bond of relief has been intimated to the creditor, it gives a co-obligant, bound as principal, the benefit of the septennial prescription. *Vide infra*, p. 939.

[4] *Hamilton* v. *Hunter*, 1743, M. 4155; *Drummond's Daughters* v. *His Creditors*, 1795, M. 4164. For various forms of bonds of relief, adapted to the cases of the cautioner being bound in proper or improper cautionry, see *Jur. Styles*, vol. ii. 446.

[5] *Gray* v. *Thomson*, 1847, 10 D. 145.

cipal, and not merely from the time when the cautioner pays the principal's debt. Hence not only is the cautioner, on his actual payment of the debt to the creditor, entitled to demand repayment of the sum which he has paid to the creditor, with interest and expenses, but, in virtue of the implied mandate, he is entitled, on being sued by the creditor for the debt, or on the creditor using any other legal step against him for obtaining payment, to take legal measures in his own person for his relief, before he has made any actual payment to the creditor. The technical distress to which he is thereby subjected by the creditor is sufficient ground for an action *ex mandato* concluding that the debtor relieve him from his distress, by procuring a discharge of the obligation.[1] Further, though the cautioner has made no payment, and the creditor has taken no step against him to obtain payment, he may, in certain circumstances, take proceedings against the principal debtor for his relief. Thus if the debtor has bound himself to deliver to the cautioner his obligation cancelled, at the term at which he is bound to pay the creditor, the cautioner can enforce this obligation immediately on the expiry of the term of payment.[2] Apart from any special stipulation of this sort, it is a result of the implied mandate by the principal debtor to the cautioner that the latter can compel the former, not merely to relieve him on the occasion of each payment he is forced to make, but, as soon as liability is threatened to be enforced against him, to stand between him and the creditor who is demanding the performance of the obligation. A cautioner is entitled to relief out and out; he is not bound to remain under an obligation of debt, with the possibility of being made bankrupt, if the principal debtor is able to relieve him.[3] So in England, a surety, before he has made any payment, or been pressed by the creditor for payment, may, if the debt is due and remains unpaid, take proceedings to compel the debtor to pay the debt; for, as was observed, "it is unreasonable that a man should always have a cloud hanging over him."[4] This right on the part of the surety to compel the principal debtor to relieve him from liability by paying off the debt exists, whenever the principal debt is admittedly due, even though he cannot show that the

[1] Ersk. iii. 3. 65.

[2] *Ib.*

[3] See observations by Ld. Pres. Inglis and Lord Deas in *Cunningham* v. *Montgomerie*, 1879, 6 R. 1333; cf. *Alston* v. *Denniston*, 1828, 7 S. 112; *Kinloch* v. *M'Intosh*, 1822, 1 S. 491.

[4] *Ranelaugh* v. *Hayes*, 1683, 1 Vern. 189; *Wooldridge* v. *Norris*, 1868, L. R. 6 Eq. 410; see also per Wickham, V. C., in *Ferguson* v. *Gibson*, 1872, L. R. 14 Eq. 379; per Willes, J., in *Bechervaise* v. *Lewis*, 1872, L. R. 7 C. P. 372, at 377.

creditor has refused to exercise his right to sue the principal debtor.[1]

Precautionary measures by cautioners.

Although, then, a cautioner cannot now compel the creditor to discuss the principal debtor, he can take measures to compel the debtor to fulfil his obligation when it is due, and so save himself from what, in many cases, might be the hardship of first paying the debt and then working out his relief. The fact that, in the older law, cautioners in Scotland had the benefit of discussion, tended to prevent the question arising in a sharp form; but the principle of equity on which the doctrine is founded is clearly recognised and stated by Erskine, as follows: "The Roman law, most equitably, allowed action for relief to the cautioner against the debtor, where the debtor shifted the payment of his debt from day to day for a considerable time together, especially if the cautioner's circumstances at the same time disabled him to make payment of the debt himself, by which he might be entitled to a proper relief (L. 38, s. 1, Mand.). Upon a similar ground of equity, the Court of Session admits adjudication to pass at the suit of cautioners in conditional obligations (because these may be long pendent) without any previous distress, under this quality, that no execution shall be used on the decree till distress."[2] Where a principal debtor has undertaken that a certain property should be held in security for a cautioner to cover the latter's liability under his guarantee, the cautioner in question can, before making any payment, or being called on for payment, have the principal debtor ordained to complete the transfer of the security, so as to make it effectual for the cautioner's relief, if he should be called on to pay; and the fact that the creditor has by contract a lien over such property does not prevent the cautioner from being able to force the principal debtor to make the cautioner's right in it effectual.[3] Further, even before the arrival of the term of pay-

[1] *Mathews* v. *Saurin and the Provincial Bank Lim.*, 1893, 31 L. R. Ir. 181; cf. *Wolmershausen* v. *Gullick* [1893] 2 Ch. 514, where a similar principle was applied in the case of a claim of a surety for relief against a co-surety. It appears that in England it is within the power of the surety, as soon as the principal debt has become due, to compel the creditor to sue the principal debtor and collect the debt — per Lord Eldon in *Wright* v. *Simpson*, 1802, 6 Ves. 733; *Newton* v. *Chorlton*, 1853, 10 Hare, 646, at p. 652.

[2] Ersk. iii. 3. 65; cf. *Gray* v. *Thomson*, 1847, 10 D. 145.

[3] *Scott* v. *Grahame*, 1830, 8 S. 749; cf. *Boswell* v. *Montgomerie*, 1836, 14 S. 554, in which case funds were ordained to be paid over by a debtor only on condition of his being duly secured against liability under a cautionary obligation undertaken for his creditor. In *Reid* v. *Watson*, 1836, 14 S. 223, the cautioner failed to prove that his guarantee was granted in reliance on an offer of security previously made by the debtor.

ment, the cautioner may use precautionary diligence, if the principal debtor is *vergens ad inopiam, i.e.* if he is in embarrassed circumstances and threatened with insolvency. By attaching the goods of the principal debtor, he can provide himself with funds beforehand wherewith to provide relief for himself in the event of his being forced to make payment of the obligation, into which he has entered on behalf of the debtor.[1] A cautioner, however, who has neither made any payment, nor is threatened with distress, nor is able to show that the principal debtor is *vergens ad inopiam*, cannot competently sue an action of relief against the principal debtor where the principal obligation is for a definite sum, payable after a definite period, which has not expired.[2]

Cautioner's right of retention.

A cautioner for a debt, which is due, is entitled to retain funds belonging to the principal debtor until he is relieved of his obligation. On the other hand, if the principal debt be future and contingent, he does not have a right of retention, except in special circumstances, such as where the principal debtor is *vergens ad inopiam*.[3] Moreover, where the cautioner has a right to retain against the principal debtor, he has an equal right to retain against any creditor of the principal debtor, who arrests in his hands.[4] So in England it has been held that if the surety is made executor of the principal debtor, he is entitled to retain any sum, which has been paid by him towards the discharge of the principal debt, out of the assets of the principal debtor, against the latter's creditors.[5] Similarly, a surety, on being sued by the creditor for payment of the principal debt, is entitled to plead any set-off, due from the plaintiff (the creditor) to the principal debtor, which the latter himself could have pleaded in reduction of the debt.[6]

Cautioner's right to be put in the creditor's place, to enable him to work out his relief.

The cautioner, on paying the debt in full, is entitled to require the creditor to communicate the full benefit of his contract.[7] In virtue of this right, which is an application of the general privilege known as the *beneficium cedendarum actionum*, a cautioner, who has satisfied the creditor, can demand to be placed in possession of all rights whatsoever held by the creditor against the principal debtor, so that he thereafter stands for all purposes in the place of the creditor. That the cautioner should thus be put in the place

[1] *Cod.* Lib. 4 Tit. 35, s. 10; Poth. *Obl.* No. 441; *Kinloch* v. *Mackintosh*, 1822, 1 S. 457.

[2] *Spence* v. *Brownlee*, 1834, 13 S. 199; cf. *Murray* v. *Hogarth*, 1835, 13 S. 453.

[3] More, *Lectures*, i. 402 and 406; *M'Pherson* v. *Wright*, 1885, 12 R. 942.

[4] *Brodie* v. *Wilson*, 1837, 15 S. 1195, 9 Sc. Jur. 559; see also *Inglis* v. *Gunn & Robertson*, 1828, 6 S. 405.

[5] *Boyd* v. *Brooks*, 1865, 34 L. J. Ch. 605. Cp. *in re Giles* [1896] 1 Ch. 956; *in re Watson* [1896] 1 Ch. 925.

[6] *Bechervaise* v. *Lewis*, 1872, L. R. 7 C. P. 372.

[7] Bell, *Prin.* s. 255.

of the creditor may be a necessary step in order to enable him effectually to work out his right of relief against the principal. Accordingly, the cautioner not only has transferred to him *de jure* the right to sue the principal debtor for relief, but also is entitled to demand from the creditor an assignation of the debt itself, of any available diligence or remedy, and of all securities for the debt, which are in the hands of the creditor.[1] This right holds good in whatever manner the cautionary relation has been constituted. Thus the drawer or an indorser of a bill of exchange is entitled, on paying the bill, to the benefit of any securities deposited with the acceptor,[2] or to what has been realised on such securities;[3] and an accommodation acceptor, on paying the bill, is entitled to all securities given to the creditor by the party who is the principal debtor.[4] The right of a cautioner, on paying, to put in force all the remedies which the creditor himself would have had for the recovery of the debt, is illustrated in numerous cases.[5] Thus where a bond and disposition of heritable property has been granted by the principal debtor in security of his debt, the cautioner for the debtor is entitled, on paying the debt, to an assignation of the bond, and to the use of all the creditor's rights of recovery by sale or otherwise.[6] Further, it is in the power of a cautioner in a heritable bond, in which no definite period is fixed for payment, at any time to pay up the principal debt, obtain an assignation of the bond, and use the creditor's right of selling the

[1] Bell, *Prin.* s. 255; *Erskine* v. *Manderson*, 1780, M. 1386; *Lowe* v. *Greig*, 1825, 3 S. 543. Erskine, iii. 3. 68, expresses an opinion that the creditor is not bound to grant such an assignation, but the cases referred to settle the law in the contrary sense. See on the whole subject the opinions in *Sligo* v. *Menzies*, 1840, 2 D. 1478.

[2] *Duncan, Fox, & Co.* v. *New South Wales Bank*, 1880, 6 App. Cas. 1.

[3] *Gray* v. *Seckham*, 1872, L. R. 7 Ch. App. 680.

[4] Byles on *Bills*, 15th ed., note, p. 319, and authorities there quoted.

[5] This right of sureties has, in England, been declared, and somewhat extended, by Statute by sec. 5 of the English Mercantile Law Amendment Act (19 & 20 Vict. c. 97). Under this enactment a surety who pays the principal debt is entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such judgment, etc., shall, or shall not, at law be deemed to have been satisfied by the payment of the debt; and the Act operates as an implied assignment of such judgment, specialty, etc., so that the surety thereafter stands for all purposes in the shoes of the creditor. A surety who has paid the creditor is entitled to the benefit of a judgment obtained by the creditor against the principal debtor and sureties, although the judgment has not been actually assigned to him—*in re M'Myn*, 1886, 33 Ch. Div. 575; see also *in re Churchill*, 1888, 39 Ch. Div. 174. The effect of the enactment is to assimilate the law of England to that of Scotland.

[6] *Lowe* v. *Greig*, 1828, 3 S. 543.

security-subjects to recoup himself; and the principal debtor cannot stop such a proceeding by alleging that the assignee was a cautioner and had not been distressed.[1] Again, a surety for the price of goods sold, on paying the price to the seller, becomes entitled to the seller's lien upon the goods for the price, and, in certain circumstances, to his right of stoppage *in transitu*.[2] So if the Crown be the creditor in the principal debt, a surety paying the Crown debt due from his principal is entitled to all rights of priority over the other creditors of the principal debtor which the Crown had.[3] Similarly, a cautioner for rent, payable by a tenant, is entitled, on paying the rent, to an assignation from the landlord of his right of hypothec.[4] The claim of the cautioner to reap the full benefit of every accessory security and remedy in the hands of the creditor for the payment of the principal debt is equally valid, whether at the date of his becoming cautioner he knew, or did not know, of the existence of the security or remedy.[5] Further, the cautioner's title is equally good, whether the securities in question were taken by the creditor at the date of the contract of suretyship, or only came into his hands subsequently to that date.[6]

Where creditor holds from the debtor a security, in which other creditors have an interest.

Where the creditor holds in security for the debt not only an accessory obligation by a surety, but also some other security-subject, in which other creditors of the debtor have an interest, the surety is entitled, on paying the debt, to come exactly into the place of the creditor to whom he was bound, in a question with the other creditors of the debtor who have an interest in the security-subject. If, for example, the particular creditor to whom the surety undertook his obligation held a first mortgage over certain property of the debtor in security of the debt, then the surety, on making payment of the debt, is entitled to have this first mortgage assigned to him, so that he becomes first mortgagee in place of his cedent; and the other creditors of the debtor, who are subsequent mortgagees, can get only what is left of the security after the surety has effectuated his total relief. In an Irish case, in which a surety had paid a debt for which the creditor held in security the first of a number of mortgages over a certain property, it was argued that the right

[1] *Gray* v. *Thomson*, 1847, 10 D. 145.

[2] *Imperial Bank* v. *London and St. Katherine Dock Co.*, 1877, 5 Ch. Div. 195. Before payment he has not this right—*Louson* v. *Craik*, 1842, 4 D. 1452; and, after payment, an assignation should be taken.

[3] *In re Churchill*, 1888, 39 Ch. Div. 174.

[4] *Stewart* v. *Bell*, 31 May 1814, F. C.

[5] *Duncan, Fox, & Co.* v. *New South Wales Bank*, 1880, 6 A. C. 1—*Mayhew* v. *Crickett*, 1818, 2 Swan, 185, 191.

[6] *Forbes* v. *Jackson*, 1882, 19 Ch. Div. 615, see per Hall, V. C., at 621; *Campbell* v. *Rothwell*, 1878, 38 L. T. R. 33.

of the surety to stand in his creditor's place and become the holder of the first mortgage, while it might apply against encumbrancers whose securities were created subsequently to the surety's contract, could not apply against encumbrancers whose securities were created prior to the surety's contract. It was held, however, that the surety's right was absolute.[1] Where a first mortgage is paid off by the debtor himself, such payment goes to the benefit of subsequent mortgagees, but where the debt, secured by a first mortgage, is paid by a surety for the debtor, the surety simply steps into the place of the first mortgagee.

Importance in certain cases, if taking from creditors a formal assignation.

It is important for the cautioner, in certain cases, to obtain a formal assignation of his rights from the creditor, and not rest content with the *de jure* right of relief. Thus in *Garden* v. *Gregory*,[2] where a cautioner had bound himself to a landlord for the due payment of rent by a tenant, it was laid down that, unless the cautioner took a formal assignation of the landlord's rights, any creditor of the tenant, who attached the subjects of hypothec by arrestment, would be preferred to the cautioner. The advantage of taking an assignation is also illustrated in *Brown* v. *Doctor*,[3] where certain persons guaranteed that a contractor would perform a work for which he had contracted. The cautioners, on the contractor's failure to perform, being required to implement their obligation, obtained from the contractor an assignation to the contract, and the price to be paid for it, and completed the work. Meantime a creditor of the contractor arrested the price of the work in the hands of the employer; but it was held that the cautioners, as assignees, were to be preferred for the price to the arrester. At the same time, of course, a cautioner who has obtained a formal assignation cannot, in his character of assignee, recover more from the debtor than the loss he has actually sustained through the debtor's default. Thus where the debtor's bond, assigned by the creditor to a cautioner who has paid the debt, contains a stipulation for a penalty in case of failure to pay, the cautioner, as assignee, is not allowed to exact the penalty from the debtor, but is restricted to the sum actually paid, with interest.[4]

Whether the cautioner can claim a security held by the creditor for other debts as well as for the debt guaranteed.

The question here arises how far a cautioner's claim to a security held by the creditor is excluded by the circumstance that the

[1] *In re Davison's Estate*, 1893, 31 L. R. Ir. 249; see at 255.

[2] 1735, M. 3390.

[3] 1852, 1 Stuart, 269.

[4] *Inglis & Weir* v. *Rennie*, 1825, 4 S. 113; cf. *Anderson* v. *Dayton*, 1884, 21 S. L. R. 787. As to circumstances preventing cautioner's right to an assignation, see *infra*, p. 832.

creditor has other debts covered by the security, for which debts the cautioner has not intervened. In *Sligo* v. *Menzies*,[1] a creditor held a heritable bond over certain subjects, in which bond a cautioner was taken bound for the interest. Subsequently, the creditor, on lending the debtor a further sum, took a second bond over the same subjects without any cautioner. It was held that the creditor was not entitled to postpone the prior bond to the posterior bond so as to draw payment of the posterior bond out of the subjects, and throw the burden of the prior bond on the cautioner. The Court took the view that the cautioner in the first bond was entitled, on payment of the first bond, to have the security-subject assigned to him, and that any act of the creditor, which impaired the cautioner's security, liberated the cautioner *pro tanto*.[1] Similarly, where a debtor assigned a life policy in security of advances, and a third party guaranteed payment of the interest on these advances, it was held that the sum in the policy, on becoming due by the death of the debtor, must, after paying off the advances, be applied to extinguish the arrears of interest for which the cautioner was liable, and not in payment of any other debt due by the deceased debtor to the creditor.[2] So in England it seems settled that where a creditor, who holds a cautioner bound for a debt due by a debtor, has made further advances to the debtor, after the date of the contract of suretyship, in reliance upon other securities held by him from the principal debtor at the date of the contract of suretyship, the surety, upon payment of the amount for which he had rendered himself liable, is entitled to an assignation of all the securities held by the creditor.[3] In other words, the creditor must give to a surety the full benefit of all securities for the debt which he holds at the time of the cautioner's contract, and is not at liberty to vary the position of the cautioner with reference to these securities.

On the other hand, it is laid down by Erskine that where a creditor holds a subject in security for another debt, in which the cautioner is not bound, equity will not compel him to transfer it to the cautioner, and thereby run the hazard of losing the other debt, unless the cautioner shall likewise pay off that debt, for which he did not interpose his credit.[4] This doctrine, stated in the broad terms used by Erskine, would imply that a cautioner is not entitled to an assignation from the creditor of a security, unless

[1] *Sligo* v. *Menzies*, 1840, 2 D. 1478.

[2] *Sandeman* v. *Shepherd*, 1837, 15 S. 416.

[3] *Forbes* v. *Jackson*, 1882, 19 Ch. Div. 615; see also per Cotton, L.J., in *Holme* v. *Brunskill*, 1878, 3 Q. B. D. 495, approved in *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755, at 764; *in re Kirkwood's Estate*, 1878, 1 Ir. L. R. 108.

[4] Ersk. iii. 5. 11.

he pays off, not only the sum for the payment of which he became cautioner, but also such further sum as may have been advanced by the creditor on the same security. Such a rule is inconsistent with the decision in *Sligo* v. *Menzies*, as well as with the English authorities above referred to. As pointed out, however, in *Sligo* v. *Menzies*, there is ground for distinction between debts, covered by the security, already due at the date of the cautioner's contract, and debts, covered by the security, which only come into existence after the cautioner's obligation, and to whose constitution the cautioner neither explicitly nor impliedly assented.[1] In the case of debts constituted before the date of the contract of cautionry, the cautioner, if he knew of their existence, might fairly be taken to have impliedly consented that the security should cover, not only the particular debt which he guaranteed, but also these other debts; and, accordingly, to this class of debts Erskine's doctrine may apply. It cannot apply, however, to debts incurred subsequently to the cautioner's obligation, and which were not contemplated, or assented to, by him, for that would be to allow a creditor to derogate from the security on which the cautioner had relied for his relief, and so alter for the worse the cautioner's position. The English case, *Farebrother* v. *Wodehouse*,[2] is an instance in which the surety, at the time the suretyship was entered into, knew that certain securities held by the creditor were intended to cover, not only the debt, whose payment he guaranteed, but also another debt, for whose payment he did not intervene. It was held that the surety, on paying the debt which he guaranteed, was not entitled to the transfer of the securities, until the other debt for which the creditor held them had also been paid. Still less would a creditor be entitled, after the cautioner has lodged his claim for the assignation of a security, to constitute other debts covered by the security, and then plead that his rights would be prejudiced if he were compelled to assign.[3]

In *Scott* v. *Fotheringham*, A., the cautioner for interest in a heritable bond over subject X., subsequently, by bond of corroboration, became bound as principal debtor for the debt, and disponed in security for it a certain subject, Y. B., the holder of a second heritable bond over X. subject, purchased the first bond, with the securities for it, and ultimately sold the subject Y. The

[1] *Sligo* v. *Menzies*, 1840, 2 D. 1478, at p. 1491.

[2] 1856, 23 Beav. 18.

[3] *Fleming* v. *Burgess*, 1867, 5 Macp. 856. As to the appropriation of payments by the debtor, or securities held by the creditor, between debts due by the debtor, some of which have been guaranteed by cautioners, while others are not guaranteed, see *infra*, p. 851.

Court held that B. was bound to apply whatever was got from subject Y. towards discharging the first bond, and that, to the extent to which the first bond was thereby paid up, A.'s trustee could demand an assignation to it, in order to operate his relief out of the subjects embraced in it.[1] Also, in England, if A., the principal debtor, has mortgaged property to B., the creditor, and C., a surety, has, in addition to his personal obligation, granted to B. a real security over property belonging to him, then, if B. lends a further sum to A., B. cannot tack this further advance to the first mortgage debt, because C. has not only a right (on paying the first mortgage debt) to the delivery of the security, but has an actual right of redemption;[2] and the result when C., the surety, is thus a co-mortgagor, is that B., by making the further advance, discharges C. (redeeming the first mortgage) altogether from the suretyship.[3]

Right to securities does not arise until full payment is made.

In all cases, before the cautioner can demand from the creditor an assignation of securities held by him, it is necessary that he make full payment of the debt; and the payment of a dividend by the trustee on the bankrupt estate of the cautioner is not full payment to this effect.[4] Until the creditor has received full payment of the entire debt due, he remains in full possession of all remedies competent to him, and is left unfettered as to the mode in which he is to pursue these remedies.[5] At the same time, where a cautioner—*e.g.* a cautioner for interest—has paid all that is at any time due, though he still continues liable for subsequent payments not yet due, he is entitled *pro tanto* to the benefit of securities for the debt in the hands of the creditor.[6]

It is to be observed that, on the failure of the principal debtor to pay, there is no reciprocal right on the part of the creditor to claim securities which may have been deposited by the principal debtor with the surety in respect of his guarantee.[7]

Duty of creditor to conserve the interests of cautioners.

From the right of the cautioner to total relief against the principal debtor, and to the benefit of all securities for the debt in the hands of the creditor, there arises a corresponding duty on the part of the creditor to have regard to the interests of the cautioner.

[1] *Scott* v. *Fotheringham*, 1859, 21 D. 737.

[2] *Bowker* v. *Bull*, 1850, 1 Sim. (N. S.) 29; *Higgins* v. *Frankis*, 1846, 15 L. J. Ch. 329.

[3] *Beevor* v. *Luck*, 1867, L. R. 4 Eq. 537; *Kinnaird* v. *Trollope*, 1870, 39 Ch. Div. 636.

[4] *Ewart* v. *Latta*, 1865, 3 M. (H. L.) 36. For other limitations on cautioner's right, *vide infra*, p. 832.

[5] See per Lord Chancellor in *Ewart* v. *Latta*, *supra*.

[6] *Lowe* v. *Greig*, 1828, 3 S. 543.

[7] *In re Walker* [1892] 1 Ch. 621. The manner in which the rights of the different parties operate in bankruptcy is treated *infra*, Chap. XXIV.

To this extent the creditor is in the position of a trustee for the cautioner, and, as such, he must preserve intact all the remedies against the principal debtor, whether in his own name or in the name of the cautioner; must not, by any voluntary act, do away with, release, lose, or depreciate any securities for the principal debt; and must abstain from any dealing with the principal debtor, or with third parties, which would prejudicially affect the position of the cautioner, as by extending the time of payment of the debt, varying the mode of accounting, or the like. "If," in the words of Erskine, "the creditor shall do any act, which shall have a tendency to weaken the cautioner's right of relief, the cautionary obligation ceaseth."[1] The acts of the creditor, which thus serve to discharge a cautioner, are treated in discussing the modes in which cautionary obligations are extinguished.[2]

Right of mutual relief or contribution.

Cautioners in a proper cautionry, having the right of division, are in the first instance liable to the creditor only *pro ratâ, i.e.* each for his own individual share. Cautioners, on the other hand, who are bound jointly and severally, or as co-principals and full debtors, are, by the terms of their obligation, from the first liable to the creditor *singuli in solidum, i.e.* each for the whole sum due.[3] Nevertheless, all cautioners alike, even those who are bound *in solidum* to the creditor, are, in relation to one another, liable only *pro ratâ*; and, consequently, where one of several co-cautioners, after the liability of the principal has arisen, pays the whole debt, or a part of it greater than his proportionate share, he forthwith becomes entitled to claim from each of the others a rateable contribution, to recoup himself for the excess which he has paid beyond his own share. "When many persons are obliged *in solidum*, and are thereby liable conjunctly and severally, payment and satisfaction made by one for more than his own share doth oblige all the rest *pro ratâ*."[4] The claim of a cautioner for contribution from his co-cautioners does not arise until he has paid more than his proportion of the debt ascertained to be actually due to the creditor; for this constitutes the ultimate burden which each

[1] Ersk. iii. 3. 66.

[2] *Vide infra*, p. 918 *et seq.*

[3] Bell, *Prin.* s. 62; *Richmond* v. *Graham*, 1847, 9 D. 633; *Morton's Trs.* v. *Robertson's Jud. Fact.*, 1892, 20 R. 72; *Church of England Life and Fire Insur. Assoc.* v. *Winks*, 1847, 19 D. 1079.

[4] Stair, i. 8. 9. The same principle of proportional relief is expounded in detail in Bell, *Com.* i. 368 *et seq. Note.*—It is of course no exception to this rule, that where the obligant called upon to pay is, as matter of fact, the person for whose behoof the debt was incurred, he will have no right of relief against his co-obligants, who intervened simply on his behalf—*Erskine* v. *Cormack*, 1842, 4 D. 1478.

cautioner can be called upon to bear.[1] The proportion of the debt payable by each cautioner is determined according to the number of persons who are, as a matter of fact, cautioners for the debt, whether bound in the same or in separate instruments, without reference to the number of the principals.[2] The death of a cautioner does not release his estates from liability for contribution. Thus in a recent English case, where there were two sureties to a bond, and upon the death of one of them a new bond was given by the surviving surety and a new surety, all rights being reserved against the estate of the deceased surety, it was held that the estate of the deceased was liable to contribute one-third.[3] The statement, however, that the proportion payable by each cautioner is determined by the number of the cautioners, is true only as long as they are all solvent. When some of the cautioners are insolvent, the proportion payable by the solvent cautioners is determined by the number of those who continue solvent.[4]

When right to mutual relief arises.

Obviously, if each cautioner was allowed to sue all the others for a rateable proportion of what he had paid the instant he had paid any part of the debt,—though the part paid did not amount to more than his full *pro ratâ* share of the whole,—it might result in a multiplicity of actions; for each cautioner could then at once sue the others for contribution on the occasion of every payment he made, however small such payment might be.[5] Accordingly, although a cautioner, as we have seen, has a right to insist upon relief from the principal debtor as soon as he has made payment of any part of the principal debt, or even, in certain circumstances, without making any payment whatever, he never has a title to recover any sum from co-cautioners, without having made an actual payment to the creditor of a sum in excess of his *pro ratâ* share of the whole debt ascertained to be due to the creditor by the principal debtor.[6] As soon, however, as a cautioner has paid

[1] *Cranstoun* v. *M'Dowal*, 1798, Mor. 2552; *ex parte Snowdon*, 1881, 17 Ch. Div. 44.

[2] *Kemp* v. *Finden*, 1844, 12 M. & W. 421.

[3] *Coles* v. *Peyton* [1893] 3 Ch. 238.

[4] Ersk. iii. 3. 74, quoting *Craigie*, 1710, M. 14649. The effects of the insolvency of the parties to a cautionary obligation are discussed *infra*, Chap. xxiv. In England, at law, the proportion recoverable by a paying surety seems to have been determined by the number of the original sureties, even where some were insolvent—per Bayley, J., in *Brown* v. *Lee*, 1827, 6 B. & C. 689, at 697; but in equity, which now prevails, the rule has always been, as in Scotland, that the solvent sureties are liable to contribute *inter se* to the whole amount—*Peter* v. *Rich*, 1830, 1 Ch. Rep. 19, at 34.

[5] *Vide* per Parke, B., in *Davies* v. *Humphreys*, 1840, 6 M. & W. 153.

[6] *Alston* v. *Denniston & Co.*, 1828, 7 S. 112.

his *pro ratâ* share, he has a claim for relief from co-cautioners in respect of each payment that he is subsequently forced to make.[1] It is competent also for a cautioner who is threatened with distress, and who has paid no more than his share of the debt, to raise an action concluding to have his co-cautioners ordained to pay their proportions.[2] Further, it would seem that a cautioner, on being sued by the creditor for the whole debt, or a part of it greater than his *pro ratâ* share, may at once have it declared that he is entitled to be indemnified by his co-sureties, and that they are liable to him for any sum for which he may be ordained to pay in excess of his *pro ratâ* share.[3] A cautioner's claim of relief against co-cautioners does not, it would appear, extend to any part of the expenses incurred by him in attempting to defend legal proceedings taken by the creditor against him to recover the debt, unless he was authorised by the co-cautioners to defend;[4] but it does extend to interest on the money paid by the cautioner in excess of his proportion, from the date of such payment.[5] Where, however, sureties were liable for a debt "with interest at 5 per cent," a surety who paid the interest due for one year was found not entitled to relief from a co-surety in respect of such payment, the principal debt remaining unpaid.[6] A surety who demands payment of a specific

[1] *Davies* v. *Humphreys*, 1840, 6 M. & W. 153.

[2] *Low* v. *Farquharson*, 1831, 9 S. 411. See remarks of James, L.J., in *ex parte Snowdon*, 1881, 17 Ch. Div. 44.

[3] Per James, L.J., in *ex parte Snowdon*, *supra*. See per Lord Eldon in *Craythorne* v. *Swinburne*, 1807, 14 Ves. 160; *MacDonald* v. *Whitfield*, 1883, 8 App. Cas. 733. *Note.*—In England the surety originally sued by the creditor may avoid the circuitous procedure of bringing a separate action against his co-sureties for contribution, by securing that the co-sureties shall be brought into the original action as parties; and so complete justice is done by one hearing, and one judgment, giving effect to the rights of all parties, *i.e.* decree is given to the creditor against the surety originally sued, and to the latter against his co-sureties for their several proportions of the debt—*Witham* v. *Vane*, 1880, 49 L. J. Ch. 242; see Byles on *Bills*, 15th ed., 407 and 408. A surety, against whom a judgment has been given, or a claim proved, for the full amount of the principal debt, can, before he has paid anything, proceed against his co-sureties and the creditor, and obtain an order that the co-sureties pay their proportions to the creditor, and that the creditor shall not enforce his judgment against him for the full amount. Where the creditor is not made a party to such proceedings, an order is simply made that the co-sureties indemnify the surety, against whom judgment has passed, when he has paid his proportion, from all further liability—*Wolmershausen* v. *Gullick* [1893], 2 Ch. 514; *English and Scottish Co.* v. *Flatau*, 1888, 36 W. R. 238; see also *Johnstone* v. *Salvage Association*, 1887, 19 Q. B. D. 458, at 460.

[4] *Knight* v. *Hughes*, 1828, 1 Mood. & Walk. 247.

[5] *Ex parte Bishop*, 1880, 15 Ch. Div. 401.

[6] *Lever* v. *Pearce*, 1888, W. N. 105. Cp. *in re Macdonald*, 1888, W. N. 130.

sum, by way of contribution from a co-surety, must be prepared to give particulars of the items making up the sum.[1] It is well settled that the right to contribution exists whether the surety knew, or did not know, at the time he became surety, that others were co-sureties along with him.[2] A surety, however, who voluntarily makes a payment—as, *e.g.*, of a fee to an arbiter—which he was not under a legal obligation to pay, though he may have been under a moral obligation to do so, cannot claim contribution from a co-surety in respect of that payment;[3] but, of course, under no circumstances can a payment made by a surety, on the default of the principal debtor, towards the extinction of the principal debt, be considered a payment made voluntarily, and under no legal obligation.[4]

Application of the principle in obligations on bills or notes.

The principle of mutual relief applies equally when the obligation is constituted by a bill or note. When the cautionary obligation is constituted by a note, the rights of parties are exactly as in any other cautionary obligation with joint and several liability, *i.e.* parties who are cautioners have a right of total relief against the principal, and a cautioner-maker, who has paid more than his share, is entitled to compel his co-cautioners to contribute in equal proportions. So any one of a number of persons who successively indorse a bill to accommodate a third person—though *primâ facie* in the position of principal and cautioner to each other according to the order in which their names stand on the bill—may prove that, as between themselves, they are co-cautioners; and if this is proved, their respective rights and liabilities are exactly those of any other co-cautioners, irrespective of the position of their names on the bill.[5] Similarly, where a bill was drawn by one person and indorsed by another for the accommodation of the acceptor, and the drawer had to pay the bill, it was held that he could show that the indorser was a co-surety with him, and so was liable in contribution, though he could not sue him on the bill.[6] Further, parole evidence is competent in Scotland, as in England, to show the true relation of the parties to a bill or note among themselves.[7]

[1] *Blackie* v. *Osmaston*, 1884, 28 Ch. Div. 119.

[2] *Craythorne* v. *Swinburne*, 1807, 14 Ves. 160, at 163 and 165; *Whiting* v. *Burke*, 1871, L. R. 6 Ch. 342; L. R. 10 Eq. 539.

[3] *Henderson* v. *Paul*, 1867, 5 M. 628. In this case it was held that there was an implied agreement that the arbiter should be paid. Cf. *Edinburgh Light Co.* v. *Clyne's Trs.*, 1835, 13 S. 414, 2 S. & M'L. 243; *Drummond* v. *Leslie*, 1835, 13 S. 584.

[4] *Pitt* v. *Purssord*, 1841, 8 M. & W. 538.

[5] *MacDonald* v. *Whitfield*, 1883, 8 App. Cas. 733; *Chalmers* v. *Taylor*, 1832, 11 S. 53.

[6] *Reynolds* v. *Wheeler*, 1861, 30 L. J. C. P. 350.

[7] 45 & 46 Vict. c. 61, s. 100; *National Bank of Australasia* v. *Turnbull & Co.*,

Right to mutual relief exists *de jure*.

The right to mutual relief arises *de jure*, without any assignation, and independently of any clause of mutual relief in the obligation.[1] The principle, laid down in the leading English case, *Deering* v. *Lord Winchelsea*,[2] that the doctrine of contribution among co-sureties "is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it," has been expressly adopted by the House of Lords as being equally applicable to Scotland.[3] In *Stirling* v. *Forrester*,[4] where a bank took as security four promissory notes, for £2000 each, indorsed by four sureties, it was contended that the right to contribution among sureties was founded upon a supposed contract between them, and that, as the sureties in this transaction had contracted by different instruments, and had incurred their respective obligations without communication with one another, the doctrine of contribution did not apply. The House of Lords expressly rejected this view, holding that, as the doctrine of contribution depended on equity and not on contract, the four promissory notes were to be considered as one transaction of suretyship.[5] The rule is, that the principle of contribution among co-sureties is equally applicable whether cautioners are bound in the same or in different instruments, and whether those bound in one instrument knew, or did not know, of the other instruments, by which the other cautioners were bound, provided all the instruments are as a matter of fact primary concurrent securities for the same debt.[6] The criterion which determines whether or not

1891, 18 R. 629; see per Lords Pres. and Adam. This right of contribution is not peculiar to cautioners; it exists in the case of all joint and several co-obligants.

[1] Stair, i. 8. 9; *Carswell* v. *Irvin*, 1850, 12 D. 462; Ersk. iii. 3. 68; *Smiton* v. *Miller*, 1792, M. 2138; see also per Lord M'Laren in *Morton's Trs.* v. *Robertson's Jud. Fac.*, 1892, 20 R. 78.

[2] 1800, 2 B. & P. 270, 1 White & Tudor, Lead. Cas., 5th ed., p. 106; also *in re Arcedeckne*, 1883, 24 Ch. Div. 709.

[3] *Stirling* v. *Forrester*, 1825, 3 Bligh, 575, per Lord Redesdale, at 590 and 596.

[4] *Supra.*

[5] The fundamental principle that the right and duty of contribution is not in any way based on contract, is shown by its application to cases where there is no contract. Thus, as between co-trustees, the right of mutual contribution among them for losses arising from a breach of trust is (in the absence of fraud) fully recognised. So a claim for damages against joint delinquents, at least when it is liquidated by a joint and several decree against the delinquents, is simply a civil debt, and the result is that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro rata*, or, in other words, for an equal share with the rest—see per Lord Watson in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, 1894, 21 R. (H. L.) 39.

[6] *M'Phersons* v. *Haggarts*, 1881, 9 R. 306; *Reynolds* v. *Wheeler*, 1861, 30

parties are co-sureties for the purpose of contribution is simply whether the same default of the principal debtor makes them all responsible for the debt.[1]

Where the obligations of the cautioners are entered into at different periods.

At one time there was some doubt whether this principle held good in the case of obligations undertaken, not only in different instruments, but at different periods. Erskine expresses the opinion that where new cautioners become liable in a new instrument for a debt, previously secured by a bond of caution or guarantee, the cautioners in the previously constituted bond will be regarded as principals, *quoad* the cautioners in the later bond, and, as such, will be held liable to the latter in total relief.[2] This, however, has been overruled; and where a new or additional cautioner is subsequently interponed, and becomes bound in a separate deed, as in a bond of corroboration, he is presumed, in the absence of proof to the contrary, to have intervened solely on account of the principal debtor, and consequently is entitled only to a proportional relief against the previous cautioners, precisely as if he had become bound along with them in the original obligation.[3] In *Miller* v. *Smiton*,[4] Miller was principal debtor, along with four cautioners, in a bond of cash credit. On the death of one of the cautioners, the bank desired another cautioner in his place, and a bond of corroboration was granted by the principal debtor and Smiton. On the bankruptcy of the principal debtor, Smiton sued the cautioners in the original bond for total relief; but it was held that, since he became bound, not for the cautioners in the original bond, but for the principal debtor, he was only entitled to relief *pro ratâ*. Again, in *Lennox* v. *Campbell*,[5] on the death of one of the cautioners in a cash-credit bond, a new cautioner granted a bond of corroboration to the bank, to which the principal debtor was not a party. It was urged on behalf of the new cautioner, that the fact of the principal debtor not being a party to the bond of corroboration distinguished the case from *Miller* v. *Smiton*, and prevented the original cautioners having a claim for contribution against him; but the Court refused to recognise such a distinction, and held the new cautioner liable in *pro ratâ* contribution. Since

L. J. C. P. 350; *Whiting* v. *Burke*, 1871, L. R. 6 Ch. App. 342; *M'Donald* v. *Whitfield*, 1883, 8 App. Cas. 733.

[1] See per Alderson, B., in *Pendlebury* v. *Walker*, 1841, 4 Y. & C. (Ex.) 441; approved by Fry, J., in *Steel* v. *Dixon*, 1881, 17 Ch. Div. 830, and per Pearson, J., *in re Arcedeckne*, 1883, 24 Ch. Div. 709.

[2] Ersk. iii. 3. 69.

[3] *Ker* v. *Gordon*, 1685, M. 14641; *Smiton* v. *Miller*, 1792, M. 2138; *Lennox* v. *Campbell*, 18 May 1815, F. C.; *Walker* v. *Inglis*, 1827, 5 S. 726, affd. 1830, 4 W. & S. 40; *Thorburn* v. *Howie*, 1863, 1 M. 1169.

[4] 1792, M. 2138.

[5] 18 May 1815, F. C.

these decisions, it has been quite settled that where new cautioners have intervened, their obligation is *in dubio* presumed to be a primary concurrent security with, and not merely a subsidiary security to, the former one. To enable the new cautioners to claim total relief against the cautioners formerly bound, they must be able to rebut this presumption by proof that they intervened on behalf, and at the request, of the former cautioners, and not for the principal debtor.[1]

If the later guarantee leaves it in doubt whether the new guarantor intervened for the original principal debtor, or only for the cautioner in the original bond, and if there is no extraneous written evidence of what the real contract between the parties was, it is competent to inquire into the circumstances under which the subsequent guarantor undertook his engagement, in order to get at his real intention.[2] If, for example, the occasion of the subsequent obligation was that the preceding obligants were being pressed for payment, and the subsequent obligant, at their request, interposed to relieve them, this would rebut the presumption that they were all co-cautioners, and show that, with regard to the subsequent obligant, the preceding obligants were principal debtors.[3] Thus in *Inglis* v. *Walker*,[4] two cautioners, A. and B., were being pressed for payment by the creditor, and, at the request of both of them, a third party, C., interposed as cautioner. The arrangement made was that A. and B. should each grant a bill for one-half of the debt to the creditor, each indorsing the bill of the other, and C. also putting his name to both bills. A. retired his bill; but C. was compelled to pay B.'s bill, and he was found entitled to total relief against A. So, where the terms of the later instrument are ambiguous, parole evidence of the circumstances is competent to rebut the legal presumption and show the intention of the parties, so as to settle questions of relief *inter se*. Mere verbal communings or statements of the parties would not, indeed, avail for this purpose; but the Court would not exclude proof by oral testimony of relevant facts and circumstances, tending to show what was the actual contract between the parties, *i.e.* whether it was for the principal debtor or for the cautioners in the prior bond that the new guarantor intervened.[5] On the

[1] Bell, *Com.* i. 370; Bell, *Prin.* S. 272; cf. the English case, *Turner* v. *Davies*, 1796, 2 Esp. 478.

[2] *Craythorne* v. *Swinburne*, 1807, 14 Ves. 160, 3 Ross's L. C. (Commercial) 33, at 40.

[3] See opinion of Lord Justice-Clerk Macqueen in *Smiton* v. *Miller*, 1792, 3 Ross's L. C. (Commercial), at p. 44.

[4] 1827, 5 S. 726; affd. 1830, 4 W. & S. 40.

[5] See remarks by Lord Deas in *Thorburn* v. *Howie*, 1863, 1 M. 1169;

other hand, if there is no ambiguity on the face of the document, — as, for example, where the additional cautioner is bound in the same terms, to the same creditor, and for the same debt of the same principal debtor, for which the original cautioners were bound, — it is incompetent, by leading parole evidence, to alter or qualify the written obligations of the parties, in virtue of which they are all co-cautioners in the same obligation.[1]

Where the amount, for which each is liable, is limited.

The principle of contribution applies where cautioners, by one or different deeds, bind themselves for the same debt, the liability of each being limited to a different amount.[2] In such a case, all must contribute proportionally to the amounts for which they have respectively made themselves liable.[3] The principle is that the ultimate burden of the debt, whatever it may be, must be borne by the sureties in proportion to the shares of the debt for which they have respectively made themselves responsible.[4] If, for example, there are four sureties for a debt of £150, A. and B. being each bound for £50, and C. and D. being each bound for £25, and the loss ultimately falling on the sureties is £48, the burden is proportionably distributed among the sureties, so that A. and B. pay £16 each, and C. and D. £8 each; and if any one of them pay more, he will have a claim for contribution in respect of the excess.[5] Where, however, a number of cautioners are bound in different instruments, having no reference to each other, for distinct specified sums, there is no right of contribution between them, though the separate sums relate to the same debt. In such a case, the different obligations are conjunct

see also the opinion of the Lord Chancellor in *Cragthorne* v. *Swinburne*, 1807, 3 Ross's L. C. (Commercial) 33, at pp. 40, 41.

[1] *M'Phersons* v. *Haggarts*, 1881, 9 R. 306. In this case the verbal agreement averred by the pursuers, the cautioners in the earlier bonds, was that the obligation of the subsequent cautioner released them altogether from their liability.

[2] See Brodie's *Supp. to Stair*, p. 943; *Lawrie* v. *Stewart*, 1823, 2 S. 368,—a case on the communication of securities,—throws doubt on this; but the decision there, which was pronounced by a bare majority of the judges, is doubted by Brodie, *Supp.* 943; Menzies, *Convey.* 221; and Bell, *Com.* i. 367, and is contrary to the principle of the law of cautionry, whereby relief is based on equity, and not on contract.

[3] Per Alderson, B., in *Pendlebury* v. *Walker*, 1841, 4 Y. & C. 424, at 441; see also *Arcedeckne* v. *Howard*, 1875, 45 L. J. Ch. 622; see illustration of the mode of calculating the contribution in such a case, Brodie's *Supp.* 943.

[4] Per Fry, J., in *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825; *Whiting* v. *Burke*, 1871, L. R. 6 Ch. App. 342; *Coles* v. *Peyton* [1893], 3 Ch. 238.

[5] The illustration is taken from *Ellesmere Brewery Co.* v. *Cooper* [1896] 1 Q. B. 75.

neither *in re* nor *in verbis*; each is a separate and distinct transaction.[1]

Effect of a cautioner obtaining a formal assignation from the creditor.

The right of mutual relief exists apart from any assignation, and, accordingly, a cautioner who makes payment requires no assignation from the creditor to enable him to sue his co-cautioners for their share of the debt.[2] At the same time, if a cautioner, on paying the debt, demands an assignation, the creditor is bound to grant it.[3] Moreover, it is in many cases an advantage to take such an assignation. For a cautioner who has paid the debt cannot, without a formal assignation, enforce his claim of relief against his co-cautioners by any other means than by bringing an action of relief; whereas, by getting an assignation of the bond, he may at once charge his co-cautioners upon the bond for relief.[4] The question here arises whether a cautioner, who has paid the debt and got from the creditor an assignation of the debt and the bond, is entitled to decree against his co-cautioners, jointly and severally, for the whole sum in the bond, under deduction of his own *pro ratâ* share; or whether he is entitled only to decree against each for his own individual share, as would be the case if he did not take a formal assignation from the creditor.[5] On the one hand, it is laid down by Erskine that "an obligant, who upon payment gets a conveyance of the debt from the creditor, is thereby in his right entitled to sue any one of the co-obligants for the whole, leaving to that one his action of relief against the others, deducting, nevertheless, his own share, and those of other co-obligants who are become notoriously insolvent."[6] Further, if the terms of the instrument of assignation are to be taken as the measure of the assignee's right, the effect and extent of the assignation would be such as Erskine describes. On the other hand, it seems inequitable that a cautioner, by taking an assignation, should acquire a more extensive right of relief than he has apart from the assignation; and, at common law, apart from an assignation, he is entitled only to proportional relief from his co-cautioners.[7] Further, the doctrine that a cautioner who has paid and taken an assignation can bring an action *in solidum* against one of his co-obligants, would lead to

[1] *Morgan* v. *Smart*, 1872, 10 M. 610; *Coope* v. *Twyman*, 1823, 1 T. & R. 426; *Pendlebury.* v. *Walker*, 1841, 4 Y. & C. 424.

[2] Bell, *Prin.*, s. 62; *Finlayson* v. *Smith*, 1827, 6 S. 264; cf. *Graham* v. *Tait*, 1885, 12 R. 588—case of assignation.

[3] *Gilmour* v. *Finnie*, 1832, 11 S. 193.

[4] See per Lord Fullerton in *Erskine* v. *Cormack*, 1842, 4 D. 1478, at 1480.

[5] *Vide supra*, p. 810.

[6] Ersk. *Inst.* iii. 3. 74.

[7] Stair, i. 8. 9; Bell, *Com.* i. 365 *et seq.*

a multiplication of circuitous actions; for the co-obligant who had been compelled to pay more than his share would be entitled, upon the same principle, to demand an assignation for his relief, and upon that he would be in the same position as the co-obligant who had sued him, and would be entitled to recover from him the excess which he had overpaid.[1] The only Scotch authority directly in point is *Anderson* v. *Dayton*,[2] an Outer House case, in which Lord Kinnear, for the reasons above stated, refused to accept the doctrine of Erskine, and held that a cautioner who had paid the debt and got an assignation had not a more extensive right against his co-cautioners than he would have had at common law; in other words, that he was entitled only to decree against each for his own individual share.[3] In a recent English case,[4] however, a contrary view was taken, it being held, in accordance with the doctrine of Erskine,[5] that a surety who pays the debt and obtains an assignation from the creditor has, as assignee of the creditor, exactly the same remedies against the other sureties as the creditor had.

Communication of benefits.

Cautioners, in addition to being entitled to mutual relief for payments made in excess of their *pro ratâ* shares, have a right to benefit by any security, ease, or relief which may have been obtained by any of their number from the person for whom they intervened.[6] It is equitable, seeing that there is an equality of the burden, that there shall be also an equality of the benefit. Since all the cautioners are equally entitled to have the debt paid out of the debtor's estate, it would clearly be inequitable to allow one cautioner to lessen the common security by appropriating any part of the debtor's property to his own separate relief. Accordingly, each cautioner must bring into hotchpot every security which he has received from the principal debtor in respect of the cautionry; and if he has received anything by way of abatement or otherwise, which goes to diminish the total amount of the burden, he is bound, as between himself and his co-cautioners, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the co-cautioners have to bear, so that that ultimate burden may be distributed between them, equally or proportionally, as the case may require.[7]

[1] Pothier, *Oblig.* s. 282.

[2] 1884, 21 S. L. R. 787.

[3] Cp. *Ledingham* v. *Mackenzie*, 1824, 3 S. 113 (N. E. 74).

[4] *In re Parker, Morgan* v. *Hill* [1894], 3 Ch. 400.

[5] Ersk. iii. 3. 74.

[6] Ersk. iii. 3. 70; Bell, *Com.* i. 367; *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825.

[7] *Milligan* v. *Glen*, 20 May 1802, F. C.; see judgment of Fry, J., in *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825; and *Berridge* v. *Berridge*, 1890, 44 Ch. Div. 168.

The Scotch cases illustrating this doctrine are very numerous, and involve securities of the most diverse description, *e.g.* goods assigned and delivered by the principal debtor, with a power of sale;[1] a vendition of a ship, in security;[2] a heritable security;[3] an assignation of a debt.[4] Where a cautioner has obtained a security from the principal debtor, the other creditors of the principal debtor are not entitled to object to the benefit of the security being communicated to the other co-cautioners.[5] A security, obtained by one of several co-cautioners, is none the less liable for the mutual relief of all, although it does not become available till after the cautioners have paid up the debt. On becoming available, it must be applied towards refunding the co-cautioners the payments made by them on account of the principal debt. Thus in *Berridge* v. *Berridge*,[6] five sureties jointly and severally guaranteed to a banking company the balance owing to it by a customer on his current account, to the extent of £2000, and, afterwards, the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against liability in respect of his suretyship. On the bankruptcy of the principal debtor, the several sureties were compelled to pay the £2000—some of them paying as much as £500, others paying only £300. On the death of the principal debtor, and the consequent receipt of the policy money by the surety with whom the policy had been deposited, it was held that the security enured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied, after paying the secured surety the premiums paid by him, with interest thereon, and all costs, in repaying to the different sureties the amounts which they had respectively paid under the guarantee.[7] On the same principle, one of several cautioners is not entitled, after it is known that the principal debtor is in embarrassed circumstances, to apply indefinite payments by the principal debtor in extinction of a separate debt due to him by the principal debtor. The fact that the principal debtor is known to be embarrassed lays a duty on the

[1] *Humble* v. *Lyon*, 1792, Hume, 83.

[2] *Cowan* v. *Thom*, 1802, Hume, 85.

[3] *Nicol* v. *Doig*, 1807, 1 Bell, *Ill.* p. 199, note 12; and *Campbell* v. *Campbell*, 1775, M. 2132.

[4] *Ledingham* v. *Mackenzie*, 1824, 3 S. 113.

[5] *Fisher's Crs.* v. *Campbell*, 1778, Mor. 2134. Cp. *ex parte Read* [1897] 1 Q. B. 122, where a payment to a surety was held a fraudulent preference.

[6] 1890, 44 Ch. Div. 168.

[7] The mode of division of the policy money, as carried out in this case among the different sureties, who had paid different amounts, is instructive. It is given in the report, 44 Ch. Div., at p. 178.

cautioners to communicate everything each receives from the debtor to the extinction of the joint obligation.[1] Similarly, if one of several cautioners has compounded for the debt with the creditor, he can claim from his fellow-cautioners only a proportional share of the sum actually paid by him.[2] So where one of two sureties paid the debt of the principal out of monies of the latter which he had in his hands at the time, and which he was entitled to apply in paying the debt, it was held that he could recover nothing from his co-surety by way of contribution.[3]

Where a cautioner consents to become cautioner only upon the terms of having a special security.

It is immaterial whether a security, granted to a cautioner by the principal debtor, was given as the result of a contract between the debtor and the cautioner at the time the latter became cautioner, or whether it was given subsequently, or has arisen in some other way.[4] Although the favoured cautioner consented to become cautioner only upon the terms of having the security in question, his co-cautioners will not be deprived of their right to demand that they share with him any benefit he receives from it, if, when they entered into the contract of cautionry, they were ignorant of the agreement for the security.[5] In one case, indeed, a distinction was taken between a security obtained by a cautioner under a stipulation with the principal debtor, entered into at the time he became cautioner, as a condition of his undertaking the cautionary obligation, and a security acquired subsequently.[6] In the case referred to, a landlord, by missive of lease, became bound to pay his tenant for meliorations at the end of the lease, on condition that he was to be allowed to retain any sums due on that account until he was relieved of a cautionary obligation, which he, of the same date and as *pars ejusdem negotii*, came under for a cash-credit bond to a bank for the tenant. On the landlord being compelled to pay, as his share in this cautionary obligation, a sum equal to the amount due for meliorations, it was held that the condition on which he undertook the cautionary

[1] *Christie* v. *Reid*, 1826, 4 S. 368 (N., E. 372). As to whether a person who is cautioner for the same principal debtor in two separate bonds, with different co-obligants in each bond, is bound to apply money of the principal debtor, which comes into his hands and is available for paying the bonds, rateably between the bonds, see *Stenhouse* v. *Tod*, 1890, 27 S. L. R. 261.

[2] *Brodie* v. *Keith*, 1672, M. 3393. As to such compromise, see *White* v. *Robertson*, 1864, 2 M. 553.

[3] *Goepel* v. *Swinden*, 1844, 1 D. & L. 888, 13 L. J. Q. B. 113.

[4] Per Fry, J., in *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825, App. 382.

[5] *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825; *Berridge* v. *Berridge*, L. R. 44 Ch. Div. 168; *Sheffield Banking Co.* v. *Clayton* [1892], 1 Ch. 621.

[6] *Murray* v. *Miller*, 1832, 10 S. 706, reported *sub nom. Murray's Tr.* v. *Ducat's Tr.*, 1832, 7 Fac. Dec. 547.

obligation was effectual to entitle him to retain for his own relief the amount due for meliorations, and that he was not bound to communicate any part of it to a co-cautioner in the bond, who had paid an equal sum. The reports do not make it clear whether or not the other cautioner knew of this arrangement. If the other cautioner was ignorant of the special stipulation between the principal debtor and his co-cautioner, the decision is contrary to the principles which regulate the mutual relief of cautioners both in Scotland and England. On the other hand, if the other cautioner was, at the time of entering on the cautionary contract, aware of the special condition on which his co-cautioner had consented to become bound, so that he might be taken to have acquiesced in it,[1] the case is simply an illustration of the rule that a cautioner, by acquiescing in a special contract, may deprive himself of the rights which the law confers on him.

Cautioners may contract themselves out of their right of mutual relief.

A cautioner may, by express contract, take himself either wholly or partially out of the operation of the doctrine of mutual relief or contribution in any of its applications. For example, where, in an English case, three parties became sureties, and agreed among themselves that, if the principal debtor failed to pay the debt, they should pay only their respective aliquot parts; and afterwards one of them became insolvent, and one of the remaining solvent sureties paid the whole debt, it was held that he was entitled to recover only one-third from the other solvent surety.[2] Similarly, the obligation of a surety to communicate the benefit of a security which he holds from the principal debtor depends simply on an equity, to which the Courts, in the absence of agreement to the contrary, will give effect; and the rule will not be applied so as to defeat a special agreement.[3] Accordingly, where one of the cautioners in a cash-credit bond agreed to become cautioner only on condition of having a certain heritable security conveyed to him by the principal debtor, of which security the favoured cautioner was to have the sole benefit, so far as requisite to

[1] Bell, *Com.* i. 367. *Note.* — The decisions in *Steel* v. *Dixon* (1881, 17 Ch. Div. 825) and the other English cases above referred to, do not in any way throw doubt on the doctrine that knowledge on the part of the other sureties of the special agreement between the debtor and the favoured surety will bar their claim to share in the proceeds of the special security so constituted. In *Steel* v. *Dixon*, for example, it was expressly admitted that the co-sureties, when they entered into their contract, were ignorant of the agreement as to the special security.

[2] *Swain* v. *Wall*, 17 Car. 1, 1 Ch. Rep. 80.

[3] Per Lord Rutherfurd Clark in *Hamilton* v. *Freeth*, 1889, 16 R. 1022, at 1027.

cover his liability, and it was proved that the co-cautioners, when they entered into the cautionary obligation, knew of, and consented to, the arrangement, the Court found that the favoured cautioner was not bound to communicate to his co-cautioners the benefit of the security.[1]

While, then, on the one hand, the mere fact that a security has been given by the principal debtor to one of the cautioners, in virtue of a special agreement made at the time when the cautionary obligation was entered into, does not, though it formed a condition of the favoured cautioner's interposition, prevent the security from being available for the relief of all the cautioners alike; on the other hand, when it is proved, either that the cautioners, by contract among themselves, agreed that the cautioner in question should have the sole benefit of the security,[1] or that the other cautioners at the time of their contract were cognisant of an arrangement between the principal debtor and their co-cautioner to this effect, and so impliedly acquiesced in it,[2] they will be held to have contracted themselves out of their right to have the security in question thrown into hotchpot. A separate agreement of this sort, in order to be effectual to deprive cautioners of their common-law right to contribution, must be clear and express; but it is capable, where it has been acted on and does not contradict the written document, of being proved by parole evidence.[3]

Co-cautioner's right to share in securities extends to a security previously held by the creditor, and assigned by the creditor to a cautioner who has made payment.

A cautioner's claim to benefit by securities is not confined to securities granted by the principal debtor to a co-cautioner: it extends to securities which were previously held by the creditor for the debt. The cautioner who pays the principal debt is entitled to all securities held by the creditor, and must communicate the benefit of these securities to his co-cautioners. This he does by deducting the proceeds of the securities from the total amount paid, and claiming contribution only for the sum by which the proceeds of the securities in question fall short of the sum paid. Thus where several persons joined in a promissory note as sureties for a debtor, and the creditor, for his further security, took out insurance policies on the life of the debtor, it was held, on one of the sureties paying the debt and obtaining from the creditor an assignation of the policies, that this surety could enforce a claim for contribution against a co-surety only on his bringing into account, as a set-off, the monies received by him on the policies.[4]

[1] *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022.

[2] Bell, *Com.* i. 367.

[3] *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022.

[4] *In re Arcedeckne*, 1883, 24 Ch. Div. 709.

A creditor, however, who holds securities for the principal debt, may, on the bankruptcy of the principal debtor, instead of taking payment from any of the sureties and assigning to them the securities he holds, surrender the securities to the trustee on the bankrupt estate of the principal debtor, and prove on that estate for the whole debt.[1]

Cases in which the benefit of securities need not be communicated.

As we have seen, cautioners bound in different instruments, having no reference to each other, for distinct specified sums, have no right of mutual relief, although the different sums happen to make up one debt; and consequently, they have no right to demand communication of securities and eases.[2] The decision in *Laurie* v. *Stewart*,[3] which carries this further, and deprives cautioners bound in the same deed, but with the amount of their respective liabilities limited to specified sums, of their right to share in securities, is more than doubtful, being adversely criticised by eminent Scotch authorities, and opposed to the English cases on the subject.[4] The correct principle is that in such a case the securities shall be shared among the cautioners, not equally, but proportionally to the amount for which they are respectively liable.[5]

A security which has been obtained by a surety, not from the principal debtor, but from a third party, need not be communicated to fellow-sureties; for clearly the estate of the principal debtor is in no way lessened, and consequently the burden of the debt on the other sureties is in no way increased, by its having been granted.[6]

Where a cautioner holds a security from the principal debtor, covering other debts as well as his prospective liability in a cautionary obligation, he is not bound to prejudice himself by renouncing the benefit of the security in so far as it is applicable to those other debts, but is entitled to apply the proceeds of the security first in satisfaction of these other debts.[7] Any sum, however, that remains from the proceeds of the security, after paying the other debts, must be rateably communicated to fellow-cautioners, so that the holder of the security must, equally with his co-cautioners, pay from his own pocket any balance of the principal

[1] *Rainbow* v. *Juggins*, 1880, 5 Q. B. D. 138, 422.

[2] *Morgan* v. *Smart*, 1872, 10 M. 610.

[3] 1823, 2 S. 368 (N. E. 327).

[4] See *supra*, p. 817.

[5] *Vide supra*, note 2, p. 817. See per Alderson, B., in *Pendlebury* v. *Walker*, 1841, 4 Y. & C. 424, at 441, and per Lord Russell, C.J., in *Ellesmere Brewery* v. *Cooper* [1896], 1 Q. B. 75.

[6] *Coventry* v. *Hutchison*, 1830, 8 S. 924.

[7] *Campbell* v. *Campbell*, 1775, M. 2132.

debt which the remaining proceeds of the security do not cover. Thus in *Milligan* v. *Glen*,[1] Milligan and Glen were co-cautioners in a joint and several bond for £300. Glen, who had, in addition to undertaking this cautionary obligation, advanced certain sums to the principal debtor, got from the latter a heritable security. On the failure of the debtor, Glen, having realised the security, paid £150 under the bond, and left Milligan to pay the balance still due. In defence to an action brought by Milligan for relief of one-half of the balance so paid, Glen urged that the whole money recovered by him from the security had, after paying the half of the bond, been applied in extinction of the other debts due to him by the principal debtor. Nevertheless Milligan was found entitled to relief to the extent of one-half what he had paid.

It has been suggested that if a co-cautioner refuse to do his part in suing the principal debtor, he may by this refusal deprive himself of any right to share in anything that may be recovered from the principal debtor in the action.[2] Again, a cautioner who has paid the debt, and so come into the creditor's place, may, by "giving time" to the principal debtor, or by relinquishing securities, liberate his co-cautioners from their liability, so that he cannot subsequently force them to pay their shares of the debt, for his relief.[3]

An agreement, entered into between the principal debtor and a cautioner at the time when the cautionary obligation was undertaken, that the latter shall have the sole benefit of the security, is effectual, if the other cautioners have impliedly or expressly assented.[4] If the other cautioners were aware of the arrangement in question at the time when they entered on their engagement, their knowledge, combined with silence, would probably be construed as acquiescence;[5] but, if knowledge on their part is not clearly proved, such an agreement between a principal debtor and cautioner would be ineffectual to deprive the other cautioners of their right to a share in the security.[6]

Determination of the number of cautioners in order to ascertain the amount of relief due.

The amount which a cautioner who has paid the whole debt, or a sum greater than his proportional share, may claim from a co-cautioner by way of relief, depends on the number of cautioners who

[1] 1802, 20 May 1802, F. C.

[2] See observations of Fry, J., in the argument in *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825.

[3] *Hume* v. *Youngson*, 1830, 8 S. 295.

[4] *Hamilton* v. *Freeth*, 1889, 16 R. 1022.

[5] Cf. *Murray* v. *Miller*, 1832, 10 S. 706; Bell, *Com.* i. 367. *Vide supra*, pp. 821, 822.

[6] *Steel* v. *Dixon*, 1881, 17 Ch. Div. 830, per Fry, J., at 832.

are solvent at the maturity of the obligation.[1] Sometimes, however, difficulties arise in determining the number of cautioners. Thus where the partners of a firm, in addition to signing the firm-name to a bond of caution or guarantee, add their own individual signatures, the question arises whether these individual signatures import an additional liability on the partners as individuals, or whether they merely import a confirmation of the firm's obligation. The question, in other words, is whether, when both the firm-name, A. & B., and the names of the individual partners in the firm, A. and B., are affixed to a guarantee, these signatures are to be reckoned as making three cautioners, the firm and the two partners, or only one, namely, the firm. The matter is one of construction in each case, regard being had to the language and nature of the guarantee, and the circumstances in which it was undertaken. Thus, on the one hand, in *Mellis* v. *Royal Bank*,[2] where a cash-credit bond had been granted, signed by M. & Co., and also by the individual partners of that firm, including A., the opinion was expressed that a discharge by the bank to M. & Co. would not have availed A., as he was bound to the bank as an individual, by having subscribed his name separately from the signature of the firm. On the other hand, in *Christie* v. *Reid*,[3] where a cash-credit bond was signed by A., and by a firm, B. & C., as also by B. and C., the individual partners of the firm, it was held, in a question of relief, that B. and C. had signed only in corroboration of the firm, B. & C., and that the relief must be settled on the principle of there being only two cautioners, viz. A. and the firm, B. & C. Where, however, the bond, in addition to being signed by the firm-name and by the individual partners, bears that the parties undertake the obligation "as partners and individuals," there is an end of doubt; for being all bound to the creditor conjunctly and severally, the relief must be regulated on the same principle, and consequently the signatures of the individual partners of the firm import a liability on them as individuals, superadded to, and distinct from, the liability of the firm.[4]

If the creditor do anything to interfere with, or prevent effect being given to, the mutual claims of cautioners to relief or to the benefit of securities, he liberates the cautioners from their engagement.[5]

[1] See *supra*, p. 811. *Note.*—The rules regulating relief between solvent and insolvent cautioners are treated under bankruptcy of co-cautioners, *infra*, p. 835 *et seq.*

[2] 22 June 1815, Fac. Coll.

[3] 1826, 4 S. 368.

[4] *M'Bride* v. *Clark*, 1865, 4 M. 73; *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022.

[5] As to this, *vide infra*, p. 910 *et seq*, and p. 916 *et seq.*

CHAPTER XXIV

CAUTIONERS' RIGHTS IN BANKRUPTCY

Where cautioner is insolvent.
Where principal debtor is insolvent.
Where debtor and some cautioners are insolvent.
Where debtor and all the cautioners are insolvent.

In discussing the claims of cautioners to total relief from the principal debtor, or to mutual relief *inter se*, we have hitherto dealt only incidentally with the mode in which these claims work out when one or more of the parties are bankrupt. It remains to consider in detail how the rights of parties to a cautionary obligation are affected by the rules regulating ranking in bankruptcy.

Bankruptcy of a cautioner, the principal debtor and other cautioners being solvent.

Where cautioners are bound *singuli in solidum* with the principal debtor, the creditor has it in his power to enforce payment of the whole debt from any one of the cautioners; and accordingly, if he choose to rank on the estate of a bankrupt cautioner, he may do so for the full amount of the principal debt.[1] Of course the estate of the bankrupt cautioner has total relief for what is paid from the solvent principal. In a recent English case, certain sureties guaranteed a debt of £6250 to a bank, and, after the obligation was undertaken, three of the sureties agreed with the bank that, in lieu of their personal liability to pay the entire sum guaranteed in case of default by the principal debtor, there should be substituted a deposit of £3000 in the bank, which

[1] Where a creditor held, in security of a debt of £300, a bill for £2000, signed by the principal debtor and four cautioners, the creditor was held entitled to rank on the estate of a bankrupt cautioner only for the £300 due by the principal debtor —*Jackson* v. *M'Iver*, 1875, 2 R. 882. But where a bill or note, signed by third parties, has been pledged by a debtor as a security for his debt, the parties to the bill or note are not cautioners, and the creditor is entitled to rank on the estate of any one of them for the full amount of the bill, even though the original debt has been reduced by part payments, subject only to his liability to account to his debtor, the pledgor —*Black* v. *Melrose*, 1840, 2 D. 706; see also per Lord Gifford in *Jackson* v. *M'Iver*, 1875, 2 R. 882.

should afford a complete security to the bank up to this amount. The £3000 was carried to a suspense account, and power was given to the bank, whenever it thought fit to do so, to appropriate the money to the payment of the principal debt *pro tanto*. It was held that this deposit did not, so long as it was not appropriated by the bank, operate as payment, and that therefore the bank was entitled to prove for the full amount of the debt against the estate of a bankrupt co-surety, who was not a party to the making of the deposit.[1]

Creditors' right to a contingent ranking.

If the bankruptcy of a cautioner occurs before the date at which the principal debt is exigible, the creditor is entitled to rank on the bankrupt estate of the cautioner as a contingent creditor for the whole debt, or for the cautioner's *pro ratâ* share of the debt, according as the cautionry is "improper" or "proper."[2] The refusal of the creditor to rank on a cautioner's sequestrated estate does not discharge the other cautioners.[3] If the creditor does not claim such a contingent ranking, it is probable that the co-cautioners of the insolvent could claim such a ranking.[4] The effect of the contingent ranking is that the creditor has a dividend on the bankrupt cautioner's estate set apart as a security to meet the liability that would fall on the cautioner if the principal debtor failed to meet his obligation at maturity.[5] If the obligation undertaken by the cautioners is that the principal debtor shall pay a definite sum at a specified time, there is no difficulty in calculating the amount of the creditor's contingent claim, although the time specified for the payment of the principal debt is still distant. In many cases, however, owing to the indefinite nature of the cautioner's liability, there is necessarily much difficulty in estimating the amount for which the creditor should be contingently ranked on the estate of a bankrupt cautioner. Where, for example, the cautioners have undertaken to pay the balance ultimately due on a course of dealing between the principals, or the loss that may result from the misconduct of an official, the condition, upon which the creditor's contingent claim depends, is uncertain, both in respect of it coming into existence at all, and in respect of the time at which it may come into existence; and further, the amount of the cautioner's liability, if it does emerge, is quite undetermined. In Scotland, con-

[1] *Commercial Bank of Australia* v. *Wilson* [1893], App. Cas. 181.
[2] Bell, *Com.* i. 368.
[3] Ivory's *Ersk.* ii. 682, Note 173.
[4] *Wolmershausen* v. *Gullick* [1893] 2 Ch. 514. Cf. *ex parte Stokes*, 1848, De G. 618.
[5] Bankruptcy Act, 1856, s. 53; see *Mitchell* v. *Scott*, 1881, 8 R. 875, at 879.

tingent claims of creditors on bankrupt estates are treated very generously, and a ranking is allowed in many cases, although the contingency is remote in time and the amount of the liability is very indefinite.[1] Where, however, it is quite uncertain whether there will ultimately be any liability at all, or what the amount of it will be, if it does occur,[2] it is in the interest of the creditor, instead of putting in a claim for a contingent ranking on the estate of a bankrupt cautioner, to demand a new solvent cautioner in place of him who has become bankrupt. If this demand is not complied with, the creditor may stop the dealing, or intimate the withdrawal of the credit, or cease to employ the official whose conduct is guaranteed, with the result that the cautioners' liability, if anything is owing at the time, becomes instantly exigible. If the creditor's demand for a new cautioner in place of the insolvent is complied with, the substitution is usually effected by means of a bond of corroboration, by which the original solvent obligants, with the new obligant, bind themselves, jointly and severally, for payment to the creditor. Where a new cautioner is taken bound, he should take care that the terms of his engagement make it clear whether he intervenes on behalf of the original cautioners, — in which case he will have total relief against them; or whether he incurs a primary concurrent obligation along with them for the principal debtor.[3] Further, it should be made clear whether the creditor takes the obligation of the new cautioner merely as additional to that of the old cautioner, *i.e.* in supplement of what may be recovered from the insolvent cautioner; or whether he takes the new obligation in lieu of that of the insolvent cautioner—in which case he will be taken to have abandoned his claim against the insolvent cautioner.[4]

Principal debtor insolvent, cautioners solvent.

On the bankruptcy of the principal debtor, the creditor may rank on the estate of the debtor, and claim from the cautioners the balance of the debt left unpaid by the dividends received from the bankrupt estate; or he may at once demand the whole debt from the solvent cautioners. If the creditor elect to rank for the debt on the bankrupt estate of the principal debtor, he is bound, in claiming on that estate, to deduct the produce or value

[1] See opinions in *Garden* v. *M'Iver*, 1860, 22 D. 1190; *Downs* v. *Gourlay*, 1886, 13 R. 1101; *Gordon* v. *M'Cubbin*, 1851, 13 D. 1154.

[2] As to contingencies which do not admit of being valued, see per Lord Wood in *Garden* v. *M'Iver*, 1860, 22 D. 1190, at 1194; see also *Robinson* v. *Oommanney*, 1882, 21 Ch. Div. 780; 1883, 23 Ch. Div. 285.

[3] *Vide supra*, p. 815 *et seq.*

[4] As to this, *vide infra*, p. 844; and as to the circumstances in which a discharge by the creditor of an insolvent cautioner will liberate the others, *vide infra*, p. 910 *et seq.*

of securities held by him from the principal debtor,[1] as well as any partial payments of the debt which he may have received, either from the principal debtor or from the cautioners, prior to the sequestration of the former.[2] But payments made by cautioners after the sequestration of the principal debtor need not be deducted by the creditor in claiming on that estate, as the date of sequestration is the period at which the amount of the claim is settled.[3] Even where the creditor had deducted from his claim payments made by a cautioner after the sequestration of the principal debtor, and had thus enabled the cautioner to be ranked for such payments, he was found entitled subsequently to demand from the cautioner the amount received by him in dividends.[4]

If creditor ranks on debtor's estate, the cautioners cannot also rank.

Where the creditor ranks on the estate of the principal debtor, the cautioners remain liable to him for any balance of the debt which remains unpaid; and, on paying the difference between the dividends received by the creditor and twenty shillings in the pound of the debt due, they cannot rank on the principal debtor's estate in relief of what they have paid.[5] To allow them so to rank would be to contravene the rule against the double ranking of the same debt.[6] The receipt by the creditor of a dividend on his claim is, so far as the bankrupt estate is concerned, payment of the debt for which the cautionary obligation was undertaken;[7] and to allow the cautioners to rank also for the balance, which they have had to pay to the creditor, would be to force the estate, to that extent, to pay the same debt twice over.[8] This rule, however, does not apply to cases where the bankrupt compounds with his creditors without being sequestrated or deprived of his estate by a trust deed, but only to cases where the effect of the bankruptcy is to divest the bankrupt of his estate.[9] Of course, also, any

[1] As to the surrender by the creditor of collateral securities for the debt to principal debtor's trustee, see *Rainbow* v. *Juggins*, 1880, 5 Q. B. D. 422.

[2] *Hamilton* v. *Cuthbertson*, 1841, 3 D. 494; *Oriental Commercial Bank*, 1868, L. R. 6 Eq. 582. *Note.*—The fact that a surety holds a security over the principal debtor's estate, so that he, on paying up the debt, could prove only for the balance, does not prevent the creditor, who holds no security, from proving for the whole debt due to him—*Midland Banking Co.* v. *Chambers*, 1869, L. R. 4 Ch. App. 398.

[3] *Robertson* v. *Bank of Scotland*, 1823, 2 S. 450; *Mein* v. *Sanders*, 1824, 2 S. 778; *Royal Bank* v. *Commercial Bank*, 1881, 8 R. 805, Lord President, at p. 817.

[4] *Houston's Exrs.* v. *Speirs' Trs.*, 1835, 13 S. 945.

[5] *Anderson* v. *M'Kinnon*, 1876, 3 R. 608.

[6] Bell, *Com.* i. 365, ii. 420.

[7] The bankrupt remains personally liable, until he is discharged—per Lord President in *M'Kinnon* v. *Monkhouse*, 1882, 9 R. 393.

[8] Bell, *Com.* ii. 424.

[9] *M'Kinnon* v. *Monkhouse*, 1882, 9 R. 393.

cautioner who has made a partial payment of the debt, prior to the sequestration of the principal debtor, is entitled to be ranked on the principal debtor's bankrupt estate in respect of such partial payment, the creditor ranking for the portion of the debt which remains unpaid.[1] Further, the rule that a cautioner for a bankrupt principal debtor will not be allowed to rank on the bankrupt's estate for his loss as a cautioner, when the creditor has already ranked on that estate for the full debt, does not prevent a cautioner, who holds securities from the principal debtor covering both the cautionary obligation and other debts due to him by the principal debtor, from applying the securities, in the first instance, to pay the balance left unpaid by the creditor's ranking on the debtor's estate, and from ranking on the debtor's estate for the other debts due to him, deducting from his claim, in respect of these debts, only the balance of the value of the securities remaining after relieving himself of his loss on the cautionary obligation.[2]

Cautioners, on paying the debt in full, stand in the creditor's place.

When cautioners have paid the principal debt in full,—whether they do so voluntarily, or yield to a demand from the creditor, who prefers to exercise his right of at once going against them rather than of ranking on the estate of the principal debtor,[3]—the cautioners are entitled to stand in the place of the creditor in every respect.[4] Thus they are entitled to the benefit of any securities held by the creditor from the principal debtor, and also to rank on the principal debtor's estate for the sums they have respectively paid from their own pockets in satisfaction of the principal debt. They may rank either in their own names by virtue of an assignation of the creditor's claim,[5] or in the name of the creditor.[6] If they have the benefit of securities held by the creditor they can rank on the debtor's estate only for the balance not covered by the securities. Where full payment by the cautioners is not made till after the creditor has been ranked for the debt and has received certain dividends from the bankrupt estate, the cautioners are entitled, on making payment, to treat the creditor as a trustee for them, *quoad* these dividends.[7] Further, if, after the creditor has drawn certain dividends from the principal's estate, the cautioners step in and pay the difference between what the creditor has drawn from the estate and the

[1] *Hamilton* v. *Cuthbertson*, 1841, 3 D. 494; *Thomson* v. *Latta*, 1863, 1 M. 913.

[2] *Jamieson* v. *Forrest*, 1875, 2 R. 701.

[3] *Supra*, p. 829.

[4] Bell, *Com.* ii. 416, 420.

[5] *Erskine* v. *Manderston*, 1780, M. 1386.

[6] Bell, *Com.* i. 365.

[7] *Ex parte Rushforth*, 1805, 10 Ves. 409.

whole amount due on the debt, they will be entitled to stand in the creditor's place and receive any future dividends.[1]

Limits to cautioners' right to come into creditor's place.

The whole debt, for which the cautioners are liable, must be paid before they can be placed in possession of the rights possessed by the creditor against the debtor—either his right to securities or his right to rank on the debtor's estate.[2] Till such full payment, the creditor remains in the full possession of every remedy competent to him, and is left unfettered as to the mode in which he shall pursue these remedies.[3] An arrangement dispensing with the actual payment of the debt, by the substitution of a new security in which the surety joined, and which, in fact, amounted to the creation of a new suretyship, has been held, in England, not to be full payment so as to enable the cautioner to stand in the creditor's place.[4] Further, there may be special circumstances which will prevent the cautioner, even if he pays the whole debt, from demanding an assignation of the entire right held by the creditor. Thus where two *pro indiviso* proprietors of a heritable estate, A. and B., were joint obligants in a bond over it for £500, which was recorded, while a back-letter granted by A. to B., showing that the latter was merely a cautioner for A., was not recorded, it was held, on A.'s bankruptcy, that, in a question with the holder of a postponed bond for £1000 granted by A. over his own share of the estate, the fact of B. being a mere cautioner for A. in the joint bond could not be taken into account. The holder of the postponed bond was entitled to rely on the record, which showed that the prior bond was over the estates of A. and B. jointly; and, that being so, the Court took the view that, even if B. paid the whole sum of £500, he would not be entitled to an assignation of the entire bond for £500, but could only demand an assignation of it to the extent of one-half.[5] Again, while a cautioner who pays the whole debt is in the ordinary case entitled, as standing in the creditor's place, to the same ranking on the principal debtor's estate as the creditor himself would have been entitled to, he cannot rank for a greater sum. On this principle, it has been held, in England, that if, subsequently to the principal debtor's bankruptcy, the cautioner pay the debt, with interest from the date of the principal's bankruptcy, he cannot rank for such subsequent

[1] *Re Bulmer, ex parte Johnson*, 1853, 3 De G. M. & G. 218.

[2] *Ewart* v. *Latta*, 1865, 3 M. (H. L.) 36.

[3] Per Lord Chancellor in *Ewart* v. *Latta*, 1865, 3 M. (H. L.) 36, at p. 41.

[4] *Ex parte Sergeant*, 1822, 1 G. & J. 183; see *ex parte Turquand, re Fothergill*, 1876, 3 Ch. Div. 445.

[5] *M'Millan* v. *Smyth*, 1879, 6 R. 601.

interest, because interest, for the purpose of ranking, stops at the date of the bankruptcy.[1] In a Scotch case, however, paying cautioners, in ranking for relief on the principal debtor's bankrupt estate, have been allowed to include interest accruing on the debt between the date of the debtor's sequestration and the date of payment.[2]

Where guarantee does not cover the whole principal debt, it depends on the intention of the parties whether cautioners can claim proportional relief from the principal debtor's bankrupt estate.

Where cautioners bind themselves for part only of a larger debt, or guarantee a person's credit to a certain amount only, and the creditor gives credit to a larger amount, it is a question of some difficulty whether, on the bankruptcy of the principal debtor, the creditor, after receiving payment from the cautioners of the amount for which the latter are liable, is entitled to rank on the debtor's estate for the whole debt originally due, and apply the dividends received to the extinction of that part of the debt not extinguished by the cautioner's payments; or whether the dividends received from the principal debtor's bankrupt estate must be applied rateably to the whole debt, so that the portion of them received in respect of the part of the debt already paid by the cautioners must be paid over to the latter by way of relief. In England, it would seem that, in the absence of evidence pointing to a different intention, the cautioners, as soon as they have paid to the creditor the portion of the whole debt guaranteed by them, are presumed to be entitled to receive the dividends payable in respect of that portion of the debt, in relief of the sum paid by them; and the creditor is not allowed to rank for the whole debt, and apply the dividends to the unguaranteed balance.[3] In *Ellis* v. *Emmanuel*,[4] it was laid down that a guarantee, limited in amount, for the floating balance on a current account between the creditor and the principal debtor is, if the limit is exceeded, *primâ facie* to be construed as a guarantee of part of the debt only — upon the ground that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety; but that where a surety gives a guarantee, limited in amount, for a debt already ascertained, which exceeds that limit, the guarantee will *primâ facie* be construed as a guarantee of the whole debt, with a limitation on the liability of the surety. In the former case, the surety, upon making payment to the extent of his liability, is entitled to a proportion of the dividends in the ratio of the amount guaranteed to the whole:

[1] *Ex parte Wilson*, 1811, 1 Rose, 137.

[2] *Paterson* v. *Lumsden*, 1846, 19 Scot. Jur. 144.

[3] *Thornton* v. *M'Kewan*, 1866, 1 H. & M. 525; *Gray* v. *Seckham*, 1872, L. R. 7 Ch. App. 680.

[4] 1876, 1 Ex. Div. 157 (C. A.).

in the latter case, his right to stand in the creditor's place, and claim dividends in respect of what he has paid, remains in abeyance until the creditor receives full payment of his whole debt.[1] In Scotland there is no universal rule applicable to such cases, so that, in every case, the exact terms of the guarantee rule the question.[2] If the intention is to guarantee the whole debt, with a limitation on the liability of the surety, the surety can recover nothing until the creditor receives full payment of the whole debt; if the intention, on the other hand, is to guarantee part of the debt only, the surety will pay his whole debt when he pays the part he has guaranteed, and, paying his whole debt, he is entitled to relief from the principal debtor's estate in respect of such payment. In all cases of this sort which have come before the Scotch Courts, the guarantees have contained expressions giving the creditor power to recover in full from the debtor's estate.[3] Thus in the most recent case,[4] a guarantee to a bank for the "due payment of all sums for which M. is, or may become, liable," while limiting the cautioner's liability to £15,000, contained provisions that the cautioner should have no right to an assignation of the guarantee so long as the principal debtor was in anywise indebted to the creditor, and that the guarantee was not to prejudice any other security or remedy which the creditor might have against the principal debtor. In view of these stipulations in the guarantee, the Court held that, on the principal debtor becoming bankrupt with a liability to the bank to the extent of £44,000, the cautioner was not entitled, on paying up the £15,000 for which he was liable, to rank on the bankrupt estate for that amount, but that the bank were entitled to rank for the entire amount of their debt, without deducting the £15,000 guaranteed by the cautioner.[5] In guarantees for officials, if the balance due on the principal's intromissions exceeds the limit of the cautioners' liability, the cautioners get nothing by way of dividends from the principal's estate, until the creditor has got full payment.[6]

[1] See per Lord Blackburn in *Ellis* v. *Emmanuel*, 1876, 1 Ex. Div. 157 (C. A.). In this case it was held that the surety had guaranteed the whole £7000, though his liability was limited to £1300, and therefore that he had no claim for dividends. *In re Sass, ex parte National Provincial Bank* [1896] 2 Q. B. 14.

[2] Per Lord President Inglis in *Harvie's Trs.* v. *Bank of Scotland*, 1885, 12 R. 1141.

[3] *Balfour* v. *Borthwick*, 1822, 1 Sh. App. 131; *Maxton* v. *M'Intosh Crs.*, 1777, M. *voce* Cautioner, App. 1; *Mein* v. *Sanders*, 1824, 2 S. 778.

[4] *Harvie's Trs.* v. *Bank of Scotland*, 1885, 12 R. 1141.

[5] Cf. *ex parte National Provincial Bank*, 1881, 17 Ch. Div. 98.

[6] *Borthwick* v. *Balfour*, 10 June, 1819, F. C., 1822, 1 Shaw's App. 131; Bell, *Com.* i. 384.

Where the principal debtor and some of the cautioners are insolvent, the other cautioners being solvent.

Where, at the maturity of the obligation, one or more of the cautioners are insolvent, as well as the principal debtor, the creditor has two methods open to him to enforce payment of his debt.[1] On the one hand, he may rank for the whole debt upon each of the insolvent estates, and demand from the solvent cautioners any balance remaining due after deducting all the dividends received from the various bankrupt estates.[2] The solvent cautioners must then share this loss between them, without further relief; for where the creditor has ranked, the cautioners cannot also rank on the estates of the bankrupts for the same debt.[3] On the other hand, the creditor may at once demand full payment of the debt from the solvent cautioners, leaving them to work out their relief, as best they may, from the bankrupt estates of the principal debtor and their insolvent co-cautioners. If the creditor enforces, or obtains by a voluntary act on their part, full payment from the solvent cautioners, the latter, while they may rank on the estate of the principal debtor for the whole sum which they have respectively paid, cannot, in virtue of their common law right to relief, rank upon the estate of any one of their insolvent co-cautioners for more than the excess beyond their *pro ratâ* share which they have had to pay owing to the insolvency of the insolvent obligants.[4] It is therefore to the advantage of the solvent cautioners that the creditor should rank on the insolvent estates, as in this way, his ranking being for the whole debt upon each estate, until he recovers 20s. in the pound, a larger sum in dividends is obtained; and, in practice, this is the usual arrangement.[5]

Where the creditor has ranked on the estates of each of the insolvent sureties for the whole debt, and subsequently receives payment in full from the solvent sureties, who thereupon take from the creditor an assignation of the whole debt and all the remedies for its recovery, the question arises whether the solvent sureties, as assignees of the creditor, are entitled to the benefit of the creditor's ranking on the estates of the insolvent sureties for the full amount of the debt. In a recent English case, where the principal debtor and one of the sureties were insolvent, and the creditor, after proving on the insolvent estates, received payment

[1] Bell, *Com.* i. 371. *Note.*—That the creditor shall have this choice has been long recognised. See report of the case of *Tillah's Crs.*, 1776, by Lord President Campbell, in *Keith* v. *Forbes*, 1794, 3 Pat. App., at p. 352.

[2] See opinion of Lord M'Laren in *Morton's Trs.* v. *Robertson's Jud. Fact.* 1892, 20 R. 72.

[3] *Supra*, p. 830.

[4] Bell, *Com.* i. 373; *Keith* v. *Forbes* (*Maxwell's Tr.*), 1792, M. 2136; revd. 1794, 3 Pat. 350.

[5] Bell, *Com.* i. 372.

In full, partly from the principal debtor's estate and partly from the solvent sureties, the Court of Appeal were unanimous in holding that the solvent sureties, as assignees of the creditor, were entitled to all the remedies which the creditor would have had for the recovery of the debt, and consequently were entitled to prove for the whole debt against the estate of the bankrupt co-surety, though of course they could only recover so much as would recoup them what they had paid beyond their *pro ratâ* share.[1] It seems doubtful whether, in Scotland, a cautioner would, as assignee of the creditor, be held entitled thus to receive a more extensive ranking for relief than he would have apart from the assignation.[2]

The loss by the insolvency of cautioners is borne by solvent cautioners equally.

Where the debt is at once paid up by solvent cautioners, their mutual relief is regulated so that the loss arising from the insolvency of co-cautioners is borne by the solvent cautioners equally. Thus if one solvent cautioner pays the whole debt, he is entitled to demand that the other solvent cautioners shall pay to him, by way of contribution, their *pro ratâ* share of the whole debt, and, in addition, their proportion of the shares of the insolvents.[3] He can, in short, claim contribution from his solvent co-cautioners, on the basis that nothing is to be got by way of relief from the insolvent co-obligants. To take a concrete instance: If there are four cautioners, and one of them is bankrupt, one of the solvent cautioners, on paying the creditor, may demand from each of the other two solvent cautioners one-third of the debt,—that is, one-quarter, being his *pro ratâ* share, together with one-twelfth, being one-third of the quarter forming the *pro ratâ* share of the insolvent co-cautioner.[4] In this way each of the solvent cautioners is made to suffer the loss equally, and each has a right to rank on the estates of the insolvent cautioners for the excess beyond his

[1] *In re Parker, Morgan* v. *Hill* [1894], 3 Ch. 400.

[2] *Anderson* v. *Dayton*, 1884, 21 S. L. R. 787; *Johnstone* v. *Inglis Tr.*, 1843, 5 D. 1396; but see Ersk. iii. 3. 74. *Vide supra*, p. 818 *et seq.*

[3] Bell, *Com.* i. 373; *Carswell* v. *Irvine*, 1850, 12 D. 462—a case in which one of three obligants, who had paid the bond, was found entitled to relief from the only other solvent obligant to the extent of one-half. This principle is given effect to in sec. 5 of the English Mercantile Law Amendment Act (19 & 20 Vict. c. 97).

[4] *Finlason* v. *Smith*, 1827, 6 S. 264. As a rule, in a question between two cautioners (although there may be more) the cautioner paying the debt is entitled instantly to demand from a solvent co-obligant relief to the extent of one-half the whole debt (Bell, *Com.* i. 373). This was the course followed in *Finlason* v. *Smith* (*supra*). It is, however, merely one step in the process of contribution, as clearly each of the two solvent cautioners who had paid his half could get relief from the third solvent cautioner, and so the contribution would finally work out as in the text.

own share which he has had to pay by reason of the insolvency of these obligants.[1] Where only one of the cautioners is insolvent, it is clear that the total rankings of the solvent cautioners, who have paid, upon the estate of the insolvent cautioner cannot amount to more than the sum which originally formed his due proportion of the debt.[2] Where more than one of the cautioners are insolvent, the question arises whether the solvent cautioners, on paying the debt, are entitled jointly to rank upon the estate of each of the insolvent cautioners for the whole amount which they have paid to the creditor in excess of the sum of their original *pro ratâ* shares of the debt; or whether the total ranking allowable on the estate of each of the insolvent cautioners is limited to his original *pro ratâ* share of the debt. Professor Bell takes the former view, and there is no reason to doubt the correctness of his doctrine. The principle is, that the solvent cautioner who pays the debt, or the solvent cautioners jointly where the debt has been paid by them equally, are entitled to rank on the estate of each insolvent cautioner for the amount which, on the principle already explained,[3] they could have sued him for by way of contribution if he had remained among the number of the solvent, instead of becoming one of the insolvent, cautioners, viz. his own share of the whole debt, together with his proportion of the share that should have been paid by the other insolvents. The only difference is that, owing to his insolvency, the right to sue is changed into a right to rank on his estate. In other words, the solvent cautioner or cautioners, on paying the debt, are ranked on the estate of each of the insolvent cautioners, on the footing that nothing is to be expected from any of the other insolvents, and that consequently these other insolvents may, for the purpose of contribution, be treated as if they were not obligants in the bond at all. As pointed out by Professor Bell, theoretical objections may be taken to this principle of ranking on the estates of the insolvent obligants; but the rule works out practically in a fairly equitable way.[4] Thus, to take a concrete illustration, where one

[1] In the case figured this would mean that each of the three solvent cautioners could claim on the estate of the insolvent for one-twelfth of the whole debt, *i.e.* ¼ (which they have paid) *minus* ¼ (which was their *pro ratâ* share).

[2] *Keith* (*Maxwell's Tr.*) v. *Heron*, 1792, M. 2136; revd. 1794, 3 Pat. 350.

[3] *Supra*, p. 836.

[4] In practice, the necessity for the application of the rule rarely arises, because, as already pointed out, it is advantageous in most cases for the parties that the creditor should rank for the whole debt on the estates of the several insolvents, and then call upon the solvent obligants to pay the balance.

cautioner is solvent and all the others insolvent, and where the whole debt has been paid by the solvent cautioner, the latter can be ranked for one-half of the whole debt on the estate of each of the insolvent obligants, however many in number these insolvents are, to the effect of drawing full relief for all that he has paid beyond his rateable proportion of the original debt. Again, if there are five cautioners, two of whom are solvent and three insolvent, the two solvent cautioners, on making payment of the whole debt, can rank jointly for one-third of the debt on the estate of each of their insolvent co-obligants.

The limits set to payments in relief by the estates of insolvent cautioners.

A cautioner never can, in name of contribution, actually recover more in dividends from the estates of insolvent co-obligants than the sum which he has paid in excess of his *pro ratâ* share; nor can the estate of an insolvent cautioner be compelled to pay more in dividends than he would, in the circumstances of the case, have been liable to be sued for, if he had remained solvent.[1] These form the limits respectively—the former, the limit of what a cautioner can receive by way of relief; the latter, the limit of what a cautioner can be forced to pay by way of relief. The bankrupt estate of an insolvent obligant is as much entitled to relief for what is paid beyond the limit as a solvent obligant is. Thus if the creditor claims at once for the whole debt on the estate of an insolvent obligant,—and this, as we have seen, is the course usually adopted,—whenever the sum paid to him in dividends by that estate exceeds the amount which would have been due in the particular case from the insolvent, if he had remained solvent, the estate is entitled to relief from the other cautioners to the extent of that excess. Thus, to take a simple case, if one of two cautioners is insolvent and the creditor ranks for the whole debt on his estate, receiving a dividend of 12s. 6d. in the pound, the bankrupt estate is entitled to relief from the solvent cautioner to the extent of 2s. 6d. per pound, being the excess above the half of the debt, which the bankrupt cautioner must have paid had he continued solvent. In estimating the right of relief, however, it is the sum actually paid in dividends, and not the sum for which a ranking is obtained, that is looked to. Thus the mere fact that the creditor has ranked for the whole debt upon the estate of the insolvent cautioner does not give that estate any right of relief, unless and until the dividends actually paid exceed in amount the sum for which the cautioner would have been liable had he remained solvent.[2] So, to take an illustration given by Professor

[1] See examples in Bell, *Com.* i. 373.

[2] *Cranston* v. *M'Dowal*, 1798, M. 2552.

Bell, if A., B., and C. are cautioners for a debt of £1000, and A. is solvent, while the others are insolvent, A., upon paying the debt, is, on the principles already explained, entitled to rank upon each of the bankrupt estates of his co-obligants for £500. Suppose the estate of B. pays 10s. in the pound, *i.e.* £250, and the estate of C. pays 15s. in the pound, *i.e.* £375, the estate of C. would not be entitled to any relief, because £375 is exactly the sum which, in the circumstances of the case, C. must have paid if he had remained solvent.[1]

Cases in which contribution cannot be enforced.

Contribution cannot be enforced if circumstances are proved in which it would be fraudulent to insist upon it.[2] Thus although, in the ordinary case, the assignee of a bond may rank on the estates of the obligants in exactly the same way as the original creditor could have done, yet, if the assignee is a mere man of straw, who has paid up the bond and secured the assignation with money supplied by one of the obligants, he will not be allowed to take any measures the effect of which would be to prevent the obligant, for whom he interposed, from bearing his proper share of the debt. In other words, it is incompetent for an obligant, by the device of securing an assignation of the debt to a third party, to alter the proper incidence of the burden of the debt.[3] If, indeed, a third party, out of his own funds, pays a bill to the holder, he is put in right of the bill, and can claim against the obligants on the bill exactly as the holder could have done. This he can do even if he so interposed on account of, or at the request of, any one of the parties to the bill, if his interposition were *bonâ fide* and above-board. The case is different, however, if the third party who pays the bill does so expressly for the honour of one particular party to the bill, or if it is shown that he paid it with funds supplied by, or in reliance upon the credit of, a particular obligant, and with a view specially to the obligation of that obligant; in this case the third party paying is identified with that obligant, and comes only into the right which would have been competent to that obligant if he had retired the bill, and not into the place and rights of the holder.[4]

Principal debtor and all the cautioners insolvent.

Where the principal debtor and all the cautioners are insolvent, the creditor is entitled, where all are bound as co-obligants, to rank on the estate of each obligant for the full amount of the debt, to the effect of obtaining thereby full payment. Each of the obligants must submit to a ranking for the

[1] Bell, *Com.* i. 373.

[2] See remarks of Kay, J., in *Mackreth* v. *Walmsley*, 1884, 51 L. T. 19.

[3] Bell, *Com.* ii. 416; *Gilmour* v. *Finnie*, 1832, 11 S. 193.

[4] *Johnstone* v. *Inglis' Tr.*, 1843, 5 D. 1396.

whole debt, for the simple reason that they have each granted a personal obligation for the whole debt.[1] "It is quite settled that, in the case of co-obligants who are bankrupt, the right of the creditor is to rank on each estate for the full debt, deducting only payments or recoveries made to account before bankruptcy, but not deducting payments or recoveries from any source after bankruptcy, except only the produce or value of a security held by the creditor before bankruptcy over the estate of the bankrupt."[2] So in England the law has been laid down by Lord Eldon as follows: "Where a person has a demand upon a bill or bond against several persons, and no part of that demand has been paid before the bankruptcy of any of them, he may prove against each; and the circumstance that one is a surety and the other the principal, or a co-surety, as between themselves, does not give a right to stop the holder receiving dividends, until he has received 20s. in the pound."[3] With regard to deductions, the creditor can only rank on the estate of any obligant for the amount of the debt as it stood at the date of that obligant's bankruptcy.[4] Where all the obligants fail at the same time, no difficulties arise as to the amount of the creditor's claim. If, however, the estate of one co-obligant has declared or paid a dividend prior to the bankruptcy of the other co-obligants, it seems the better opinion that the creditor must deduct such dividend in claiming on the estates of the remaining co-obligants.[5] Hence, from the point of view of the creditor, it is expedient that, where it is possible, claims should be made on the estates of all the bankrupt obligants before the amount of the debt is diminished by the payment of a dividend on the estate of any one of them.

If the creditor has ranked upon each estate for the whole debt, no estate can be ranked in relief upon any other estate. Thus although one estate pays 15s. in the pound, and the other only 5s. in the pound, the former, which has thus actually paid three-fourths of the debt, has no relief against the latter, which has paid only one-fourth. For to allow such relief would clearly be to allow a double ranking of the same debt upon the estate which has paid the smaller dividend.[6] As it is, each bankrupt

[1] Bell, *Com.* ii. 416.

[2] Per Lord President Inglis in *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 1881, 8 R. 805, at 817.

[3] Per Lord Eldon in *ex parte Rushforth*, 1805, 10 Ves. 409, at 416.

[4] *Hamilton* v. *Cuthbertson*, 1841, 3 D. 494.

[5] *Ib.* Such deduction is the rule in England—*ex parte Royal Bank of Scotland*, 1815, 2 Rose, 197; but see Bell, *Com.* ii. 305–6.

[6] *Anderson* v. *M'Kinnon*, 1876, 3 R. 608, and authorities there cited.

estate has paid the dividend corresponding to the whole debt. At the same time, while the creditor is entitled to rank on the estate of each obligant to the effect of receiving full payment, he is not entitled to receive more than precisely full payment. Accordingly, if the dividends declared on the estates of the various obligants, on being put together, more than suffice to pay to the creditor 20s. in the pound of his whole debt, the estate of a co-obligant which has paid more than its share of the debt is entitled, to the extent of this excess, to benefit by the creditor's ranking upon the other estates. Thus if A., B., and C., co-cautioners in a bond, are all bankrupt, and the creditor, ranking upon all three estates for the whole debt, receive from the estate of A. 13s. 4d. in the pound, and from the estate of B. 6s. 8d. in the pound, before anything is recovered from the estate of C., the trustee on A.'s estate will be entitled to the benefit of the creditor's ranking upon C.'s estate, to the effect of drawing dividends therefrom to the amount of 6s. 8d. in the pound.[1]

Cautioner holding security from bankrupt principal debtor.

Where a cautioner holds a security for his indemnification from the principal debtor, it is for his advantage that the creditor rank on the debtor's estate. For if the cautioner pays the debt, he, in ranking for relief on the principal debtor's estate, is bound to deduct the value of his security; whereas, if the creditor ranks on the debtor's estate, he can do so for the full debt, and the cautioner, on paying the balance not extinguished by the dividends, can apply his security to recoup himself.[2] The fact that the creditor has ranked for the full debt on the debtor's estate does not entitle the debtor's general creditors to claim any benefit from the security held by the cautioner, until the latter has obtained full indemnity from it for the loss sustained by him through the debtor's default.[3] A distinction has, however, been taken in this matter between securities specially granted by the principal debtor to the cautioner for his indemnification, and mere claims of retention by the cautioner. While a cautioner, holding an express security, is entitled, even where the creditor has ranked on the principal debtor's estate for the whole debt, to indemnify himself fully from the security for payments made to the creditor under his cautionary liability, it has been held, in two recent

[1] *Ex parte Stokes*, 1848, De G. 618.

[2] The rules regulating the communication of a security, held by a cautioner, among his co-cautioners are discussed *supra*, p. 831, and p. 819 *et seq.*

[3] To hold otherwise would be in effect to deprive the security-holder of the benefit of the security in reliance on which he undertook the obligation for the bankrupt; *Jamieson* v. *Forrest*, 1875, 2 R. 701; *Christie* v. *Keith*, 1838, 16 S. 1224.

cases,[1] that a cautioner who has a right of retention against the principal debtor cannot, where the creditor has ranked for the debt, effectually plead this right of retention against the trustee on the bankrupt principal debtor's estate, to the effect of indemnifying himself for payments made to the creditor under the cautionary obligation. If, indeed, the right of retention amounted to a debt which gave the cautioner a right to rank on the debtor's estate, this would suffice.

Distinction between Scots and English law.

In settling accounts between a creditor and the bankrupt estates of two co-obligants, one of whom is cautioner for the other, an important difference exists between the law of Scotland and the law of England as to the manner and extent to which a security, which has been deposited by the principal debtor with the cautioner, is available to the creditor. In England, by the rule *ex parte Waring*,[2] the creditor is entitled to avail himself of such a security. It does not pass to the trustee of the insolvent cautioner, but goes at once towards the extinction of the principal debt, so that the cautioner's estate benefits by it only to a very imperfect extent—to the extent, namely, that the ranking of the creditor on the estate is thereby diminished. In Scotland the creditor has no preferable right to the security. He is simply ranked on the estate of each obligant for the amount of his debt, and by obtaining this ranking he gets all he stipulated for, namely, the full effect of the personal obligation of each of the obligants. He receives, then, simply a dividend from the estate the cautioner, who holds the security *pari passu* with the other unsecured creditors of the cautioner. The estate of the cautioner is then entitled to be indemnified out of the security to the amount of the dividends paid to the creditor, and the sum thus obtained as indemnity becomes an asset of his estate, out of which the creditor in the cautionary obligation, along with the cautioner's other creditors, receive a further dividend, until the produce of the security is exhausted. The subject of security, in short, is

[1] *Anderson* v. *M'Kinnon*, 1876, 3 R. 608; *M'Kinnon* v. *Monkhouse*, 1881, 9 R. 393. When dividends have been paid by the debtor's estate on the whole debt, that estate has paid the debt, and to allow the cautioner to retain would be equivalent to a double ranking on the debtor's estate. It is to be observed, however, that in *Christie* v. *Keith*, 1838, 16 S. 1224, a claim of retention was effectually pleaded by a cautioner, after the creditor had ranked on the debtor's estate for the whole principal debt for which the cautioner intervened. See also the dissenting opinion of Lord Shand in *M'Kinnon* v. *Monkhouse*, 1881, 9 R., at p. 408 *et seq.*, where the inequity of depriving the cautioner of his claim for indemnification arising from his right of retention is insisted on.

[2] 1815, 19 Ves. 345.

applied exclusively to indemnify the secured cautioner's estate for what it has paid in respect of the cautionary obligation in view of which the security was given. The estate of the insolvent principal debtor has a claim only for the balance of the proceeds of the security remaining after the cautioner's estate has been indemnified out of the proceeds for his liability under the obligation. The advantage of the Scotch rule is that, under it, the cautioner-obligant, or his bankrupt estate, gets the full benefit of the security in reliance on which the cautionary obligation was undertaken.[1]

[1] Bell, *Com.* i. 294; *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 1881, 8 R. 805; affd. 1882, 9 R. (H. L.) 67. The manner in which the amount of the indemnity to which the estate of the cautioner holding the security is entitled can be ascertained, without resorting to the system of actually recouping dividends paid, is explained by Lord Watson at p. 77.

CHAPTER XXV

EXTINCTION OF CAUTIONER'S LIABILITY

Direct discharge of cautioner.
Expiry of period of liability.
Extinction of principal obligation.
Appropriation of payments.
Revocation of cautioner's obligation.
Effect of death of cautioner.
Effect of death of principal debtor.
Discharge of cautioner by conduct of creditor.
Alteration of the contract.
Discharge by creditor giving time.
Discharge by release of principal debtor.
Discharge by release of co-cautioner.
Discharge by creditor giving up securities.
Extent to which these rules apply to obligations on bills or notes.
Effect of change in firm.

Direct discharge of the cautioner.

A CAUTIONER'S obligation may come to an end by the cautioner being liberated by the creditor, while the principal debtor remains liable.[1] If there are several cautioners bound for the debt, the creditor must obtain the consent of the other cautioners to a discharge of one of their number, unless where the creditor simply assents to the discharge of a bankrupt cautioner in a sequestration.[2] Where a creditor takes a new cautioner bound, it may be difficult to determine whether the new obligation is taken in lieu of the original cautioner's obligation, so that the latter is discharged; or whether the new obligation is merely additional to the previous one, so that the original cautioner remains bound.[3] In determining the question, the Courts give effect to the intention of the parties, as gathered from the terms of the written instrument, read in the light of surrounding circumstances; and parole evidence is not admitted to prove an oral arrangement between the parties different from the written contract.[4] It is settled that a cautioner in a suspension is freed by an application by the charger for new

[1] Bell, *Prin.* s. 257. As to effect of the discharge of a cautioner upon the liability of his co-cautioners, see *infra*, p. 910 *et seq.*

[2] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 56. Cp. 19 & 20 Vict. c. 60, s. 9; *vide infra*, p. 149.

[3] *Commercial Bank* v. *Callander*, 1801, Hume, *Decisions*, 88; *Eadie* v. *Smith*, 1833, 11 S. 415; *vide infra*, p. 846.

[4] *M'Phersons* v. *Haggarts*, 1882, 9 R. 306. Where a cautioner relies on being discharged from his obligation by the creditor taking a new obligation, it is advisable for him to take steps to see that his discharge is effectual, by getting evidence of the

caution; in other words, the application for new caution, in this case, implies the abandonment of the old caution.[1]

Expiry of the period for which the cautioner is bound.

Where the cautioner's liability is limited in point of time, the expiry of the time without the occurrence of any default on the part of the principal debtor extinguishes the liability of the cautioner. A limit of time may be set to a cautioner's liability either directly, by a stipulation in the accessory contract between the creditor and the cautioner; or indirectly, by the liability of the debtor in the principal contract being limited in duration by express stipulation, or by implication, as in the case of a guarantee of the fidelity of a person in a certain office, where the appointment to the office is only for a limited period.[2]

It is to be observed, however, that although in the contract between the principals a limit is set to the duration of the debtor's liability, it does not necessarily follow that the cautioner is not obliged beyond that period. If, indeed, the cautioner is a party to the original contract between the principals, or if the cautioner's obligation refers *in gremio* to that contract, there is no doubt that the cautioner has the benefit of any limitation in the duration of the debtor's liability under that contract. If, on the other hand, the cautioner's obligation is undertaken quite separately from the contract between the principals, and makes no reference to that contract, but binds the cautioner in general and unqualified terms, the mere fact that, by the original agreement between the principals, the duration of the principal debtor's liability is limited, will not suffice to import a similar time-limit into the ancillary obligation of the cautioner, contrary to the reasonable meaning of the language in which it is couched.[3] In a case of this latter sort, it is even doubtful whether, though it were proved that the cautioner knew the limited duration of the principal debtor's engagement, this would avail to introduce, by implication, a similar time-limit into the cautioner's obligation.[4]

discharge, or insisting on his obligation being delivered; *Hay & Kyd* v. *Powrie*, 1880, 13 R. 777.

[1] *Eadie* v. *Smith*, 1833, 11 S. 415.

[2] The extent of time for which cautioners for the conduct of officials are liable is discussed *supra*, p. 762 *et seq.* As to the duration of the liability of a cautioner for a tenant under a lease, see, in addition, *Forbes* v. *Saltoun*, 1735, Elch. *voce* Cautioner, 4; and *Tayleur* v. *Wildin*, 1868, L. R. 3 Ex. 333. In the latter case it was shown that an effectual notice to quit had been given, and that the consent of both landlord and tenant was required to the latter continuing his occupation. The giving of this assent was construed as constituting a new agreement, so that the tenancy under which the rent sued for became due was not the same tenancy in respect of which the guarantee was given.

[3] *Nicolsons* v. *Burt*, 1882, 10 R. 121.

[4] See opinions in *Nicolsons* v. *Burt*, *supra*.

Extinction of the principal obligation:

The extinction of the principal obligation necessarily involves the extinction of the accessory obligation; for there cannot be a guarantee of a principal obligation which has ceased to exist.

(*a*) by prescription of the principal debt.

If the creditor allows the principal debt to prescribe, the cautioner's liability is extinguished equally with that of the principal debtor; for every objection and defence against payment which is competent to the principal debtor is open to the cautioner.[1]

(*b*) by novation of the principal debt.

Again, the novation of the principal debt operates the extinction of the cautioner's liability. "A surety," says Pothier, "is discharged by novation of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt is not the debt for which he became bound."[2] Thus where a creditor released his principal debtor, and accepted a third party as full debtor in his stead, and the surety for the former debtor agreed to give a guarantee for the latter, and to continue his former guarantee until he did so, and then died without doing so, it was held, in an action by the creditor against the executors of the deceased surety, that, as the creditor had accepted a new debtor in room and stead of the original debtor, the original debt was extinguished, and therefore that the remedy against the surety was gone.[3] In order to the discharge of a cautioner's obligation by the novation of the principal debt, it must of course be shown that the substitution of the new debt extinguished the prior one. Where, for example, the creditor took a renewal bill for part of the original bill, which constituted the principal debt, the cautioner was not liberated; for, as the original bill remained in the hands of the creditor, forming a good obligation for the balance upon which the creditor could still sue the principal debtor, the original debt was not extinguished, and therefore the cautioner remained liable.[4]

Satisfaction of the principal obligation:

(*a*) by compensation.

The principal debt may be satisfied, as regards the cautioner no less than as regards the principal debtor, by the existence of a well-founded claim of compensation in respect of a debt due by the creditor to the principal debtor. Compensation does not *ipso jure* extinguish the debt between the parties; but when

[1] Ersk. iii. 3. 66; *Halyburtons* v. *Graham*, 1735, M. 2073; *Doull* v. *Home*, 1695, M. 2077—quinquennial prescription of rents; *Duff* v. *Innes*, 1771, M. 11059.

[2] Pothier, *Oblig.* No. 378; *Cod.* 8. 41. 4.

[3] *Commercial Bank of Tasmania* v. *Jones* [1893], App. Cas. 313.

[4] *Hay & Kyd* v. *Powrie*, 1886, 13 R. 777; see per Lord Fullerton in *Campbell* v. *Cruickshank*, 1845, 7 D. 548; *Roy's Trs.* v. *Stalker*, 1850, 12 D. 722.

pleaded and sustained, it affords a complete defence against the claim of the creditor. Not only may the principal put forward this plea, and so effect his discharge, which enures to the benefit of the cautioner, but the cautioner himself, when sued for payment, may no less effectually state a plea of compensation in respect of a debt due by the creditor to the principal debtor. Thus the general rule that a person can only plead compensation in respect of a debt due to himself, suffers an exception in the case of a cautioner, in that he may oppose as a compensation not only what is due from the creditor to himself, but what is due from the creditor to the principal debtor.[1] "A cautioner," observes Pothier, "may avail himself of any defence pleadable by the principal debtor. Now, the principal debtor may oppose, by way of compensation, what is due from the creditor to him; consequently the surety may also oppose the compensation of the same debt."[2] Thus, in an English case, where the holder of a promissory note sued one of the makers for payment, it was held a sufficient defence on the part of the defendant, that he signed the note as surety, this being known to the plaintiff at the time of the making of the note; and that, after the making of the note, the plaintiff became indebted to the principal debtor in an amount equal to the amount of the note, which debt remained unsatisfied.[3] It was laid down by Willes, J., on the authority of a text of the civil law (*Dig.* xvi. 2. 4), that where a creditor was equally liable to the principal debtor as the principal debtor to him, so that the principal debtor has a good defence in law and equity against a claim against him, a surety, who would upon payment be entitled in equity to exoneration from the principal debtor, has in this state of things a defence against a claim by the creditor.[4] Special circumstances may indeed prevent the cautioner from being able to effectually state the plea of compensation. Thus, in an action of damages for an illegal use of diligence, the charger was found liable in damages, and decree for expenses was taken in name of the agent-disburser. On the messenger's cautioner being later found liable for these expenses, the agent-disburser was found entitled to recover from the cautioner the expenses decerned for in his name, and the cautioner was found not entitled to state, as a set-off against

[1] Pothier on *Oblig.* 595 (Evans).

[2] Pothier on *Oblig.* 595 (Evans). As Pothier points out, the principal debtor cannot oppose to the creditor the compensation of a debt due by him to the sureties.

[3] *Bechervaise* v. *Lewis*, 1872, L. R. 7 C. P. 372.

[4] See per Willes, J., in *Bechervaise* v. *Lewis*, *supra*.

this liability to the agent, a claim which might have been available to him against the agent's principal, the charger.[1]

The creditor in a cautionary obligation may also plead the debt for which the cautioners are subsidiarily liable, as compensation for other debts which are owing by him to the principal debtor. The mere fact that this plea is put forward in the interest of the cautioners, and has the effect of discharging them from liability by extinguishing the principal debt, does not prevent the plea from being given effect to if it is otherwise well founded. Thus where the holder of certain bills had discounted them, and subsequently retired them at their maturity after the bankruptcy of the acceptor, partly with funds supplied by a third person, who had guaranteed a prior indorser against loss upon the bills, it was held that the holder was entitled to plead compensation upon them against a debt due by him to the bankrupt acceptor; and the special objection that the plea of compensation was really stated in the interest of the guarantor, who had no debt to compensate, was repelled.[2] In the House of Lords the statement of Lord Ormidale was approved: "I am not aware and can neither find authority nor see any good reason, in equity or otherwise, for holding that the circumstance of a party having a cautioner or collateral security for his debt is destructive of his right of compensation or set-off, supposing it otherwise well founded."

(*b*) by payment.

A cautioner's obligation is extinguished by payment of the principal debt, whether the payment is made by the principal debtor or by the cautioner himself.[3] If the principal debtor discharges the debt by payment, the benefit of the discharge enures to the cautioner. In order, however, that such payment may discharge the cautioner, it must be a valid payment. Thus where a payment, made by one of two makers of a note, and accepted by the creditor in good faith, was subsequently set aside, upon the ground that it was an illegal preference, and the money was returned, it was held that this payment did not discharge the other maker, who was merely a surety for his co-obligant.[4] Payment of the debt is presumed if the written voucher which constitutes the obligation is found in the hands either of the

[1] *Cullen* v. *Dykes*, 1852, 24 Sc. Jur. 177; 14 D. 370.

[2] *Hannay & Son's Tr.* v. *Armstrong Bros. & Co.*, 1875, 2 R. 399; affd. 1877, 4 R. (H. L.) 43.

[3] As to the right of repetition by a cautioner who, in ignorance of the facts, has paid that which he was not liable to pay, see *Mills* v. *Alderbury Union*, 1849, 3 Exch. 590; cf. *Young* v. *Campbell*, 1851, 14 D. 63.

[4] *Petty* v. *Cooke*, 1871, L. R. 6 Q. B. 790. Cp. *Roy's Trs.* v. *Stalker*, 1850, 12 D. 722.

principal debtor or of the cautioner.[1] The debt may be satisfied, either by the principal debtor or the surety, otherwise than by the direct payment of money. Thus if the surety arranges with the creditor to pay the principal debt, in whole or in part, by the transfer of property possessing a marketable value, this is equivalent to payment; and the surety has an action for relief against the principal.[2] But a surety who has merely given his bond or other undischarged security to the creditor for the original debt, has not discharged the debt so as to recover from the principal debtor; for the mere giving of a security is not equivalent to actual payment.[3] If the creditor turn into money any security for the debt guaranteed, the debt is extinguished, both in a question with the principal debtor and surety, to the extent of the sum realised by the security.[4] Where the creditor and principal debtor enter into a compromise, the effect of which is to settle accounts between them and discharge the principal debt, the cautioner is free; but if a creditor, whose title to certain securities has been challenged by the principal debtor, enters into an arrangement with the latter, under which he gets quit of the challenge in consideration of paying a certain sum to the debtor, the compromise will not free the cautioner, if it is shown that the arrangement did not involve a settlement of accounts between the parties.[5]

Where creditor has taken a bill or note in payment.

A creditor is under no obligation to take a bill or note in discharge of his debt. But if a bill or note is given by the principal debtor or cautioner, and taken by the creditor, as absolute payment, the debt is discharged, and the cautioner is therefore free, even if the bill or note is not paid at maturity.[6] It is a question of fact in each case whether the intention of the parties was that the bill or note should be an absolute payment, or merely a collateral security, in which case the taking of it does not suspend the creditor's right to sue for his debt.[7] The creditor must use due diligence

[1] Ersk. iii. 4. 5.

[2] *Fahey* v. *Frawley*, 1890, 26 L. R. Ir. 78. Pothier lays it down that where the creditor has voluntarily received from the debtor property in payment of his debt, the cautioner is discharged, although the creditor is afterwards evicted from the property (Pothier on *Obligations*, 406) (Evans, i. p. 260).

[3] *Maxwell* v. *Jameson* (1818), 2 Barn. & Ald. 51; see also per Parke, B., in *Power* v. *Butcher* (1829), 10 B. & C. 329, 346.

[4] *Pearl* v. *Deacon*, 1857, 24 Beav. 186; *Kinnaird* v. *Webster*, 1878, 10 Ch. Div. 139.

[5] *White* v. *Robertson*, 1864, 2 M. 553.

[6] Benjamin on *Sale* (4th ed.), p. 732; *Cowasjee* v. *Thomson*, 1845, 5 Moo. P. C. C. 165.

[7] *Goldshede* v. *Cottrell*, 1836, 2 M. & W. 20; *Guardians of Lichfield Union* v. *Green*, 1857, 1 H. & N. 884.

to collect it, and give notice of dishonour, if necessary; otherwise it will be treated as so much money in his hands.[1] In the ordinary case, where a creditor takes a bill or note the presumption is that the instrument is a conditional payment.[2] "A negotiable instrument," observed Lush, J., "given on account of a pre-existing debt and payable at a future day, is a conditional payment of the debt, the condition being that the debt revives if the security is not realised. This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as another: to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person."[3] The payment takes effect from the date of the delivery of the bill, but is defeated by the happening of the condition, *i.e.* non-payment at maturity.[4] In *Wegg-Prosser* v. *Evans*,[5] the defendant and Thomas jointly guaranteed the payment of a certain rent by the principal debtor. On the default of the debtor, the creditor applied to Thomas to pay the half-year's rent, and Thomas handed to him a cheque for the amount. The cheque was not paid, and the creditor, having sued Thomas on the cheque, recovered judgment against him; but the judgment was not satisfied. Thereupon the creditor brought an action against the defendant upon the guarantee; and the Court, holding that the cheque was not in itself satisfaction of the debt, but merely a conditional payment, and that, by taking the cheque, the creditor had not given time to the principal debtor or done any injury to the defendant, found him liable in payment.[6]

Where cautioners are answerable for the payment of money by an official, it is sometimes difficult to determine whether certain payments made by the principal debtor constitute a performance of his obligation. Where an official, whose conduct had been guaranteed by sureties, made certain payments in the notes

[1] *Peacock* v. *Purssell*, 1863, 32 L. J. C. P. 266.

[2] Cf. *Maillard* v. *Argyle*, 1843, 6 M. & G. 40; *Leake* v. *Young* (1856), 25 L. J. Q. B. 266; *in re Boys* (1870), L. R. 10 Eq. 467.

[3] Per Lush, J., in *Currie* v. *Misa*, 1875, L. R. 10 Ex. 153, at p. 163.

[4] *Belshaw* v. *Bush*, 1851, 11 C. B. 191.

[5] [1894], 2 Q. B. 101; [1895], 1 Q. B. 108, C. A.

[6] In *Wegg-Prosser* v. *Evans*, *supra*, all that happened, so far as the defendant was concerned, was that he was not called upon to pay under the guarantee so soon as he otherwise might have been. The effect upon the cautioner's liability of the creditor postponing his right of action on the debt by taking a bill or note payable at a later date, and thereby "giving time," is discussed *infra*.

of an English banker, who issued his own notes, it was held, on the banker's bankruptcy, that, as the conduct of the employers showed that they had elected to treat the notes as payment, the obligation of the official was satisfied so far as the sureties were concerned.[1] Again, where cautioners undertook that the factor of a trust should make payment "to the trustees, or to any persons authorised by them," of rents uplifted by him, the mere payment by the factor of the rents into a bank account, kept in his name as factor, was held not to be a fulfilment by the factor of his obligation so as to relieve his cautioners from liability.[2] The fact of the factor in this case having year by year submitted accounts, which, though imperfect and incorrect, were docqueted by the trustees, did not bar the trustees from their claim against the factor's cautioners for the principal's intromissions.[3]

Appropriation of payments, as between guaranteed and non-guaranteed debts.

Where the principal debtor is indebted to the creditor in two debts, for only one of which a cautioner has intervened, difficulty may arise in determining whether a particular payment made by the debtor to the creditor, subsequently to the contracting of the two debts, is to be applied in reduction of the guaranteed debt, or in reduction of the unguaranteed debt.[4] Unless there is an express or implied contract with the cautioner to apply payments in reduction of the guaranteed debt, the power of the principal debtor and the creditor to appropriate payments is unaffected by the existence of the cautioner's obligation.[5] A debtor, accordingly, who owes several debts to a creditor, one of which has been guaranteed by a third party, retains his power of appropriating any payment which he may make to the creditor to any of the debts, guaranteed or non-guaranteed. Where, however, there are facts which may be considered indicative of an intention on the part of the debtor to make a payment in relief of the surety, it will readily be inferred from these facts that the payment was actually made in reduction of the guaranteed debt.[6]

[1] *Guardians of Lichfield Union* v. *Green*, 1857, 1 H. & N. 884.

[2] *Waugh* (*Shaw's Tr.*) v. *Clark*, 876, 14 S. L. R. 125.

[3] *Vide infra*, p. 867.

[4] Where the debtor was a member of a money club, in which money, raised by means of monthly subscriptions among its members, was lent out to members, it was held that the monthly payments of the principal debtor, as a member of the club, specifically appropriated themselves, and could not be applied to extinguish a loan obtained from the club, the payment of which had been guaranteed by a surety—*Wright* v. *Hickling*, 1866, L. R. 2 C. P. 199.

[5] See per Lord Chan. Selborne *in re Sherry*, 1884, 25 Ch. Div. 692.

[6] Smith, *Merc. Law*, 10th ed., 680; see per Lord Ellenborough in *Marryatt* v. *White*, 1817, 2 Stark. 101. This case is instructive as showing the circumstances which will be construed as proving an in-

If there is no appropriation by the debtor, the creditor, by his receipt, may appropriate the payment to whichever of the debts he pleases,—as, for example, to the worst-secured debt.[1] Further, if there be no appropriation at the time of the payment by either of the parties, the creditor has the power at any time afterwards, before action, and while the debtor continues solvent, to ascribe the payment to extinguish any legal demand which he has against the debtor.[2] If, for example, an existing debt was due by the principal debtor to the creditor, before the debt whose payment is guaranteed by the cautioner, the creditor is entitled, even though the cautioner is ignorant of the existence of the earlier debt, to apply indefinite payments received from the debtor to the earlier debt, and is not bound to apply them in reduction of the guaranteed debt.[3] The only effectual way in which this common-law power of appropriation of payments can be taken away from the principal debtor and creditor is by proof of a contract, express or implied, with the surety that money paid shall be applied to the guaranteed debt.[4]

Effect of the bankruptcy of the principal debtor on the appropriation of payments.

The bankruptcy of the principal debtor fixes the liability of parties as at its date, and puts an end, as regards future payments, to the unreserved power of appropriation formerly enjoyed. Further, after the bankruptcy of the debtor, the creditor is not allowed to impute indefinite payments made by the debtor before his bankruptcy, though not appropriated at that date, to an unsecured debt, so as to leave a debt for which a cautioner is responsible wholly unpaid; nor can such prior unappropriated payments be applied, on the bankruptcy of the debtor, entirely to the guaranteed debt, so as to leave the creditor nothing but his claim against the bankrupt estate for his other debt. Payments made by the debtor before his bankruptcy, unappropriated as between the debts at the date of the bankruptcy, are on the bankruptcy equitably apportioned between the debt guaranteed by the cautioner and the debt which is not so

tention on the part of the debtor to apply payments in liquidation of the guaranteed debt.

[1] Ersk. iii. 4. 2; Bell, *Prin.* s. 563; *Cochrane* v. *Mathie*, 1821, 1 S. 80.

[2] As to the special favour shown to the creditor by Scots law in the application of indefinite payments, see Ersk. iii. 4. 2, and *Campbell* v. *Dent*, 1838, 2 Moo. P. C. C. 292.

[3] See Lord Selborne's explanation of *Kirkby* v. *Duke of Marlborough*, 1813, 2 M. & S. 18, and *Williams* v. *Rawlinson*, 1825, 3 Bing. 71, in *Sherry*, 1884, 25 Ch. Div. 692.

[4] *Kinnaird* v. *Webster*, 1878, 10 Ch. Div. 139; *Browning* v. *Baldwin*, 1879, 40 L. T. 248; see observations of Lord Selborne *in re Sherry*, 1884, 25 Ch. Div. 692, and of Lord Young in *Scott's Trs.* v. *Alexander's Trs.*, 1884, 11 R. 407.

guaranteed.[1] This principle is illustrated in the case of *Dickson* v. *Moncrieff*.[2] There A. and B. were bound to a bank for certain debts in which A. was the principal debtor and B. the cautioner; and A. and C. were bound to the bank in a debt in which A., though *ex facie* bound as principal debtor, was really cautioner for C. A. held stock of the bank, over which the bank had a lien for debts due to them. On A.'s insolvency, the bank realised the stock, and distributed the price of it rateably among the different debts due to them by A. B., who was cautioner for A., brought an action to have it declared that the bank were bound to apply the proceeds of A.'s stock primarily to the debts in which A. was the proper debtor, and only secondarily to the debts in which he was liable merely as a cautioner. The Court held that the bank acted properly in distributing the proceeds rateably among all the debts due to them by A.

Appropriation of payments where debt guaranteed is part of current account.

Where there is no special appropriation by either of the parties, and a current account is kept of transactions between them, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side.[3] In other words, where a creditor carries monies paid to him, which have not been specifically appropriated by the person paying, into a current account, the result is that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other side of the account.[4] Hence if a limited guarantee has been given for the payment of a specific debt, which enters a current account, or a definite balance due on a current account at a given date, all payments made by the debtor, subsequently to the date in question, which are entered into the account, go to reduce the debt for which the guarantors intervened; and when such subsequent

[1] Ersk. iii. 4. 2; *Balmanno* v. *M'Nee*, 1826, 2 W. & S. 7. But see *Cochrane & Co.* v. *Mathie*, 1821, 1 S. 80; *Bannatyne's Reprs.* v. *Brown's Trs.*, 1825, 3 S. 593. Cf. *Brown & Co.* v. *Wylie*, 1809, Hume, 87, where the Court applied an indefinite payment made to a creditor by a bankrupt principal debtor, before his bankruptcy, proportionably to a part of the creditor's debt which was guaranteed and to a part which was not guaranteed.

[2] 1853, 16 D. 24; cf. *Duchess of Buccleuch* v. *Doul*, 1725, Mor. 6807; *Allan* v. *Allan & Co.*, 1831, 9 S. 519.

[3] Whenever an account in the form of a current account has been produced and founded on by the creditor, he is barred from making any special appropriation of its items —*Scott's Trs.* v. *Alexander's Trs.*, 1884, 11 R. 407.

[4] This rule is known as the rule of *Clayton's* case—*Devaynes* v. *Noble*, 1816, 1 Mer. 572 at 605; 3 Ross's L. C. (Commercial) 654.

payments have been made up to the amount of the debt, the liability of the guarantors is extinguished.[1] On the other hand, if the guarantee is continuing, *i.e.* intended to cover any fluctuating balance on successive transactions which may be due to the creditor, up to the limit mentioned in the guarantee, no amount of subsequent payments by the debtor will discharge the liability of the guarantors, if, at the closing of the account, there remains a balance due to the creditor.

Even in a continuing guarantee of a current account, the doctrine of appropriation of payment may extinguish a cautioner's liability.

The principle, however, may operate to extinguish the liability of cautioners, even in a continuing guarantee, if any event occurs which has the effect of fixing their liability as at the date of the event in question—in other words, which has the effect of putting a stop to their liability under the guarantee for transactions subsequent to the event in question. Thus where cautioners in a continuing guarantee were liberated as regards future transactions, by a change in the mode of dealing between the principal parties, it was held that payments made subsequently to the change of dealing must be applied to the extinction of the debit entries in the current account prior to the change of dealing, and that in this way the balance against the cautioners at that date was entirely extinguished.[2] Similarly, where a member of a firm which had granted a cash credit died, and the cash credit continued to be operated upon by the surviving partners as before, the account being kept by the bank as a continuous account, it was held that the balance standing against the deceased partner at the date of his death was extinguished by the subsequent payments to account by the surviving partners, these payments being applied to extinguish the debit entries in their order.[3] In a recent case, *Cuthill* v. *Strachan*,[4] Strachan, one of the cautioners for a cash-credit account with a bank was sequestrated, the balance against the principal debtor under the account being £599 at the date of the sequestration. The bank made no claim in the sequestration, and the principal debtor continued to operate on the cash-credit account, until the account was closed by his bankruptcy, at which date the balance due to the bank was £615. Another cautioner, who had paid this sum to the bank, claimed relief against Strachan, who meantime had carried through a composition settlement with his creditors; but it was held that,

[1] *Lang* v. *Brown*, 1859, 22 D. 113; *British Linen Co.* v. *Thomson*, 1853, 15 D. 314; *Kinnaird* v. *Webster*, 10 Ch. Div. 139. *Vide supra*, p. 782 *et seq.*

[2] *Houston* v. *Speirs*, 1829, 3 W. & S. 392.

[3] *Royal Bank* v. *Christie*, 1839, 1 D. 745; affd. 1841, 2 Rob. 118.

[4] 1894, 21 R. 549.

since subsequently to the date of Strachan's sequestration payments had been made by the principal debtor into the account exceeding in amount the balance due at that date, Strachan's liability as cautioner had been wholly extinguished.[1]

Application of the principle in determining the liability of cautioners in guarantees of conduct.

This principle of appropriating payments may also be important in guarantees of conduct. If an employee has given different bonds, at different times, with different sureties, for the faithful performance of his duties, the apportionment among the different sureties respectively of liability for monies dealt with by the employee during the different periods embraced in the different bonds may depend on it. Where a running account between the principals is kept of debts and payments, of credits and receipts, the payments made by the employee at different times, before and after the changes in the sureties, will be applied in their order to extinguish the items on the debit side of the account.

Manner of preventing the extinction of a cautioner's liability by the operation of this principle.

If the creditor desires to prevent the operation of this principle in extinguishing the liability of cautioners, he can do so only by closing the old account, and opening a new and distinct account. Since the rule of appropriation of payments applies only to a current account which is one and unbroken, the effect of thus closing the account is to prevent the balance, due at the date of closing, from being wiped out by subsequent payments. Thus where a party, who had guaranteed to a bank the account of one of their customers, died,[2] and the bank forthwith closed the customer's account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but only with the interest on the overdraft, it was held, on the bankruptcy of the customer, that the bank were entitled to go against the executors of the guarantor for the amount of the overdraft as it existed at his death, less the amount of the dividend which they had received on it from the bankrupt estate of the customer; and the plea of the executors, that the payments by the customer into the new account after the death of the guarantor went in discharge of the overdraft existing at his death, was repelled.[3] The fact that transactions

[1] See also *M'Laren* v. *Bradly*, 1874, 2 R. 185.

[2] In this case it was assumed that the guarantee, though not expressed to terminate on the death of the guarantor, did so terminate on his death being notified to the bank.

[3] *In re Sherry*, 1884, 25 Ch. Div. 692; cf. *Commercial Bank of Australia* v. *Wilson* [1893], App. Cas. 181, where money deposited by guarantors with a bank, with power to the bank to appropriate it to the payment of the principal debt *pro tanto* whenever they thought fit, was put into a separate suspense account. It was

have been entered on the books of the creditor in one unbroken account, does not preclude the creditor, provided the account has not been communicated to the cautioner, from afterwards separating the account, and thereby preventing the extinction of the cautioner's liability.[1] If, for example, a change has occurred in a creditor-firm by the death of one of the partners, the new firm are entitled to separate a continuous account in their books into two separate accounts, one made up to the day of the death of the partner, and the other commencing from that period, and render to one of them as due to the old, and the other as applicable to the new firm, so as to make a guarantee held by them effectual for the balance due by the debtor at the date of the change in the firm.[2] "If," observed Bayley, J., "a book had been kept for the common use of both parties, as a passbook, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes are not conclusive on him until he has made a communication on the subject of these entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit."[3] When an unbroken current account has once been produced and founded on by the creditor, he is barred from thereafter making any special appropriation of its items, or altering its form.[4]

Appropriation of payments by cautioner.

Similarly, where a cautioner is indebted to the creditor in other debts, independently of his cautionary obligation, the rules as to the appropriation of payments are applied in determining to which of the debts particular payments by the cautioner to the creditor are to be ascribed. If the cautioner intends that a payment made by him to the creditor should go to the debt for which he is cautioner, he should distinctly appropriate the payment in question to that debt; and, further, it is advisable for him, if the debt is satisfied by the payment, to require that the creditor should, on receiving the payment, deliver up the guarantee.[5]

held that the deposit did not operate as payment until so appropriated; that the bank had not so appropriated it; and therefore that the bank was entitled to prove for the full debt against the bankrupt estate of a guarantor who was not a party to the deposit.

[1] *Simson* v. *Ingham*, 1823, 2 B. & C. 65; 3 Ross's L. C. 689.

[2] *Simson* v. *Ingham*, 1823, 2 B. & C. 65; 3 Ross's L. C. 689.

[3] Per Bayley, J., in *Simson* v. *Ingham*, 1823, 2 B. & C. 65.

[4] *Scott's Tr.* v. *Alexander's Trs.*, 1884, 11 R. 407.

[5] As to this, see per Lord Chancellor Westbury in *Waugh* v. *Wren*, 1863, 11 Weekly Rep. 244; cf. also *Hay & Kyd* v. *Powrie*, 1881, 13 R. 777. If

Tender.

In general, when payment is tendered by the principal debtor and refused by the creditor, and loss afterwards arises, the creditor has no right to come against the cautioner and force him to make good the payment which was formerly refused. Thus where a sequestrated bankrupt, who had been discharged under a composition contract, offered payment of the whole composition on a certain debt to the creditor, and the creditor rejected this offer without intimating to the cautioner in the composition either the offer or the rejection, it was held, on the bankrupt being again sequestrated some years later, that the creditor in question had lost all recourse for the debt against the cautioner in the composition contract.[1] Of course, if such an offer of payment be made by the principal debtor only upon certain conditions, and is refused upon reasonable grounds, such refusal will not prevent the creditor from subsequently having recourse against the debtor's cautioner.[2]

Revocation of guarantee. Guarantees for money debts:—when non-revocable

If a cautioner has undertaken an absolute obligation for a certain amount, incurred once for all, he cannot, after his offer has been accepted, withdraw from his obligation without taking the debtor into his own hands. Further, if the cautioner's obligation be, by the terms of the contract, for a fixed period, he cannot, in the absence of a stipulation in the contract to that effect, withdraw his security before the expiry of the period.[3] On the other hand, where an offer of guarantee for future advances has not been accepted, it is within the power of the guarantor to revoke it at any time before acceptance, even when a fixed period is mentioned for the duration of the guarantee. Thus in *Offord* v. *Davies*,[4] the Messrs. Davies made a written offer to Offord that, if he would discount bills for a certain firm, they would guarantee the payment of such bills to the extent of £600 during a period of twelve months. Some bills were discounted by Offord, and duly paid; but before the twelve months had expired Messrs. Davies revoked their offer, and announced that they would guarantee no more bills. Offord continued to discount bills, some of which were not paid, and then sued Messrs. Davies on the guarantee; but it was held that the revocation was a good defence

—when revocable.

the instrument of debt is in the cautioner's hand, the debt is presumed to be paid—Ersk. iii. 4. 5.

[1] *Cooper* v. *Blakemore*, 1834, 12 S. 834.

[2] *Vide* per Lord Mackenzie in *Cooper* v. *Blakemore*, 1834, 12 S. 834.

[3] Bell, *Prin.* s. 266; *Spence* v. *Brownlie*, 1834, 13 S. 199. In *King* v. *Creighton*, 1840, 2 D. 832, the cautioner in a suspension was not allowed to withdraw, without the consent of the charger, or previously finding new caution.

[4] 1862, 12 C. B. (N. S.) 748.

to the action. Again, if the obligation of the cautioner relates to future transactions,—as in the case of a cash-credit bond, or other continuing guarantee for goods that may be sold, money that may be advanced, or bills that may be discounted to the principal debtor in the future,—and no definite period is marked out in the contract for the endurance of the obligation, either expressly or by implication, the cautioner is entitled at any time to stop further dealings or advances on his responsibility by giving distinct notice—even verbal notice—to the creditor to the effect that he will not be liable for further dealings or advances.[1] In such cases, each new transaction or advance is a separate consideration, and accordingly this class of obligations is differentiated from the class of obligations in which the cautioner undertakes a definite liability for a certain amount or for a fixed time. In the latter class of cases the consideration is given once for all, and there is but one obligation extending over the whole time.[2] Where a guarantee is revocable, a cautioner who withdraws is of course bound for any liabilities incurred by him under his guarantee for transactions entered into, or advances made, prior to the date at which he sent notice of revocation.

Revocation by cautioners for a bankrupt in a composition contract.

A cautioner for a bankrupt in a composition contract is in a position different from that of the ordinary cautioner, in respect that his obligation does not become final until it has been approved by the Lord Ordinary or the Sheriff.[3] The right of the cautioner to withdraw after his offer of caution has been accepted by the creditors, but before judicial approval, seems to be co-extensive with that of the bankrupt himself. In *Ironside* v. *Gray*[4] the question was raised whether the bankrupt and the cautioner—one or both—are entitled to withdraw their offer of composition and caution respectively at any time before final judicial approval; but the point was not decided, since in that case, upon the bankrupt giving in a minute withdrawing his offer, the Sheriff refused to approve, and the Lord Ordinary adhered. The report of the case, however, supports the statement of Professor Bell[5] that, before final approval, it is competent for the cautioner, upon cause shown, in the nature of some extraordinary alteration of circumstances, or decline in value of the estate, to withdraw. Some very

[1] Bell, *Prin.* s. 266; Smith, *Merc. Law*, 10th ed., i. 588; see observations of Lord Deas in *British Linen Co.* v. *Menteith*, 1858, 20 D. 557, at 561. As to cash-credit bonds, see Bell, *Com.* i. 387.

[2] *Lloyd's* v. *Harper*, 1880, 16 Ch. Div. 290; Brodie's *Supp. to Stair*, p. 928.

[3] Bankruptcy Act, 1856, s. 138.

[4] 1841, 4 D. 629.

[5] Bell, *Com.* ii. 353.

sufficient reason, however, in the shape of a substantial alteration of circumstances, must be averred and proved before the Court will allow either the bankrupt or his cautioner to resile, even prior to the judicial approval.[1]

Revocation by cautioners in a guarantee for the holder of an office.

Where the engagement of an employee is for a fixed period, and a cautioner guarantees that he will faithfully discharge his duties during that period, the cautioner is bound for the whole period named, and, in the absence of special circumstances, cannot withdraw.[2] On the other hand, it appears that a cautioner for the fidelity of an employee or holder of an office, where the length of the employment depends on the pleasure of the parties, may put an end to his liability on reasonable notice to the creditor, provided he takes due care to have his bond cancelled or delivered up.[3] At the same time, if a person guarantees the fidelity of a person, and upon the faith of that guarantee the person obtains a situation, it is not reasonable that the guarantor should be allowed, arbitrarily and without the justification of any misconduct on the part of the employee, to withdraw from the engagement into which he deliberately entered.[4] Thus Baron Hume, in his report of the case of *Taylor* v. *Adie*,[5] observes: "It must always be understood that the cautioner for a bank agent, when he means to withdraw, does not act capriciously or precipitately, but gives timeful notice of his purpose, and allows a reasonable period for the agent to find another cautioner, or the bank to find another agent."[6] In England, as in Scotland, the law is careful to guard the interests of the creditor and principal debtor. A guarantee of the fidelity of the holder of an office is, in England, presumed to be commensurate with the endurance of the office, and to be undertaken for a definite period and for a consideration given once for all, viz. the appointment of the principal debtor to the office. Accordingly, in the ordinary case, such a guarantee is not revocable by the granter, unless on the emergence of some special circumstance,

[1] *Lee* v. *Stevenson's Tr.*, 1883, 11 R. 26.

[2] Brodie's *Supp. to Stair*, 928; *Calvert* v. *Gordon* (1828), 3 Man. & R. 124; see also *Gordon* v. *Calvert* (1828), 4 Russ. 581.

[3] Brodie's *Supp. to Stair*, 928; *Taylor* v. *Adie*, 1818, Hume, 114; *Kinloch* v. *Mackintosh*, 1822, 1 S. 491. As to the conditions on which the Court will grant warrant for the delivery of a bond of caution for a judicial factor, see *Aitken, Petr.*, 1893, 21 R. 62. Cp. *Baird* v. *Refuge Ass. Co.*, 1890, 6 Sh. Ct. Rep. 187.

[4] See observations in *Burgess* v. *Eve*, 1872, L. R. 13 Eq. 450, at 457. The right of a cautioner to determine his obligation may be tried, in a question either with the creditor or principal debtor, in an action of declarator and relief.

[5] 1818, Hume's Dec. 114.

[6] See also Bell, *Com.* i. 384.

such as the misconduct of the employee. This was the principle of the decision in *Lloyd's* v. *Harper*[1]—the case of a guarantee by a father of all his son's engagements in the capacity of an underwriting member of Lloyd's, where the admission of the son to "Lloyd's" as a life member was regarded as a consideration given once for all. "Where a continuing relationship is constituted," observed Fry, J., in this case, "on the faith of a guarantee, there is strong reason for holding that the guarantee cannot be annulled during the continuance of the relationship."[2]

Effect of misconduct on the part of the principal debtor on the revocability of a guarantee.

In all cases where the person whose conduct is guaranteed has been guilty of misconduct, the cautioner may, at once and without any delay, revoke his guarantee. Further, it is the duty of the master, on becoming aware of his employee's misconduct, to communicate it to the cautioner, so that the latter may intimate whether or not he means his guarantee to hold good for subsequent service.[3] The master suffers no injury by this rule, since, on discovering the employee's dishonesty, he may at once discharge him, and so replace himself *in statu quo*. "If the surety, on becoming cognisant of the misconduct of the employee, say to the employer, 'You will continue at your peril to employ the person on whose behalf I gave the guarantee,' and if the employer refuse to give the guarantee up, the person giving it would have a right to file a bill in this Court, and the Court would decree the bond to be given up."[4]

Effect of death of cautioner:

—where notice of the cautioner's death is not sent to the creditor.

When a cautioner dies, the question arises whether his death puts an end to the liability of his estate for advances made, or transactions entered into, on the faith of the guarantee subsequently to the date of his death. Liabilities incurred under the guarantee before the date of a cautioner's death are of course in all cases enforceable against his estate. Further, it is settled that the death of a cautioner does not in itself, in the absence of a special stipulation to that effect, operate as a revocation of the guarantee, unless express notice of the death be sent to the

[1] 1880, 16 Ch. Div. 290.

[2] *Lloyd's* v. *Harper*, 1880, 16 Ch. Div. 290, at p. 306. In *Burnett*, 1859, 31 Scot. Jur. 637, 21 D. 1197, will be found a form of bond, by a guarantee association for a judicial factor, which was accepted, though it bore that the association might terminate their obligation on giving notice in writing to the Accountant of Court thirty sederunt days before the day of payment of the annual premiums.

[3] See as to the consequence of the creditor neglecting this duty, per Lord Redesdale in *Smith* v. *Bank of Scotland*, 1813, 1 Dow, 272 at 287; *Burgess* v. *Eve*, 1872, L. R. 13 Eq. 450—per Malins, V. C. 457–8; *Phillips* v. *Foxall*, 1872, L. R. 7 Q. B. 666, at p. 677.

[4] Per Malins, V. C., in *Burgess* v. *Eve*, 1872, L. R. 13 Eq. 450; approved in *Phillips* v. *Foxall*, 1872, L. R. 7 Q. B. 666 at 677.

creditor. If notice is not given, the guarantee subsists against his representatives, not merely for the debt as it stood at the cautioner's death, but prospectively.[1] Similarly, the death of one co-surety does not *eo ipso* release the other co-surety for future dealings under the guarantee.[2] In one case the representatives of a deceased cautioner in a cash-credit bond were held liable, fourteen years after the death of the cautioner, for advances made by the bank subsequently to his death.[3] In another case,[4] on the death of one of two cautioners in a cash-credit bond, the bank, without giving any notice to the executor of the deceased cautioner, demanded and received a new bond in corroboration of the previous one; yet the representatives of the original cautioner were found liable for a balance on the account arising after his death, and after the interposition of the new cautioner. In both these cases the cautioner bound his "heirs and representatives"; but it would seem that, even where the cautioner has not expressly bound his heirs and executors in the bond, they will none the less be liable for debts incurred after the cautioner's death, if no notice of the death has been sent to the creditor.[5] Further, it has been laid down that there is no duty, enforceable at law, on the creditor, upon the death of a cautioner, to give notice to executors or representatives of the deceased cautioner that a bond of caution, by which they are bound, is in existence.[6] At the same time, while there is no legal duty on the creditor to send such notice, yet, since in many cases the executors may be entirely ignorant of the existence of the guarantee, it is clearly proper that the creditor, on becoming cognisant of the death of the cautioner, should inform the executor of the guarantee which the deceased had undertaken.[7] Where the creditor has neglected to send notice

[1] Bell, *Com.* (M'L. ed.) i. 385 and 387; *Morrice* v. *Scott*, 1831, 9 S. 480; *Kerr* v. *Bremner*, 1839, 1 D. 618—the cautioner for the holder of an office. The early cases are collected in Bell, *Illust.* p. 178.

[2] *Beckett* v. *Addyman*, 1882, 9 Q. B. D. 783, C. A.

[3] *British Linen Co.* v. *Menteith*, 1858, 20 D. 557—cautioner in a cash-credit bond. The law of England on this point is similar—*Bradbury* v. *Morgan*, 1862, 1 H. & C. 249.

[4] *Commercial Bank of Aberdeen* v. *Callander*, 1801, Hume, 88.

[5] See per Lord Ormidale (Ordinary), *Caledonian Co.* v. *Kennedy's Trs.*, 1870, 8 Macp. 862; also the opinions in *Kerr* v. *Bremner* (*supra*); Bell, *Com.* (M'L. ed.) i. 385 and 387.

[6] *British Linen Co.* v. *Menteith*, 1858, 20 D. 557.

[7] See remarks of Lord Moncreiff on this point in *Caledonian Bank* v. *Kennedy's Trs.*, 1870, 8 Macp. 862, at 868. With regard to cautioners for officers within the scope of the Pupils Protection Act, it is provided (12 & 13 Vict. c. 51, s. 11) that "on the death or insolvency of the cautioner of any factor, such factor shall forthwith give notice in writing to the Ac-

of the existence of the guarantee to the guarantor's representatives, and, at the same time, has continued to make advances to, or carry on dealings with, the principal debtor, the Court will look strictly into all the circumstances, and readily give the representatives of the creditor the benefit of any equities that may arise.[1] "A cautionary obligation which transmits against representatives is one which imposes a considerable duty upon the creditor; and if delay occurs in prosecuting a claim, and loss results, an onus lies on the creditor to show that the delay was excusable."[2] Again, though the death of a cautioner does not in itself revoke a guarantee, when the contract of guarantee is completed, yet if an obligant, who has signed a bond, die before its delivery to the creditor and before money has been advanced on it, his death revokes the implied mandate to an agent to deliver the deed, after being signed by the other obligants; and if the deed is delivered after the death of the obligant, and money is advanced on it, the heirs of the obligant are not bound.[3] Moreover, an interlocutor against a debtor and his cautioner, pronounced after the death of the cautioner, is inept as to both.[4]

—where notice of the cautioner's death is sent to the creditor.

In guarantees of a continuing nature, the executors of a deceased cautioner have it in their power, by sending proper notice to the creditor, to put an end to the responsibility of the estate of the deceased for subsequent advances. Similarly, although the death of one of several joint and several obligants in a continuing guarantee does not *eo ipso* bring to an end the liability of the surviving cautioners for subsequent advances, yet the liability of the surviving cautioners for such advances is, in the ordinary case, brought to an end by notice of the death of the deceased obligant being sent to the creditor.[5] The power of recalling a guarantee by notice of the death of the guarantor does not apply to every guarantee without distinction. The principle seems to be that, if the guarantee is one which the guarantor himself had the power to bring to an end by notice, the intimation of his death will operate as a revocation of future liability.[6] If, on

countant of such death or insolvency, and the Accountant shall, as soon as the fact shall come to his knowledge, by means of such notice or otherwise, require new caution to be found."

[1] *Wyllie* v. *Black's Trs.*, 1843, 16 D. 180; Bell, *Com.* i. 387; *Harriss* v. *Fawcett*, 1873, 8 L. R. Ch. 866.

[2] Per Lord Neaves in *M'Farlane* v. *Anstruther*, 1870, 9 Macp. 117.

[3] *Life Association of Scotland* v. *Douglas*, 1886, 13 R, 910.

[4] *Ferrier* v. *Berry*, 1828, 6 S. 982.

[5] *Beckett* v. *Addyman*, 1882, 9 Q. B. D. 783; see at p. 791; *Ashby* v. *Day*, 1886, 33 W. R. 631; *in re Sherry*, 1883, 25 Ch. D. 692.

[6] *Coulthart* v. *Clementson*, 1877, 5 Q. B. D. 42, at p. 47.

the other hand, the guarantee is one which the cautioner himself during his life had not the power to determine by notice, then intimation of his death will not prevent the creditor from having recourse against the representatives of the deceased cautioner for advances or dealings subsequently to his death.[1] Thus, in *Lloyd's* v. *Harper*,[2] a father, who in 1867 guaranteed his son's engagements as an underwriter at Lloyd's, died in 1876, notice of his death being given to Lloyd's; yet, on the bankruptcy of the son in 1878, it was held that the guarantee, not being revocable by the father during his life, was not determined by his death and the notice of it to the creditor.

Form of notice necessary

Whether it is necessary in order to put an end to the liability that the executor give special notice that the guarantee is withdrawn, or whether it is sufficient that the death of the guarantor be intimated to the creditor, is a question of circumstances.[3] The intimation, in any case, must be specific. Where a guarantee was granted by a firm, and the firm was dissolved by the death of one of the partners, it was held that mere publication of the fact in the *Gazette*, without any specific notice being sent to the creditor, did not suffice to put an end to the responsibility of the surviving partners for transactions under the guarantee after the dissolution of the firm.[4] If provision is made in the contract of guarantee that notice in a special form shall be necessary to determine the guarantee, the creditor is entitled to rely on such special notice. Thus where a joint and several continuing guarantee provided that the guarantors, or any one or more of them, or their respective representatives, might determine their or his liability by a month's notice in writing to the creditor, it was held, on the death of one of the guarantors, that a mere notice of his death, sent by his executor to the creditor in connection with a different matter, did not determine the liability of the deceased's estate under the bond, and that, notwithstanding such notice, his representatives were liable for debts incurred by the principal debtors after his death.[5]

Effect upon the liability of cautioners of the death of the principal debtor or creditor.

A cautioner's obligation cannot be extended beyond the person to, or for, whom it was undertaken; and, accordingly, his liability under it comes to an end, in the ordinary case, upon the death either of the principal debtor or creditor.[6] Much depends on

[1] *Lloyd's* v. *Harper*, 1880, 16 Ch. Div. 290. As to the distinction between these two classes of guarantee, *vide supra*, p. 857.

[2] 1880, 16 Ch. Div. 290.

[3] As to what constitutes proper notice, see per Bowen, J., in *Coulthart* v. *Clementson*, 1879, 5 Q. B. D. 42.

[4] *Kemp* v. *Allan*, 1824, 3 S. 104.

[5] *Silvester, in re Midland Rwy.* v. *Silvester* [1895], 1 Ch. 573.

[6] *Vide supra*, p. 781, as to cash credit

the nature and terms of the guarantee.[1] At the same time, though the guarantee is couched in quite general terms, if the contract between the principal debtor and creditor involves a personal element, the cautioner is discharged, *quoad* future transactions, by the death of either of the principal parties. Thus where a cautioner bound himself in a bond that a clerk, the principal debtor, should faithfully serve, and account for all monies to, Pyott, his employer, and his executors, it was held that the cautioner was not liable for monies received by the clerk, in the service of the executors of the employer, who continued the business and retained him in the same employment, after the death of the employer.[2] "The bond in question," observed Lord Mansfield in this case, "is relative to the service with Pyott. It was given as an indemnity that the clerk should be faithful to him, and should pay all the money received on his account to him, or to his executors; because money might be in his hands at the time of Pyott's death, for which he could only account to his executors." Where a farm was let for eleven years to a tenant and his heirs, excluding assignees, and a cautioner undertook that the tenant would fulfil his obligations during the lease, it was held, on the tenant dying bankrupt and his son executing a renunciation as heir, that the cautioner's obligation came to an end by the death of the tenant, without leaving heirs to represent him; accordingly, the landlord's attempt to hold the cautioner liable for the rent during the whole eleven years was defeated.[3] In *Stewart* v. *Scot*,[4] three persons were appointed tutors-dative, there being no specification of any quorum and no provision in favour of survivors. They appointed one of their number to be their factor, and his intromissions were guaranteed by a cautioner. On the death of one of the tutors, it was held by the House of Lords, reversing the Court of Session, that, by the death of a tutor, the factory came to an end, and that the factor's cautioner was thenceforth free from liability for his principal's intromissions. On the other hand, if it appears from the nature of the contract between the creditor and the principal debtor, or from the language of the cautionary obligation, that it must have been the intention of the guarantor that the guarantee should run on, after the death of the creditor or the principal debtor, under their respective representatives, the cautioner's obligation will not cease on the

[1] *Vide supra*, p. 767 *et seq.*

[2] *Barker* v. *Parker*, 1786, 1 T. R. 287.

[3] *Low* v. *Earl of Rosebery*, 1812, reported by More—More's *Notes to Stair*, i. 111.

[4] 1829, 7 S. 230; rev. 1834, 7 W. & S. 211.

death of either of these parties. Thus the cautioner for the expenses in an advocation remains liable for the whole expenses of the process, although the advocator dies during the process, and his executors are sisted in his stead.[1]

Discharge of cautioners by the conduct of the creditor.

Cautioners are discharged by various acts on the part of the creditor, whereby their position as cautioners is prejudiced.[2] The question whether the position of cautioners has been prejudiced is a question of fact, not of law.[3] The kind of conduct on the part of the creditor which, after a cautionary obligation has been validly constituted, serves to discharge cautioners from their liability, is described by Story, in words frequently approved, as follows:—"If a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him in equity."[4]

Positive acts of the creditor prejudicial to the cautioner discharge the obligation; but mere passive inactivity does not.

The general rule is that cautioners are liberated from their liability by any positive act on the part of the creditor, which is contrary to the conditions, express or implied, on which the cautioners undertook the engagement, and by which they are prejudiced; but that the mere passive inactivity of the creditor, to whom a guarantee is given, or his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge cautioners.[5]

Mere negligence of the creditor does not, in the ordinary case, discharge cautioners.

In cautionary obligations for the payment of a sum of money there is, as between the creditor and the cautioner, no obligation on the part of the creditor to do active diligence against the principal debtor.[6] So there is no duty on the creditor to rank on the sequestrated estate of the debtor or a cautioner. Even where, if the creditor had ranked, his concurrence would have become

[1] *Wilson* v. *Ewing*, 1836, 14 S. 262.

[2] *Vide supra*, p. 706 *et seq.*, as to the effect of misrepresentation or concealment by the creditor in preventing the constitution of a valid contract. See p. 739 *et seq.*, as to conditions precedent to the cautioners' liability, which prevent the liability of the cautioners arising until the conditions are purified. Both these classes of cases, in which the contemplated liability of the cautioners never attaches, are to be distinguished from the class of cases dealt with here.

[3] Per Bowen, L.J., in *Mayor of Kingston* v. *Harding* [1892], 2 Q. B. 494, at p. 506.

[4] Story, *Equity Jurisprudence*, s. 325; approved, *e.g.*, by Pollock, C.B., in *Watts* v. *Shuttleworth*, 1860, 29 L. J. Ex. 229, at 234.

[5] *Black* v. *Ottoman Bank*, 1862, 15 Moo. P. C. C. 472.

[6] As to the effect of the abolition of the benefit of discussion, see *supra*, p. 788 *et seq.*

indispensable to the debtor's discharge, his refusal to rank does not discharge the cautioners.[1] It is the business of the cautioner, not of the creditor, to see that the debtor performs.[2] The very purpose of the creditor in taking a cautioner may have been in order that he might not have to sue the principal. Another reason why a cautioner is not discharged by the mere negligence of the creditor in suing the debtor, is that the cautioner has the remedy in his own hands; for he can pay off the debt himself and sue the debtor for relief. On this principle, it has been laid down, as a general rule, that an omission by the creditor, in order to have the effect of discharging a surety, must be an omission of an act which could not have been done by anyone except the creditor, and that an omission by the creditor cannot affect the surety's liability in any case in which the act omitted was one which could have been performed either by the surety or the creditor.[3] In a leading American case, where the English authorities were fully reviewed, it was held that even if, after the principal obligation becomes due, the surety request the creditor to sue the debtor, who is then solvent, and the creditor fails to do so, and the debtor afterwards becomes insolvent, the surety is not thereby discharged.[4]

—even in guarantees of conduct.

As pointed out by Professor Bell, there is an obvious difference between the guarantee of a money debt to be paid at a definite date and a guarantee of the good conduct of an official, such as a bank agent.[5] In the latter case the cautioner cannot, by paying up the debt, discharge the obligation and take the debtor into his own hands; nor is he entitled, by checking and examining the bank accounts, to take precautions which might have the effect of impeding the operations of the bank or impeaching the credit of their agent. Accordingly, in guarantees of the conduct of employees, more readily than in guarantees of money debts, the law holds that the creditor is under an obligation, arising from the relation of employer and employed, to exercise a certain measure of care and superintendence; and neglect on the part of the creditor is more readily construed as implying connivance, and so liberating the cautioners.[6] Even in this class of obligations,

[1] See Ivory's *Ersk.* iii. 3. 66, note 173, quoting *Anderson*, 25 May 1811, F. C.

[2] Per Lord Eldon in *Wright* v. *Simpson*, 1802, 6 Ves. jun. 714. Even if the debtor has become insolvent in the time suffered by the creditor to elapse, the cautioner is not liberated —*Trent Navigation Co.* v. *Harley*, 1808, 10 East, 34; *vide infra*, p. 892.

[3] Per Pallas, C.B., in *The Queen* v. *Fay*, 1879, 4 Ir. L. R. 606.

[4] *Smith* v. *Freyler*, 1882, 47 Amer. Rep. 358.

[5] Bell, *Com.* i. 381.

[6] This tendency is more conspicu-

however, mere omission on the part of the employer, if he has not expressly or impliedly contracted to do the act, or mere passive acquiescence in acts of the employee which are improper, does not release a cautioner. This doctrine was established by the decision of the House of Lords in *M'Taggart* v. *Watson*,[1] where it was held that the wrongful failure of the commissioners and creditors, or either of them, to superintend the conduct of the trustee on a bankrupt estate, and to call on him to account, did not release the cautioners of the trustee. A distinction was taken between positive acts of the creditor injurious to a cautioner, and mere passive inactivity or neglect to call the principal to account; and the rule was laid down as applicable both in Scotland and England, that mere inaction is not in itself sufficient to relieve sureties.[2] So where sureties undertook that a contractor would well and truly execute his contract, the plaintiffs having a right to superintend his work through their engineer, it was held that the non-exercise of this power of superintendence, though it resulted in the work being scamped, did not discharge the sureties from their liability.[3] Also where trustees, failing to detect mistakes in the accounts submitted to them yearly by the factor of the trust, docqueted his accounts, this was held not to be such gross negligence as to disentitle them from going against the cautioners of the factor.[4]

If the creditor's negligence is so gross as to constitute connivance at the principal debtor's default, and the position of the cautioner is thereby injured, the latter is freed from liability. A wilful abstention from doing a duty may be capable of being construed as an act of commission; omission, in short, may at a certain point become equivalent to commission. If, then, the

Exc. Where the neglect is so gross as to amount to connivance at the principal's default.

ous in the earlier cases; cf. *Mein* v. *Hardie*, 1830, 8 S. 346; *Dalzell* v. *Menzies*, 1831, 9 S. 434; *Duncan* v. *Porterfield*, 1826, 5 S. 102. See observations of Lord Justice Clerk Hope in *Falconer* v. *Lothian*, 1843, 5 D. 866.

[1] 1835, 1 S. & M'L. 553 (reversing decision of the Court of Session).

[2] *Creighton* v. *Rankine*, 1840, 1 Rob. App. 99, per Lord Chancellor Cottenham; *Biggar* v. *Wright*, 1846, 9 D. 78, where all the earlier authorities are reviewed; *Mayor of Durham* v. *Fowler*, 1889, 22 Q. B. D. 394, where the English authorities are reviewed; *Black* v. *Ottoman Bank* (1862), 15 Moo. P. C. C. 472. These rules do not apply to the relation of principal and surety which subsists between the parties to a bill of exchange. The rights of parties to a bill being settled by mercantile usage, mere negligence on the part of the holder of a bill—for example, in omitting to give notice of dishonour—may discharge an indorser, who stands in the position of a surety.

[3] *Mayor of Kingston* v. *Harding* [1892], 2 Q. B., at 94.

[4] *Waugh* (*Shaw's Tr.*) v. *Clark*, 1876, 14 S. L. R. 125.

inaction of the creditor amounts to a wilful shutting of his eyes to the default which the principal is about to commit, or is such as to imply connivance on his part at a departure from the express or implied conditions of the cautioner's obligation, this is sufficient to discharge the cautioner.[1] "I am far from saying," observed Tindal, C.J., "that there may not be an extreme case of laches amounting to fraud; and fraud will be a defence to the action, but not mere negligence."[2] Where upwards of twenty years were allowed by the creditor to elapse, and no good reason for the delay was given, while the position of the cautioner had meantime been materially changed for the worse, it was held that this was a relevant defence to the cautioner.[3] In guarantees of conduct, mere omission on the part of the creditor is more readily construed as gross negligence.[4] For example, where Commissioners of Supply, in electing a collector of cess, minuted a resolution that he should produce a discharge from the Receiver-General annually, and the collector was re-elected for three successive years without being required to produce the Receiver-General's discharge, it was held, upon it being shown that he had incurred arrears before the first re-election as well as afterwards, that the cautioners, who had bound themselves for his intromissions for the year of his election and each year of his re-election, were free. This decision was arrived at, although no special reference was made in the cautioner's bond to the minute of appointment, upon the ground that the collector's employers did not act with ordinary prudence, and by their gross irregularity exposed the cautioners to a greater hazard, and to a liability of a more dangerous kind, than was fairly contemplated in their bond.[5] Further, it appears that less will suffice to establish gross negligence, amounting to connivance, when the creditor or employer is a bank than when he is a private individual; for in the former case certain regular checks are understood to subsist, upon which the cautioner is entitled to rely.[6] At the same time, if no negligence can be brought home

[1] See per Wood, V. C., in *Dawson* v. *Lawes*, 1854, 23 L. J. Ch. 434; also per Denman, J., in *Mayor of Durham* v. *Fowler*, 1889, 22 Q. B. D. 394; *Pringle* v. *Tate*, 1834, 12 S. 918. So the gross negligence of a cautioner may disentitle him to relief—*Lyon* v. *Lizars*, 1848, 10 D. 1366.

[2] Per Tindal, C.J., in *Goring* v. *Edmonds*, 1829, 6 Bing. 94, at p. 99.

[3] *M'Farlane* v. *Anstruther*, 1870, 9 Macp. 117. In an Irish case an averment by a cautioner, that the creditor had delayed ten years to demand payment from the principal debtor, was held a bad defence—*Belfast Banking Co.* v. *Stanley*, 1867, 1 C. L. Ir. 693.

[4] See *supra*, p. 866.

[5] *Dalzell* v. *Menzies*, 1831, 9 S. 434.

[6] See observations of L. J. C. Hope in *Falconer* v. *Lothian*, 1843, 5 D. 866. But see *Black* v. *Ottoman Bank*, 1862, 15 Moo. P. C. C. 472.

to the creditor or employer personally, he cannot be made answerable for the negligence of third parties, whose careful superintendence might have prevented the loss.[1]

Averments of gross negligence on the part of a creditor in superintending the conduct of a principal debtor are a proper matter for trial by jury; and an issue on these averments may be submitted to a jury, along with other issues aimed at the reduction of the bond of caution on other grounds.[2]

Exc. Where the creditor's omission is of something which he contracted to do.

An omission on the part of the creditor to do something which he has contracted with the cautioner to do, is equivalent to a positive act. Such an omission is a distinct breach of the creditor's obligation, which alters the position of the cautioner and liberates him from his engagement. The effect of an omission to perform a condition, and the manner in which conditions may be imported into guarantees, have already been discussed.[3] An agreement by the creditor to do something is equally effectual in a question with a cautioner, though it is made with the debtor and not directly with the cautioner, if the latter has relied on it in undertaking his obligation. Thus where it was stipulated between the creditor and the principal debtor that the creditor should insure from risk by fire the work which the principal debtor was doing for him, and the surety, on his becoming surety for the due performance of the work, was informed of this stipulation, it was held that the surety was discharged by the creditor's omission to insure.[4]

Similarly, in guarantees of conduct, while the cautioner is not discharged because the employer fails to use every means in his power to guard against the dishonesty of his employee, yet, if the employer omit to do some act which he has contracted with the cautioner to do, the latter is discharged.[5] The effect of a stipulation that the creditor in a guarantee of conduct should take active measures for the cautioner's protection, is illustrated in a leading English case, in which a father gave a bond for the fidelity of his son during his apprenticeship, the master undertaking that he would, at least once a month, see his apprentice make up his cash. The apprentice having embezzled certain money, it was held, in an action brought by the master on the bond, that the father was only liable for the whole sum provided the accounts

[1] *Guardians of Mansfield Union* v. *Wright*, 1882, 9 Q. B. D. 683.

[2] *Mags. of Glasgow* v. *Hopkirk's Trs.*, 1839, 2 D. 61.

[3] *Vide supra*, p. 739 *et seq.*

[4] *Watts* v. *Suttleworth*, 1860, 5 H. & N. 235; 7 H. & N. 353.

[5] See per Bowen, L.J., in *Mayor of Kingston-upon-Hull* v. *Harding* [1892], 2 Q. B. 494, at 508

were taken monthly, and, if they were not taken monthly, that he was liable for no more than the master could prove that the apprentice embezzled in the first month in which the embezzlement began.[1]

Exc. Omission of creditor to preserve or perfect a security for the debt.

If the creditor's negligence takes the form of an omission to preserve or perfect his title to some security, to the benefit of which the surety is entitled, whereby the surety is deprived of the security in question, the omission is equivalent to a positive act inconsistent with the relation of principal and surety, and liberates the surety.[2] This holds especially where the act omitted by the creditor was one which could have been performed only by the creditor, and was not one which the cautioner could have performed for himself.[3] "If there is a contract, express or implied, that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in his hand, which he does not do, that does not release the surety, unless he can show that he has received some injury in consequence of the creditor's conduct."[4]

Exc. Omission of employer to give notice to the surety of an act of dishonesty of the employee.

In guarantees of conduct, the omission of the employer to inform the surety of an act of dishonesty on the part of the employee, or of a breach of duty, whether accompanied by dishonesty or not, is regarded as standing on the same footing as a positive act which destroys a right of the surety; such an omission, accordingly, discharges the surety from liability for the employee's conduct in the future.[5] It is contrary to the faith of the contract of guarantee for an employer, after discovering that his employee is no longer trustworthy, to continue to trust him, without informing the surety of his discovery.[6] This right of the surety to be informed is a right which the employer is bound to respect, and his omission to respect it is looked on as equivalent to a positive

[1] *Montague* v. *Tidcombe*, 1705, 2 Vern. 518.

[2] *Fleming* v. *Thomson*, 1826, 2 W. & S. 277; *Story* v. *Carnie*, 1830, 8 S. 853; *Wright's Trs.* v. *Hamilton's Trs.*, 1835, 13 S. 380; *Wulff* v. *Jay*, 1872, L. R. 7 Q. B. 756.

[3] The discharge of cautioners by the creditor losing or giving up securities is treated *infra*, p. 916 *et seq.*

[4] Per Cotton, L.J., in *Carter* v. *White*, 1883, 25 Ch. Div. 666, at p. 670.

[5] Concealment by the creditor of acts of this sort committed before the surety's contract was entered into, has the effect of rendering the guarantee void from the beginning; see p. 710 *et seq.*

[6] See per Lord Redesdale in *Smith* v. *Bank of Scotland*, 1813, 1 Dow, 287; *Phillips* v. *Foxall*, 1872, L. R. 7 Q. B. 666.

act of injury.[1] Thus where a bank, discovering grave irregularities in the conduct of one of their agents, contented themselves with severely censuring him, and continued him in their employment, without intimation of the irregularities to his cautioners, the cautioners were liberated.[2] Similarly, in England it is a good defence to an action against a guarantor of the good conduct of an official, that, before the occurrence of the defaults sued on by the employer, the official had committed defaults of the same kind, and that the employer, with knowledge of these defaults, continued to employ the person whose conduct was guaranteed in his service, without notice to the guarantor.[3] On the other hand, mere acquiescence in certain irregularities in the debtor's accounts, where no dishonesty is suspected by the creditor, is not such connivance as will discharge sureties.[4] Where the creditor does not have the power of dismissal, but merely a power of suspension,—the power of dismissal being vested in a higher official,—it has been held that his omission to exercise his power of suspension does not terminate the surety's liability.[5] Again, the surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer.[6]

Effect of omission to present for payment or give notice of dishonour: — when the cautionary obligation is on a bill or note.

Where a contract of cautionry is created through the machinery of a bill or note, the omission by the creditor of any of the duties which are imposed upon him by the law merchant, such as an omission to present for payment or to give notice of dishonour, discharges those parties to the bill who are in the position of cautioners for its payment; for, in this case, the rights of parties are settled by mercantile usage and Statute.[7]

[1] See per Bowen, L.J., in *Mayor of Kingston-upon-Hull* v. *Harding* [1892], 2 Q. B. 494.

[2] *Leith Bank* v. *Bell*, 1830, 8 S. 721, affd. 1831, 5 W. & S. 703; *Thomson* v. *Bank of Scotland*, 1824, 2 Sh. App. 316; *Thistle Friendly Society of Aberdeen* v. *Garden*, 1834, 12 S. 745.

[3] *Sanderson* v. *Aston*, 1873, L. R. 8 Ex. 73; *Burgess* v. *Eve*, 1872, L. R. 13 Eq. 450.

[4] *Mayor of Durham* v. *Fowler*, 1889, 22 Q. B. D. 394; see also *Guardians of Mansfield Union* v. *Wright*, 1882, 9 Q. B. D. 683, C. A.

[4] *Byrne* v. *Muzio*, 1881, 8 L. R. Ir. 396 Ex. Div.

[6] *Mayor of Kingston-upon-Hull* v. *Harding* [1892], 2 Q. B. 494.

[7] If the acceptor has failed to pay, the holder of the bill, after protesting it, is not obliged, in the absence of a special agreement, to use active diligence against the acceptor in order to preserve recourse against the subsequent parties to the bill. See per L. J. C. Moncreiff in *Crawford* v. *Muir*, 1873, 1 R. 91, at 95.

—when the principal obligation is under a bill or note, but the guarantee is contained in a separate instrument.

Where, however, the parties who have guaranteed the payment of the bill are not parties to the bill, but are strangers to it, there is not the same necessity for the creditor presenting for payment or giving notice of dishonour. "A man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour, unless he has actually been prejudiced by such neglect."[1] Presentment is not, in the ordinary case, necessary to render the acceptor himself liable;[2] and in no case is the acceptor of a bill or the maker of a note entitled to notice of dishonour.[3] Accordingly, a person who has given a guarantee, separate from the bill, for the payment of a bill by the acceptor, cannot insist that the bill be presented for payment to the acceptor, and is not entitled to notice of dishonour.[4] Similarly, a person who has guaranteed the payment of a note if it be not duly honoured and paid by the maker, is not entitled to notice of the dishonour of the note.[5] In *Carter* v. *White*[6] a debtor handed to his creditor a bill, accepted by himself but with the drawer's name left blank, and at the same time the plaintiff, as surety for the debtor, deposited certain stock certificates with the creditor as collateral security. The principal debtor, the acceptor, died insolvent, without the creditor having inserted any drawer's name. The bill was never presented for payment, and no notice of its non-payment was given to the plaintiff; yet it was held that he was not discharged. On the other hand, where it is the usage of a particular trade, instead of indorsing bills, to give a separate guarantee for their payment, the guarantor is, as regards the acceptor, in a position very similar to that of a regular indorser, and consequently is probably entitled, like an ordinary indorser, to notice of dishonour as well as due presentment.[7] So if the person guaranteed be, not the acceptor, but the drawer of the bill, presentment for payment and

[1] Byles on *Bills*, 15th ed., p. 238; *Borthwick* v. *Robertson*, 1830, 8 S. 857; *Brown* v. *Kirkland*, 1861, 23 D. 363.

[2] Bills of Exchange Act, 1882, s. 52 (1).

[3] *Ib.* s. 52 (3).

[4] *Hitchcock* v. *Humphrey*, 1843, 5 M. & G. 559; *Murray* v. *King* (1821), 5 B. & Ald. 165, in which case the indorser of a bill guaranteed its payment in a separate bond, and it was held that the want of notice of dishonour of the bill was no defence to an action on the bond; cf. *Holbrow* v. *Wilkins*, 1822, 1 B. & C. 10.

[5] *Walton* v. *Mascall*, 1844, 13 M. & W. 72.

[6] 1883, 25 Ch. Div. 666.

[7] Byles on *Bills*, 15th ed., 290; see *ex parte Bishop*, 1880, 15 Ch. Div. 400, C. A., where it appeared that when bill-brokers, who have discounted bills, re-discount the bills with a bank, they are accustomed, instead of indorsing each bill, to give a general guarantee for the payment of the bills.

notice of dishonour are probably both necessary in order to bind the guarantor. In *Phillips* v. *Astling*[1] the defendant, who was not a party to the bill, guaranteed the payment of a bill by the drawer or the acceptor. The bill was not presented for payment when it became due; and, though notice of its non-payment was sent to the drawer, no notice was given to the defendant. On the subsequent insolvency of the drawer and the acceptor, it was held, in an action against the guarantor, that the latter was discharged by the omission of the creditor to take the necessary steps to obtain payment from the parties to the bill while they continued solvent.[2] Even if the acceptor is the party guaranteed, it is probably necessary, where the acceptance is qualified, to give notice of dishonour to a guarantor who is not a party to the bill. Further, even in those cases in which notice is not strictly necessary, it is obviously fair, and certainly prudent, for the creditor to give the guarantor some notice.

Alteration of the contract.

A cautioner is discharged from his liability if, subsequently to the execution of his contract, the creditor consent to an essential change in the obligation of the principal debtor, or to any alteration whereby the position of the cautioner is prejudiced, without the knowledge or assent of the cautioner.[3] A cautioner is concerned in every transaction between the creditor and the principal debtor, and, consequently, if any innovation is made in the agreement between the principals, the cautioner ought to be consulted. The general rule is that if an alteration is made in the conditions of the principal's liability, the cautioner, if he has not assented to such alteration, is the sole judge whether he will remain liable. The reason of the rule was stated by Lord Loughborough—and his words have frequently been approved—as follows: "It is the clearest and most evident equity not to carry on any transaction without the knowledge of the surety, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his affairs as your own) without consulting him."[4]

Substitution of a new contract for the original contract.

An extreme case of alteration is where a new contract altogether is substituted in place of the original contract between the principal debtor and creditor,—that is, where there has been novation.[5]

[1] 1809, 2 Taunt. 206.

[2] For an explanation of *Phillips* v. *Astling*, see *Hitchcock* v. *Humphrey*, 1843, 5 M. & G. 559, at 564.

[3] Bell, *Prin.* i. 259; *Bonar* v. *M'Donald*, 1847, 9 D. 1537; affd. 1850, 7 Bell's App. 379.

[4] Per Lord Loughborough in *Rees* v. *Berrington*, 1795, 2 Ves. jun. 540, at 543.

[5] *Vide supra*, p. 846.

Change by Statute in the duties of a person whose conduct is guaranteed.

A cautioner, who guarantees the due performance of his duties by the holder of an office, is discharged if the duties of the office be subsequently materially altered; nor does it matter whether this subsequent change is effected by agreement between the employee and his employer, or is the result of an intervening Statute. Where a bond was given by sureties for the conduct of a bailiff, and by a later Statute new duties, not previously germane to the office, were imposed on the bailiff, the sureties in the bond were held not liable for the misconduct of the principal after the date of the Statute, although his misconduct was in relation to a matter in respect of which his duty was in no way altered by the intervening Act.[1] "It may be considered settled law," said Lord Chancellor Campbell in this case, "that where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided."[2] In every case much necessarily depends on the nature of the office and on the terms of the bond.[3] Where it can be inferred from the words of the guarantee or from the nature of the office that the sureties must have contemplated the continuance of their liability, although an alteration should be made in the tenure or duties of the office, such a change does not liberate them. Where, for example, certain persons guaranteed the fidelity of the treasurer of a corporation during his tenure of the office "under any annual or other future election," and the tenure of the office, which had previously been from year to year, was altered by a subsequent Statute to an appointment "during the pleasure of the council," it was held that this variation in the tenure of the office did not discharge the sureties. The words of the bond, "annual or other future election," were construed as showing that the sureties contemplated a continuance of the principal's employment, and therefore it was held that, even assuming that the change in the duration of the office necessarily involved an alteration of risk, such increase of risk must have been contemplated.[4] So if a bond of caution for a judicial officer contains a provision

[1] *Pybus* v. *Gibb*, 1856, 6 El. & Bl. 902; *Bonar* v. *M'Donald*, 1850, 7 Bell's App. 379.

[2] Per Lord Chancellor Campbell in *Pybus* v. *Gibb*, 1856, 6 El. & Bl., at 911.

[3] *Oswald* v. *Mayor of Berwick*, 1853, 1 El. & Bl. 295; 1855, 3 El. & Bl. 653; affd. 1856, 5 H. L. Cas. 856.

[4] *Oswald* v. *Mayor of Berwick*, 1856, 5 H. L. 856; *Mayor of Dartmouth* v. *Silly*, 1856, 7 El. & Bl. 97. Contrast with these cases that of *Mayor of Cambridge* v. *Dennis*, 1858, El. B. & E. 660, where the terms of the surety's bond showed an intention not to be bound after a change in the principal's tenure of his office.

that the officer shall be bound to discharge his duty according to the rules prescribed or to be prescribed by the Court, the cautioners continue liable though Acts of Sederunt be subsequently passed which increase the responsibilities of the officer.[1] Further, if the change made in the duties of the office consists merely in a reorganisation of the work of the official, the sureties are not discharged. Thus where, after the execution of the sureties' bond, an Act was passed regulating, and in some respects changing, the work of the principal's office, under which Act also the principal was elected to a new office additional to, and distinct from, that which he previously held, the sureties were not discharged, since it was shown that the duties of the old office were left, in substance, the same as before; and the appointment of the principal to the additional office did not affect his position as holder of the old office.[2] In an action, which came before the Supreme Court of the United States, upon a bond guaranteeing that a collector of customs should truly execute all the duties of collector according to law, the sureties pleaded in defence that the duties, risks, and responsibilities of the office had been enlarged, and that their liability had been thereby terminated. It was laid down that, while a change in the nature of an office liberated a surety, the mere addition of certain duties, though these new duties differed from those belonging to the office when the surety's bond was given, did not render the bond void as a security for the performance of those duties, belonging to the office at the date of the bond, the faithful performance of which it was intended to secure.[3]

The effect upon a guarantor's liability of a change in the principal contract may depend on the form of the guarantee: distinction between guarantees in this respect.

In determining the effect upon the liability of cautioners of variations in the original contract between the principals, a sharp distinction is drawn between a guarantee of a future course of dealing, couched in general and absolute terms, and entered into between the creditor and cautioner quite separately from, and without reference to the particular terms of, the original contract

[1] The obligatory nature of such a provision has never been questioned.

[2] *Skillett* v. *Fletcher*, 1867, L. R. 2 C. P. 469. If the change involves that the principal ceases to hold his old office, his sureties are discharged; cf. *Malling Union* v. *Graham* (1870), L. R. 5 C. P. 201, where an assistant overseer under one Statute was afterwards appointed, under a later Statute, collector of poor-rates for the same parish. Cf. *Anderson* v. *Thornton*, 1842, 3 Q. B. 271, where a surety engaged for a "clerk" to a banker, who was subsequently appointed manager, and a defence on this ground by the surety was held bad, because it did not aver that the principal ceased to be clerk when he became manager.

[3] *Guassen* v. *United States*, 1878, 97 U. S. 584. Cp. *supra*, pp. 763, 764.

between the creditor and the principal debtor; and a guarantee of a particular and definite transaction, or one in which the contract between the principals is made part of the contract between the creditor and the cautioner.[1]

General guarantees of future dealings entered into independently of the contract between the principals.

Where a guarantee, general and unqualified in its terms, is given with reference to a future course of dealing, and the terms of the principal contract are not imported into the accessory contract by narration or reference, or even by notice of them being sent to the cautioner, the Courts do not readily hold that slight alterations in the original contract between the principals as to the manner or time of payment release the cautioners. If a cautioner choose to undertake a general and unqualified guarantee, apart from, and independently of, the contract which has been, or may be, entered into between the principals, his obligation is taken as contemplating and covering any slight deviations from the original contract which the principals see fit to make in actually carrying out their agreement. He is not presumed to have granted the guarantee upon the faith of the specific terms of the original agreement between the principals, but rather to have contemplated the general usage of trade and the ordinary credit given among merchants.[2] Accordingly, in this class of cases, the criterion applied in determining whether a cautioner is, or is not, discharged, is not so much whether there has been some actual alteration in the original contract between the principals, as whether the alteration in question is, or is not, a reasonable one in the circumstances; and if the alteration is not unreasonable, the cautioner will not be discharged.[3] "Where one guarantees all goods which may be furnished to a trader, or all bills which may be discounted by a banker, as a cautioner, he necessarily, by the generality of the obligation, leaves the principal debtor and creditor free to arrange the details of their transactions as they think fit, provided these are not at variance with the ordinary custom of merchants.[2] This is the principle of a general guarantee, and it has been frequently applied."[4] Where, for example, a cautioner

[1] See per Lord President Inglis in *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74, at p. 80, and in *Nicolsons* v. *Burt*, 1882, 10 R. 121, at 125.

[2] *Cook* v. *Moffat & Couston*, 1827, 5 S. 774; *Bowe & Christie* v. *Hutcheson*, 1868, 6 Macp. 642. See also the opinion of L. J.. C. Moncreiff in *Stewart, Moir, & Muir* v. *Brown*, 1871, 9 Macp. 763.

[3] See opinions in *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74; *Cook* v. *Moffat & Couston*, 1827, 5 S. 774.

[4] Per L. J. C. Moncreiff in *Stewart, Moir, & Muir* v. *Brown*, 1871, 9 Macp. 763, at p. 766; *Brown & Co.*, 1809, Hume, *Decisions*, 96; *Prest, Brown, & Prest* v. *Hotson*, 1809, Hume, *Decisions*, 97; *Edwards* v. *Milne*, 1885, Guth. Sh. Ct. Cas. (2nd ser.), 75.

granted an absolute guarantee for a credit to be allowed to a third party, an arrangement being made between the creditor and the third party as to the mode in which the credit was to be operated on, it was held, on a deviation from this arrangement occurring, that the cautioner could not found on the deviation, as his guarantee had contained no reference to the arrangement.[1]

General guarantees of conduct.

The same principle is recognised in guarantees of conduct. Thus in the case of a guarantee in these terms: "I guarantee W.'s intromissions, as your agent in Leith, to the extent of £500,"—it was held that a change in the agreement between the creditor and the principal debtor as to the time and manner in which the latter was to account to the former, did not discharge the surety.[2] The ground of the decision was that the guarantee left the mode of accounting open, provided it was reasonable, and that the new arrangement was not unreasonable. It was clearly explained by Parke, B., in this case, that if the guarantee had, expressly or impliedly, stated that the surety was to be responsible only for intromissions in the mode then used, any deviation from that mode would have discharged the surety as to the transactions in which the deviation took place.[3] So the cautioners for the factor of a trust were not discharged by the trustees dispensing with the services of a law agent in connection with the trust. The employment of a law agent was undoubtedly a safeguard; yet the Court took the view that as the manner of conducting the law business was a matter in the discretion of the trustees, the change did not constitute such an alteration as would discharge the cautioners.[4] Again, in *Sanderson* v. *Aston*,[5] a plea by a surety, in defence to an action by the creditor, that the original agreement between the creditor and the principal debtor had been altered, without his consent, so as to be made terminable only on three months', instead of on one month's, notice, was held to be bad. In *Nicolsons* v. *Burt*,[6] a cautioner bound himself in a separate document, granted apart from the contract between the principals, and couched in absolute terms, "for the due and punctual payment of all sums collected" by the principal debtor, who acted as traveller for a firm. The contract between the principals was contained in a minute of

[1] *Ellice* v. *Finlayson*, 1832, 10 S. 345.

[2] *Stewart* v. *M'Kean*, 1855, 10 Ex. 675.

[3] Per Baron Parke in *Stewart* v. *M'Kean*, 1855, 10 Ex. 675.

[4] *Waugh* (*Shaw's Trs.*) v. *Clark*, 1876, 14 S. L. R. 125.

[5] 1873, L. R. 8 Ex. 73.

[6] 1882, 10 R. 121.

agreement, under which the traveller's engagement was for three years at a fixed salary, payable monthly; but it was not proved that the terms of this agreement were communicated to the cautioner. Subsequently, the traveller's engagement was renewed for a second fixed period of three years by a writing appended to the original minute. In defence to an action by the creditor for the recovery of sums misapplied during the period of the second engagement, the cautioner pleaded that his guarantee had reference solely to the first engagement; and further, that the new agreement, under which the appointment was for a fixed period of three years, instead of being terminable at a month's notice, involved such an alteration in the original contract as liberated him. The Court held that, looking to the unqualified terms of the cautioner's obligation, the liability of the cautioner was not terminated by the new engagement, but that he continued bound until either he intimated his withdrawal or the service came to an end.[1] Where, in short, the terms of the agreement between the creditor and the principal debtor are not in any way made part of the accessory contract, it is necessary for the cautioner, in order to gain relief, to show that some alteration has been made which is unreasonable, or that something has been done which materially alters his position, or increases the risks fairly incident to his undertaking.

Effect of alterations in the case of guarantees of definite transactions, or where the terms of the principal agreement form part of the cautioner's contract.

On the other hand, where a guarantee is given for a particular and definite transaction, or where the original agreement between the creditor and the principal debtor is, by recital, by reference, or by other means, made part of the cautioner's contract, all the conditions of the original agreement must be strictly adhered to, and any alteration, whether shown to be material or not, will discharge the cautioner if made without his consent.

Guarantees for the performance of specific contracts.

If a guarantee relate to the performance of a particular contract, the contract must be carried out strictly in the manner for which the cautioner made himself responsible.[2] "When one becomes cautioner for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the cautionary obligation; and if the creditor, without the consent of the cautioner, alter these terms to the prejudice of the cautioner, the latter will be free."[3] A creditor

[1] *Nicolsons* v. *Burt*, 1882, 10 R. 121.

[2] *Murray* v. *Lee*, 1882, 9 R. 1040; *Stewart* v. *Scott*, 1803, Hume, *Decisions*, 91; *Evans* v. *Whyle*, 1829, 5 Bing. 485; *Drummond* v. *Rannie*, 1836, 14 S. 437.

[3] Per L. J. C. Moncreiff in *Stewart, Moir, & Muir* v. *Brown*, 1871, 9 Macp. 763.

cannot enforce a guarantee of a definite transaction unless he has literally performed his part of the contract.[1] For example, where A. contracted with B. to build a ship for a given sum, to be paid by instalments as the work reached certain stages, C., who guaranteed the performance of the contract by B., was discharged by A. paying B. for the instalments of the work before the arrival of the periods at which the payments became due.[2] Similarly, where a party became a cautioner for a composition under an arrangement whereby the debtor's estate was to be conveyed to trustees for payment of his debts and the relief of his cautioner, the cautioner was discharged on showing that, without his consent, a different arrangement had been come to between the debtor and his creditors. As the effect of the new arrangement was that the contract between the creditors and their debtor was no longer the same as that for which the cautioner bound himself, the Court refused to examine whether the cautioner could qualify prejudice by the change.[3] On the same principle, the cautioners for the rent payable by a tenant are discharged from liability if part of the subjects of the lease to which the cautionary obligation related, and in consideration of the possession of which the rent was paid by the tenant, are removed from the tenant's possession under an arrangement to which the creditor in the cautionary obligation was a party.[4] In a recent English case, *Barber* v. *Mackrell*,[5] a surety guaranteed to the holder the payment by the acceptor of two bills, which were to be renewed. The amount of each of the bills was stated in the letter of guarantee. On its being shown that the separate amounts of the new bills were different from the separate amounts of the old bills, though the aggregate was the same, and that the new bills did not commence from the date of the expiration of the old bills, it was held that the surety was not bound by his guarantee, as the creditor could not show that the contract had been literally performed.

Continuing guarantees or guarantees of employment, in which the terms of the principal agreement are made part of the surety's contract.

The principle that a cautioner is discharged by any departure from the original agreement between the creditor and principal, which, though made in good faith, is in any degree prejudicial to

[1] *Scott* v. *Campbell*, 1834, 12 S. 447. The following are a few of the many English cases illustrating this doctrine: *Whitcher* v. *Hall*, 1826, 5 B. & C. 269; *Mills* v. *Alderbury Union*, 1849, 3 Ex. 590; *Pidcock* v. *Bishop*, 1825, 3 B. & C. 605; *Archer* v. *Hale*, 1828, 4 Bing. 464; *Archer* v. *Hudson*, 1844, 7 Beav. 551; *vide supra*, p. 742.

[2] *General Steam Navig. Co.* v. *Rolt*, 1859, 6 C. B. (N. S.) 550.

[3] *Scott* v. *Campbell*, 1834, 12 S. 447; cf. *Taylor & Paterson* v. *Scoular*, 1816, Hume, *Decisions*, 108.

[4] *M'Dougall & Herbertson* v. *Northern Co.*, 1864, 2 M. 935.

[5] 1892, 67 L. T. 108.

him, is equally applicable to continuing guarantees for future dealings, or to guarantees of conduct, provided that the original contract between the creditor and the principal debtor is made part of the agreement between the creditor and the cautioner. The terms of the principal contract are part of the cautioner's obligation, if the cautioner has subscribed them;[1] or they may be incorporated into the subsidiary contract by narrative,[2] or by reference,[3] or by proof that the cautioner had formal notice of them before entering on his contract.[4] In each of these cases the cautioner is regarded as having undertaken his guarantee in reliance on the agreement between the creditor and the principal debtor being strictly carried out; and the rule is absolute that there shall be no change in that agreement, without acquainting the cautioner, who has a concern in every transaction between the principals. Any alteration which is not obviously unsubstantial or for the benefit of the cautioner, discharges him, if made without his consent.

Illustrations. Thus, in *Bonar* v. *M'Donald*,[5] the leading Scotch authority on this subject, a cautioner for a bank agent, who subscribed the bond given by the principal, was released from his obligation by a subsequent agreement between the bank and the agent, not intimated to the cautioner, that the agent should be liable for one-fourth of the losses arising from discounts. A cautioner, in such circumstances, is none the less discharged although the original agreement, notwithstanding the alteration, is substantially performed, and although the loss ultimately sought to be recovered against the cautioner has not in any way arisen out of the alteration in the contract.[6] Similarly, in another cautionary obligation for the conduct of a bank agent, the fact that the book of instructions and regulations given by the bank to their agent was signed by the cautioner was held to import an incorporation of them into the guarantee, and to make it part of the contract between the bank and the cautioner that these regulations should be adhered

[1] *Bonar* v. *M'Donald*, 1850, 7 Bell's App. 379.

[2] *Holme* v. *Brunskill*, 1877, 3 Q. B. D. 495; *London and N.-W. Rwy. Co.* v. *Whinray*, 1854, 10 Ex. 77.

[3] *Walker* v. *Fraser*, 1837, 15 S. 526.

[4] *British Guarantee Assoc.* v. *Western Bank*, 1852, 15 D. 834; *Dundee and Newcastle Steam Shipping Co.* v. *National Guarantee and Suretyship Assoc.*, 1881, 18 S. L. R. 685; *vide infra*, p. 882.

[5] *Bonar* v. *M'Donald*, 1850, 7 Bell's App. 379.

[6] See per Lord Cottenham in *Bonar* v. *M'Donald*, 1850, 7 Bell's App. 388; *London and North-Western Rwy. Co.* v. *Whinray*, 1854, 10 Ex. 77, where the surety was discharged by the mode of remunerating the principal being changed from a fixed salary to a commission on the sales.

to, and enforced, by the bank. Accordingly, a violation of the regulations in question having been permitted by the bank, the cautioner was discharged, although there was a clause in the regulations expressly reserving power to the bank to alter them. The Court refused to hold that this clause rendered it unnecessary, when an alteration in the regulations was made by the bank, to intimate it to the cautioner.[1] On the same principle, where a guarantee for the good conduct of an employee bears that the employee is to be remunerated for his services in a certain way, the surety is exonerated if, subsequently to the execution of the guarantee, a change is made in the mode of remuneration. Thus where a guarantee, granted to a railway company, narrated that the company had agreed to appoint the debtor their agent for the sale of coal, at a yearly salary of £100, and subsequently the company agreed with the agent to substitute for this salary a commission of 6d. per ton on all coal sold by him, the surety was held not to be responsible for the agent's dealings after this change in the mode of paying him.[2] So in another English case, in which the surety's bond contained a full recital of the contract between the creditor and the principal debtor, it was held that the surety was discharged by a new agreement being entered into between the principals, although it was found, as a matter of fact, by a jury, that the new agreement had made no substantial or material difference in the relation of the parties, and had not prejudiced the surety.[3] In this case Cotton, L.J., laid down the law applicable to the class of cases with which we are dealing as follows: "The true rule is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration . . . but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable,

[1] *Leith Bank* v. *Bell*, 1830, 8 S. 720; affd. 1831, 5 W. & S. 703. Cf. *Walker* v. *Fraser*, 1837, 15 S. 526, in which case a previous minute of agreement between the creditor and principal debtor was referred to in the guarantee, and the cautioner was liberated by a contravention of the stipulation contained in this minute.

[2] *London and North-Western Rwy. Co.* v. *Whinray*, 1854, 10 Exch. 77.

[3] *Holme* v. *Brunskill*, 1877, 3 Q. B. D. 495; see also *Polak* v. *Everett*, 1876, 1 Q. B. D. 669.

notwithstanding the alteration, and that if he has not so consented he will be discharged."[1] In short, where the original agreement between the principals is, in one way or another, made part of the agreement between the creditor and the cautioner, there are only two questions: (1) What are the terms of the contract? and (2) Has the creditor observed these terms?[2]

Where the principal contract differs from that contemplated in the guarantee.

The same principle applies where a guarantee is given in the contemplation of a contract in certain terms being entered into between the principals, and it turns out that the actual contract as entered into between the principals does not comply with that described in the guarantee. Thus, in *Clarke* v. *Green*,[3] A. undertook to guarantee a debt due to B. from C., in consideration of B. agreeing to accept payment thereof by instalments. The agreement, however, actually entered into between B. and C. contained a proviso that the whole debt should be payable at once, in the event of C. making default in payment of any one instalment. By this alteration A. was held to be discharged from liability under his guarantee.

Notice to cautioner of terms of principal contract or separate undertakings by the creditor.

Although the contract between the creditor and the principal debtor is separate from, and neither narrated nor referred to in, the instrument of guarantee, yet if it is proved that notice was given to the cautioner of the terms of the contract between the principals, and that his obligation was undertaken after such notice, the cautioner is held to have executed the guarantee on the faith of the terms of the principal contract being exactly carried out.[4] It does not, however, suffice to put an end to the liability of a cautioner, who has signed an unqualified guarantee for future dealings or conduct, to show that some term of the principal contract, of which the cautioner had casual knowledge, has been altered in a reasonable way to suit the convenience of the principal parties.[5] Again, where undertakings have been given, or representations made, by the creditor to the cautioner, which are relied on by the cautioner in entering into his engagement, the creditor, although they are not incorporated into, nor referred to in, the instrument of guarantee, is bound to observe them, and his failure to substantially perform them is a variation of the cautioner's contract. Where, for example,

[1] Per Cotton, L.J., in *Holme* v. *Brunskill*, 1877, 3 Q. B. D. 495, at 505, quoted and approved in *Ward* v. *National Bank of New Zealand*, 1883, 8 A. C. 755, at 764.

[2] See *supra*, p. 739 *et seq.*, as to conditions precedent.

[3] 1849, 3 Ex. 619.

[4] *Sanderson* v. *Aston*, 1873, L. R. 8 Ex. 73, at 76.

[5] *Nicolsons* v. *Burt*, 1882, 10 R. 121; see per Lord Pres. Inglis, at p. 125.

in a guarantee of the conduct of a bank teller, the bank, prior to the contract with the cautioner being entered on, gave an undertaking as to the manner in which the teller's cash was to be checked, the bank, although the undertaking in question was not referred to in the bond of guarantee, was held bound to implement the undertaking, it being a matter materially affecting the risk of the cautioner's obligation; and the bank was not allowed to lead evidence as to the mode of checking adopted in other banks, in order to show that they had acted up to the general practice.[1]

Alteration made in the instrument of guarantee after its execution.

A creditor who has the custody of an instrument of guarantee made for his benefit is bound to preserve it in its original state, and if he alter it, or, through carelessness, allow it to be altered by a third party, in such a way as to materially vary the contract of the guarantor, the guarantor is discharged. In *Davidson* v. *Cooper*,[2] after a guarantee had been signed by the guarantor and delivered to the creditor, a seal was, without the consent or knowledge of the guarantor, affixed to it opposite the signature of the guarantor, so as to make it purport to be sealed by the guarantor. This was held to constitute a material alteration; and the effect of it, happening as it did while the document was in the hands of the creditor, was to discharge the guarantor from all liability.[3] In a later case, several directors of a bank gave a guarantee to the bank, under which each was liable for the whole amount of the debt, although the intention of the parties was that each was to be only liable for his share. On some of the guarantors paying their proportions of the debt, the secretary of the bank, being under the impression that the legal effect of the document was what was intended, struck out the names of those guarantors who had paid their proportions. In an action by the bank against one of the guarantors, it was held that, as the guarantee had been materially altered by the act of the secretary while it was in the custody of the bank, the liability of the sureties was extinguished.[4] On the other hand, an addition to, or alteration in,

[1] *British Guarantee Assoc.* v. *Western Bank*, 1853, 15 D. 834; *Dundee and Newcastle Steam Shipping Co.* v. *National Guarantee and Suretyship Assoc.*, 1881, 18 S. L. R. 685. As to the distinction between representations and conditions in guarantees, *vide supra*, p. 739 *et seq.*; as to mode of proof, p. 747 *et seq.*

[2] 1843, 11 M. & W. 778.

[3] The attaching of the seal made the instrument a deed; and, as was observed by Alderson, J., in the course of the argument, this altered the meaning of the words. "On becoming a deed the words did not mean the same thing," *e.g.* the heirs of the guarantor would be bound, and no plea under the Statute of Limitations could thereafter be stated.

[4] *Bank of Hindostan, China, and Japan Lim.* v. *Smith*, 1867, 36 L. J. C. P. 241.

an instrument of guarantee does not discharge the surety, if it is quite immaterial. Thus, in *Andrews* v. *Lawrence*,[1] A., upon the faith of a guarantee by C., agreed to do certain work for B. & Co. under a contract which, after many specific stipulations, contained a clause making B. & Co. liable for "any important work not mentioned in this tender" which might be required. C.'s guarantee was for the work done "according to the contract" between the principals. The word "important" in the clause quoted was inserted in the principal contract by A., the creditor, with the consent of B. & Co., the principal debtors, after C. had executed his guarantee. It was held, however, that the insertion of this word had no material effect upon the liability of C., the guarantor, and consequently that he was not discharged.[2]

Alteration of instrument of guarantee by intended co-cautioner.

An alteration in the instrument of guarantee by one of the cautioners, after some of his co-cautioners have signed, may result in a complete discharge of all the cautioners. Thus in the recent case, *Ellesmere Brewery Co.* v. *Cooper*,[3] four persons, as sureties for a principal debtor, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to £50 each, and that of the remaining two to £25 each. One of the sureties, whose liability was limited to £50, after the other three had executed the bond, put his name to it, but added to his signature the words "for £25 only." The creditor accepted the bond so executed without objection. It was held that the effect of this alteration was to discharge the three first signatories from all liability, and, further, that the last signatory, who made the alteration, was not liable even for the £25, the sum to which he had limited his liability. "He, in good faith," observed Lord Russell, C.J., "expressly limits his liability to £25; but he undertakes that liability, not as a separate or independent liability, but as part of a contract in which the other sureties are joining him,—against whom, in certain eventualities, he will have rights of recourse,—between whom and himself a common burthen is to be borne, although unequally distributed. But if, in fact, such sureties are not bound by the contract (and we have adjudged that they are not), he is entitled to say, 'This

[1] 1865, 19 C. B. (N. S.) 768.

[2] Cf. *Aldous* v. *Cornwell*, 1868, L. R. 3 Q. B. 573, where a promissory note, which did not express any time for payment, but to which the payee, while it was in his possession, added the words "on demand," was held to be enforceable, upon the ground that the alteration only expressed the legal effect of the note as originally made, and was therefore immaterial.

[3] [1896], 1 Q. B. 75.

is not the contract into which I entered, and I am not bound by it.'"[1]

Cautioner not discharged if he consent to the alteration.

If the alteration in the contract of the principals is made with the knowledge and consent of the cautioner, or if, with full knowledge of all the facts, he subsequently assents to it, he is not discharged.[2] But consent to an alteration will not be implied from mere silence on the part of the cautioner. Thus where a cautioner guaranteed payment by a debtor of the last instalment due under a composition contract, and the creditors, on the debtor's failure to pay the first instalment, took from him a second trust deed for their behoof, without intimation to the cautioner, although a circular referring to it was sent to him at the same time that it was sent to the creditors, it was held that the terms on which the cautioner granted his obligation were altered so as to release him, and that his silence after receiving the circular did not bar him from pleading this alteration.[3] A cautioner who becomes aware that the creditor is going to do something which, if done without his assent, may discharge him, is not bound to warn the creditor against doing it. It is for the principals, who are making the new arrangement, to take care of themselves, and, unless there is a duty on the cautioner to speak, arising out of special circumstances, he is entitled to stand by without objecting.[4]

Cautioner not discharged, if the alteration is induced by the fraud of the principal, against which the cautioner has guaranteed the employer.

Again, a surety for the good conduct of an employee is not discharged from liability under a guarantee, although his position has been altered by the conduct of the employer, provided that the conduct of the employer, in making the alteration, has been brought about by a fraudulent act or omission on the part of the employee against which the surety has, by his contract of suretyship, guaranteed the employer.[5] In the case referred to, certain persons, as sureties, undertook that the contractors for certain works would well and truly perform their contract. Under the contract, to which the plaintiffs, the contractors, and the sureties were parties, it was provided that a certain percentage of the

[1] Per Lord Russell, C.J., in *Ellesmere Brewery Co.* v. *Cooper*, 1896, 1 Q. B. 75, at 82.

[2] As to the effect of notice to the cautioner of an alleged alteration in the contract between the principals, and conduct on the part of the cautioner implying acquiescence in the alteration, see *Sorley's Trs.* v. *Grahame*, 1832, 10 S. 319, at 325.

[3] *Allan, Buckley, Allan, & Milne*, v. *Pattison*, 1893, 21 R. 195.

[4] See remarks of Blackburn, J., in *Polak* v. *Everett*, 1876, 1 Q. B. D. 669, at 673.

[5] *Mayor of Kingston-upon-Hull* v. *Harding* [1892], 2 Q. B. 495; see per Bowen, L.J., 504.

contract price of the works should be retained till a final certificate should be given by the plaintiffs' engineer. The contractors executed portions of the work in a defective manner, and fraudulently concealed the defective work, with the result that the final certificate was obtained from the plainiffs' engineer, and the retention money paid to the contractors. The Court held that, even if the giving of the certificate and the payment of the retention money had altered the position of the sureties for the worse, the sureties were not discharged, because both the certificate and the payment of the retention money had been obtained by the fraud of the contractors, against which the sureties had guaranteed the plaintiffs.

Where a guarantee has reference to several distinct matters, an alteration as to one of these matters does not discharge the cautioner's liability for the others.

Where a cautioner guarantees the performance by the principal debtor of two separate and distinct things, a subsequent alteration of the contract between the creditor and the principal debtor as to one of these things, without the consent of the cautioner, will not release the cautioner from his liability for the other;[1] nor does it matter, in such a case, whether the liability of the principal to perform the several distinct acts is undertaken in one contract or in several separate contracts.[2]

The discharge of a surety by alteration in the contract is an absolute discharge.

If there is an alteration in the original contract between the creditor and the principal debtor, the cautioner is discharged as to the whole debt. His discharge is an absolute discharge. In this respect the discharge resulting from an alteration of the contract differs from the discharge resulting from actings of the creditor, whereby part of a security, to the benefit of which the cautioner is entitled, is rendered unavailable; for in the latter class of cases the cautioner is discharged, not absolutely, but only *pro tanto*.[3] Where a surety, in addition to undertaking a guarantee, has in the same contract pledged his goods, or mortgaged or charged his lands, as security for the same debt, an alteration of the contract by the creditor and the principal debtor behind the back of the surety, not only discharges the surety from personal liability under the guarantee, but also releases the property which he has pledged or mortgaged. The alteration of the contract without his consent affects the surety's position equally in regard to every part of his contract of suretyship; when his guarantee is gone, the security which he has given cannot remain bound.[4]

[1] *Harrison* v. *Seymour*, 1866, L. R. 1 C. P. 518.

[2] *Croydon Commercial Gas Co.* v. *Dickinson*, 1876, 2 C. P. D. 46; cf. *Morgan* v. *Smart*, 1877, 10 M. 615.

[3] See *infra*, p. 921. The distinction is clearly pointed out in *Taylor* v. *Bank of N. S. Wales*, 1886, 11 App. Cas. 596, per Lord Watson, at p. 603.

[4] *Bolton* v. *Salmon* [1891], 2 Ch. 48.

Discharge of cautioner by the creditor giving time to the principal debtor.

A cautioner is discharged from his liability if the creditor, without his consent, give time to the principal debtor.[1] The discharge of a cautioner by the creditor giving time to the debtor is merely a particular application of the general principle that an alteration of the original contract liberates the cautioner. To "give time" means to extend the period at which, by the contract between them, the principal debtor was originally liable to pay his debt to the creditor,—the extension being the result of a new contract between the principals, to which the cautioner does not assent.[2] A cautioner, immediately on the principal debt becoming due, has a right to pay the debt to the creditor, demand an assignation of the debt, and take action against the principal debtor for total relief in respect of what he has paid. If the creditor has, by contract with the principal debtor, bound himself to grant an extension of time to the debtor, even for a single day, he has thereby tied his hands, so that he cannot himself sue the debtor; and also, since the cautioner-assignee is bound by all obligations pleadable against his creditor-cedent, the creditor, by his contract with the debtor, has put the cautioner into a position which disables the latter, if he pay the debt, from at once working out his relief against the debtor.[3] Such a contract, accordingly, interferes with the rights of the cautioner; for it deprives him of the chance of considering whether he will have recourse to his remedy against the principal or not, and in point of fact puts it out of his power to operate the same remedy against the principal debtor as he might have done under the original contract.[4] The injury to the cautioner by this interference may be a real one; for it may happen that, while the principal debtor had means of paying his debt at the date when, by the original agreement, the debt became due, he has become bankrupt before the expiry of the extended period of payment. Whether or not, however, the cautioner suffers actual damage, the theoretical injury he receives by his rights being interfered with operates his release. So vigilant is the law in protecting the

[1] Bell, *Prin.* s. 262; *Johnstone* v. *Duthie*, 1892, 19 R. 624; *Rees* v. *Berrington*, 1795, 2 Ves. jun. 540, 2 White & Tudor's, L. C. 6th ed., 1106; *per cur. Howell* v. *Jones*, 1834, 1 C. M. & R. 97, at 107.

[2] See definition by Court of Exchequer in *Howell* v. *Jones*, 1834, 1 C. M. & R. 97, at p. 107.

[3] *Scottish Prov. Instit.* v. *Ferrier's Trs.*, 1871, 8 S. L. R. 390; *Strong* v. *Foster*, 1855, 17 C. B. 201, at 219; *Swire* v. *Redman*, 1876, 1 Q. B. D. 536, at 541.

[4] See per Lord Kinnear in *Johnstone* v. *Duthie*, 1892, 19 R. 624, practically quoting Lord Eldon in *Samuell* v. *Howarth*, 1817, 3 Mer. 272, at 278.

cautioner's right to go against the principal debtor, that, as stated by Blackburn, J., "if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether."[1] If the creditor plead that the extension of time to the debtor did not prejudice the surety, or even was for his benefit, the answer is, that "the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."[2]

What constitutes "giving time."

Time may be given in many ways. In every case the essential point to be determined is whether, in point of fact, time has been given, *i.e.* whether, by the new agreement between the principals, the creditor's right of action against the debtor is suspended beyond the period at which the debtor was originally liable to pay the debt. That being so, a distinction falls to be taken between a guarantee of a debt, certain in amount and payable at a definite date, and a general guarantee for future dealing, in which the date of payment is indefinite.[3]

—where the principal debt is payable on a definite date.

Where the debt for which the cautioner has intervened is payable on a definite date, the cautioner is discharged by any agreement between the creditor and the debtor by which the date of payment is postponed, or by which the creditor ties his hands and prevents himself or the cautioner from taking action against the principal debtor at the time when, by the original agreement, he might have done so. The length of time given makes no kind of difference.[4] The manner in which the new contract between

[1] Per Blackburn, J., in *Polak* v. *Everett*, 1876, 1 Q. B. D. 669, at 674; affd. *id.*, by C. A. for same reasons.

[2] Per Lord Eldon in *Samuell* v. *Howarth*, 1817, 3 Mer. 272, at 279; *Johnstone* v. *Duthie*, 1892, 19 R. 624. See *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755, at 763. This doctrine, whereby an act on the part of the creditor, not damaging the surety to the extent of a shilling, and probably even benefiting him, may operate to wholly deprive the creditor of his right against the surety, to the extent possibly of thousands of pounds, has been criticised by eminent judges, as being against justice, *e.g.* by Blackburn, J., in *Petty* v. *Cooke*, 1871, L. R. 6 Q. B. 790, and Cockburn, C.J., in *Swire* v. *Redman*, 1876, 1 Q. B. D. 536. As was pointed out by Cockburn, C.J., however, in the last-mentioned case, the doctrine is now so firmly established as to be capable of being altered only by legislation.

[3] See opinion of Lord Pres. Inglis in *Calder* v. *Cruikshank's Tr.*, 1889, 17 R. 74, at 80.

[4] *Richardson* v. *Harvey*, 1853, 15 D. 628.

the creditor and the debtor is made is of no importance, if its effect is to extend the time at which the debtor was originally liable to pay the debt. Time may be given, for example, by a creditor, who holds a bond securing repayment within a definite period, taking a fresh bond conditioned for payment of the same debt by instalments, some of which are not due till a subsequent period;[1] or by his agreeing, along with other creditors, to accept a composition payable by instalments extending over a period of years;[2] or by his taking in payment of the debt a bill or note not payable till a date subsequent to the date at which, by the original agreement, the debt was due.[3] So where a creditor in a bond by a debtor and cautioners, payable at a certain term, granted, without consulting the cautioners, a back-letter to the debtor, agreeing that under certain conditions the bond should not be called up till six years after the term mentioned therein, the Court had no hesitation in holding the cautioners discharged.[4]

On this principle, if the holder of a bill of exchange enter into an agreement with a party to the bill whereby his right of action against that party is postponed, the subsequent parties are at once discharged. So the drawer and indorsers of a bill are discharged if the holder takes from the acceptor a new bill, payable at a subsequent date.[5] But where the holder of a bill, accepted by two co-obligants, one of whom was cautioner for the other, took from the principal debtor a renewal bill, signed by the cautioner, for a smaller sum, and entered the balance to the debit of a current account between him and the debtor, it was held, in an action on the original bill for the unpaid balance, that the cautioner-obligant was not discharged by time being given, upon the ground that the original bill remained with the creditor, and could be sued on by him at any time.[6] An accommodation bill, in which the acceptor is in the position of cautioner for the

[1] *Clarke* v. *Henty*, 1838, 3 Y. & C. 187.

[2] *Wilson* v. *Lloyd*, 1873, L. R. 16 Eq. 60; *Oakley* v. *Pasheller*, 1836, 4 Cl. & Fin. 207.

[3] *Richardson* v. *Harvey*, 1853, 15 D. 628; *Croydon Commercial Gas Co.* v. *Dickinson*, 1876, 2 C. P. D. 46; *Rees* v. *Berrington*, 1795, 2 Ves. jun. 240; *Thomson* v. *Forrester*, 1824, 2 Sh. App. Cas. 316, see per Lord Gifford at 346, 347; *Ewin* v. *Lancaster*, 1865, 6 B. & S. 571.

[4] *Scottish Prov. Inst.* v. *Ferrier's Trs.*, 1871, 8 S. L. R. 390.

[5] *Gould* v. *Robson*, 1807, 8 East, 575, and *Petty* v. *Cooke*, 1871, L. R. 6 Q. B. 790, at 794. So in *Claridge* v. *Dalton*, 1815, 4 M. & Sel. 225, an agreement to give time to the first indorser of a bill was held to discharge the subsequent indorsers, but not the drawer or acceptor.

[6] *Hay* v. *Kyd & Powrie*, 1886, 13 R. 777; cf. *Cook* v. *Moffat*, 1827, 5 S. 774.

drawer, is a cautionary obligation for the payment of a debt at a fixed or determinable time; accordingly, a holder, who knows the cautionary relation of the parties, discharges the acceptor by entering into any agreement with the drawer postponing the period of payment.[1] Similarly, where a bill is accepted for the accommodation of the drawer and an indorser, the acceptor is discharged if the holder agrees to give time to the indorser.[2]

—where the principal debt arises out of a course of dealing, the time of payment being indefinite.

In general guarantees for the price of goods to be sold, or money to be advanced, or the like, the period at which payment of the principal debt is to be enforced by the creditor is frequently quite indefinite. Accordingly, the question of fact, whether there has been, in virtue of a new agreement between the principals, an actual postponement of the date of payment, is difficult to determine. A cautioner who gives a general guarantee of this description is presumed to leave the principal debtor and creditor free to arrange the details of their transactions as they think fit, provided the arrangements so made are not at variance with the ordinary custom of merchants; and among the details left open for future arrangement, the settlement of the period to be allowed to the principal debtor for payment is included.[3] If, then, the original bargain between the principals is indefinite in respect to the term of payment, a creditor does not release the cautioner by agreeing to give indulgence, unless the indulgence is excessive and quite contrary to mercantile usage.[4] Thus the cautioner in a general guarantee given to a manufacturer, against loss in a course of dealing, was held not to be liberated by the creditor taking a bill at one month from the debtor in payment.[5] In *Cook* v. *Moffat*,[6] the creditor, a flour merchant, took from the debtor a bill for flour sold him, payable at three months, and later took a second bill for the amount, retaining, however, the original bill; the cautioner was not dis-

[1] *Ewin* v. *Lancaster*, 1865, 6 B. & S. 571; *Oriental Financial Corpor.* v. *Overend, etc.*, 1871, L. R. 7 Ch. 142; affd. 1874, L. R. 7 H. L. 348; *Greenough* v. *M'Clelland*, 1860, 30 L. J. Q. B. 15.

[2] *Bailey* v. *Edwards*, 1864, 4 B. & S. 761. As to the evidence admissible to show the real relation between the parties to a bill or note, and knowledge thereof on the part of the holder, see *infra*, p. 927.

[3] See remarks of Lord Moncreiff in *Stewart, Moir, & Muir* v. *Brown*, 1871, 9 Macp. 763.

[4] Baron Hume's introduction to report of *Prest, Brown, & Prest* v. *Hotson*, 1809, Hume, *Decisions*, 97.

[5] *Stewart, Moir, & Muir* v. *Brown*, 1871, 9 Macp. 763.

[6] 1827, 5 S. 774. As the second bill was not taken in lieu of the first, which was retained and diligence done on it, the taking of the second bill did not suspend the creditor's right of action.

charged. Again, a cautioner who guaranteed to sugar merchants payment of sugar sold, and to be sold, to the principal debtor, without specifying the credit to be allowed, was not discharged by the creditor taking bills from the principal debtor at three months for the price of the sugar, with three months' interest at 6 per cent.[1]

The custom of the trade is important, but not conclusive, in determining what credit is reasonable.

The period of credit usually allowed in the trade in respect to which the guarantee is granted is always of importance in determining whether time has been given. The guarantor is presumed to know what period of credit is usual; and if the creditor, by taking bills, extends credit to the debtor for an excessive period out-with the ordinary custom of the particular trade, this may amount to a giving of time to the debtor so as to liberate the cautioner.[2] This, however, is always a difficult case to establish, as in most trades the period of credit given is somewhat elastic and indefinite. Moreover, even if the credit given by the creditor to the debtor extends beyond the period usual in the trade, it appears that the Court will not hold the cautioner liberated, if the length of the credit given is not in itself unreasonable.[3] In each case, then, the real question is whether the credit allowed was reasonable in the circumstances. If there is no limitation of the credit in the guarantee, the guarantor is liable for payment as arranged between the parties, unless the indulgence granted to the debtor is quite excessive. Thus in a guarantee of transactions between a customer and a firm of distillers, the firm took bills at five months from the debtor in payment of whisky sold, whereas it was shown that the usual practice of the whisky trade was to deal in three or four months' bills; yet the cautioner was held bound, upon the ground that the credit given was not in itself unreasonable.[4] While, then, the period of credit usual in the trade is important in determining whether the credit actually allowed to the principal debtor is reasonable, it is not a decisive element, and the mere fact that a longer period of credit has been allowed does not necessarily involve a giving of time. This result is in accordance with the English decisions. Thus where a guarantee was given in this form: "If you will give credit to A., I will be responsible that his payments shall be regularly made,"—it was held that the credit intended was a fair and reasonable credit according to the mode of dealing between A. and the creditor, and

[1] *Bowe & Christie* v. *Hutchison*, 1868, 6 Macp. 642.

[2] *Samuell* v. *Howarth*, 1817, 3 Mer. 272; see per Lord Adam in *Johnstone* v. *Duthie*, 1892, 19 R. 624, at 628.

[3] *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74.

[4] *Calder & Co.* v. *Cruikshank's Tr.*, 1889, 17 R. 74; see per Lord President and Lord Adam.

not merely a dealing according to the strict customary credit of the particular trade.[1]

An unreasonable suspension of the creditor's remedy discharges the cautioner in all cases.

On the other hand, if, by an arrangement with the debtor, the creditor suspend his right of action against the debtor in an exceptional way, and to an extent which is unreasonable, then, even in a general guarantee for future dealings, the cautioner is discharged. Thus where a creditor, who held a letter undertaking that the writer would see him "duly paid for all goods you may supply from and after this date to the order of B.," made an arrangement with the debtor, after the account was closed, for payment by instalments, and some months thereafter drew two bills on the debtor, at three months' date, for the balance of the debt, it was held that time was given.[2] Similarly, in a leading English case, the defendant guaranteed the payment of goods to be delivered by the plaintiffs to a customer, there being no stipulation as to the credit to be given. The custom of the plaintiffs in their business was to allow discount for cash, or to give six months' credit; and it was also their custom to extend the credit by taking, at the end of the six months, a bill at two months. On it being shown that the plaintiffs allowed three months to elapse after the six months, and then took from the principal debtor a promissory note at two months, the defendant was discharged.[3]

Mere forbearance on the part of the creditor is not a giving of time—there must be a positive contract.

Mere forbearance or delay by the creditor to take proceedings against the debtor, or his refraining from pressing the debtor for payment, does not constitute a giving of time. There is, in the ordinary case,[4] no obligation on the creditor to use active diligence against the debtor.[5] Thus, where a creditor allowed two years to elapse, after the arrival of the term of payment, without demanding payment from the debtor, the cautioner was held bound;[6] and where, in the case of a composition in a sequestration, for which a cautioner was bound, two years and four months were allowed to elapse without any demand for payment being made, the cautioner was

[1] *Simpson* v. *Manley*, 1831, 2 Cr. & J. 12; cf. and contrast *Howell* v. *Jones*, 1834, 1 C. M. & R. 97, with *Polak* v. *Everett*, 1876, 1 Q. B. D. 669.

[2] *Johnstone* v. *Duthie*, 1892, 19 R. 624; *M'Lagan & Co.* v. *M'Farlane*, 19 Nov. 1813, F. C.

[3] *Combe* v. *Woolf*, 1832, 8 Bing. 156; *Holl* v. *Hadley*, 1828, 5 Bing. 54. As to the form of issue in a case where the question of fact, whether time was given, was sent to a jury, see *Warne & Co.* v. *Lillie*, 1867, 5 Macp. 283.

[4] It is otherwise where there is a special stipulation for the use of active measures, *e.g.* in *Bank of Ireland* v. *Beresford*, 1818, 6 Dow, 233, at 239; *Lawrence* v. *Walmsley*, 1862, 31 L. J. C. P. 143.

[5] *Vide supra*, p. 865.

[6] *Fleming* v. *Wilson*, 1823, 2 S. 336.

not released.[1] So in a leading English case, where the creditor neglected to sue the debtor on a bond for five years, Lord Eldon held that the surety was not released.[2] "The surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing."[3] If the surety ultimately suffers loss by the delay,—as, for example, through the supervening insolvency of the principal debtor,—his own neglect is as much the cause of it as that of the creditor; for he might himself have paid the debt instantly on its becoming due, and so have been able to avail himself of all the rights of action which the creditor had.[4]

In order to constitute a giving of time so as to release a cautioner, there must, in the ordinary case, be a positive contract on the part of the creditor, by which his hands are tied. "It is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt, and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your hands from doing that which would throw the surety upon the principal."[5] "In the language of the law," observed Lord Rutherfurd Clark, "to give time does not consist in refraining from suing, but in the creditor putting himself under a disability to sue by agreeing to postpone payment of his debt."[6]

Exc. Where the creditor is under an obligation to take active measures against the debtor.

Mere delay on the part of the creditor to enforce payment of the debt will constitute a giving of time and discharge the cautioner, if it is in contravention of the contract with the cautioner. For example, where the defendant signed a joint and several note, payable on demand, as cautioner for the other maker, on the understanding that the payee should demand payment from the other maker within three years, it was held, on the payee not demanding payment within three years, and the other maker becoming

[1] *Morison* v. *Balfour*, 1849, 11 D. 653; cf. *Stuart* v. *Campbell*, 1852, 24 Sc. Jur. 217.

[2] *Eyre* v. *Everett*, 1826, 2 Russ. 381.

[3] Per Lord Eldon in *Eyre* v. *Everett*, 1826, 2 Russ. 381, at 384; *Price* v. *Kirkham*, 1864, 3 H. & C. 437.

[4] *Trent Navig. Co.* v. *Harley*, 1808, 10 East, 34; *Creighton* v. *Rankin*, 1840, 1 Rob. 99.

[5] Per Lord Chancellor Hatherley in *Oriental Financial Corpor.* v. *Overend, Gurney, & Co.*, 1871, L. R. 7 Ch. App. 142, at 152.

[6] Per Lord Rutherfurd Clark in *Hay & Kyd* v. *Powrie*, 1886, 13 R. 777.

insolvent, that the defendant was discharged.[1] So where commissioners, acting under an Act of Parliament, which provided for money being advanced in loan to merchants, and required the commissioners, on default of the debtors, to sue without delay, made an advance to a debtor, who, along with a surety, became bound by bond and also on a bill to repay within a limited time, it was held that the commissioners, being under an obligation by the Act to sue without delay, were not entitled to lie by without suing the debtor, and subsequently go against the surety.[2] Upon the same principle, mere delay by the holder of a bill to present the bill to the acceptor for payment on its due date discharges the subsequent parties, though there is no positive contract; for such delay is contrary to the implied contract with the parties to the bill.[3]

The extension of the time of payment by legislation does not discharge a cautioner.

Since a positive contract between the creditor and the principal debtor is necessary in order to the giving of time, it is clear that the plea is inapplicable where the extension of the time for the payment of the principal debt has been brought about, not by the act of the creditor, but by supervening legislation.[4] Thus where the acceptor of a bill of exchange, who lived in France, had received an extension of time for payment, in virtue of a series of enactments of the French Government during the Franco-Prussian war, enlarging the time for the payment and protesting of bills of exchange, it was held that this extension of time did not deprive the holder, the creditor, of his remedy against the drawer, the surety.[5]

The agreement to give time must be a binding one.

In order to discharge a cautioner, the agreement between the creditor and the debtor to give the latter further time must be one that is binding upon the creditor. Thus, in England, it is necessary that the agreement to give time be founded on a sufficient consideration. So a mere promise by the holder of a bill to the acceptor not to press him, or not to sue him, does not discharge the drawer or indorsers, if the promise is not binding.[6] Again, where

[1] *Lawrence* v. *Walmsley*, 1862, 31 L. J. C. P. 143; *Holl* v. *Hadley*, 1835, 2 A. & E. 758; *Watson* v. *Alcock*, 1853, 22 L. J. Ch. 858.

[2] *Bank of Ireland* v. *Beresford*, 1818, 6 Dow, 233.

[3] *Latham* v. *Chartered Bank of India*, 1874, L. R. 17 Eq. 205; *Black* v. *Ottoman Bank*, 1862, 15 Moo. P. C. C. 472, at 484. Where a person guarantees payment of a bill, but is not a party to the bill, he is not discharged by mere delay or neglect on the part of the holder; for there is no implied contract between the holder and a guarantor, whose name is not on the bill—*Brown* v. *Kirkland*, 1861, 23 D. 363. See *supra*, p. 872.

[4] See per Lord M'Laren in *Laird* v. *Securities Insur. Co. Lim.*, 1895, 22 R. 452, at 460. Cp. *Provincial Bank* v. *Cussen*, 1886, 18 Ir. L. R. 382.

[5] *Rouquette* v. *Overmann*, 1875, L. R. 10 Q. B. 525.

[6] Byles on *Bills*, 15th ed., 321.

the executrix of the acceptor of a bill of exchange verbally promised to pay the holder out of her own funds, provided he delayed action, and he delayed action accordingly, it was held that the drawer of the bill was not discharged, because the promise, being verbal, was not binding under the Statute of Frauds.[1] Nor will an agreement to give time have the effect of discharging a cautioner, if it is conditional upon the performance of an act which the debtor neglects to perform.[2] While the agreement extending the time of payment must be binding, it need not be in express language in order to have the effect of discharging the surety. Thus where the creditor in a bond, by an agreement with the debtor, took interest on his debt by anticipation, this was held to be an implied contract to give time so as to discharge the surety, because, by taking interest in this way, the creditor precluded himself from suing on the bond until at least the time had expired for which he had received interest.[3] So where the defendant was surety for the payment of a mortgage debt of £450 to the mortgagee, and by a deed, to which the defendant was not a party, this particular mortgage, as well as others given by the mortgagor, were consolidated into one mortgage debt, which was payable at a later date, it was held that the new arrangement involved an agreement that the £450 debt was not to be sued for till the arrival of this later date, and, accordingly, amounted to a giving of time, which liberated the surety.[4]

The agreement must involve an actual giving of time.

The new agreement between the creditor and the principal debtor must involve an actual giving of time to the principal debtor. If it does not, as a matter of fact, tie the hands of the creditor or suspend his right of action, and so does not deprive the cautioner of his remedy against the debtor, the cautioner is not discharged. Thus a mere offer to give time to the acceptor of a bill, not acted upon, will not discharge the drawer.[5] So if the creditor take from the principal debtor bills at sight, the taking of such bills is not a giving of time, for the creditor's hands are in no way tied up, nor are the cautioner's rights interfered with.[6] Similarly, although an agreement for time being given has been entered into between the principals, yet if, as a matter of fact,

[1] *Philpot* v. *Briant*, 1828, 4 Bing. 717, see opinion of Best, C.J.; *Strong* v. *Foster*, 1855, 17 C. B. 201.

[2] *Vernon* v. *Tarley*, 1863, 1 M. & W. 316; *Price* v. *Edmunds*, 1830, 10 B. & C. 578.

[3] *White* v. *Blake*, 1835 (Exch. Cas.), 1 Y. & C. 420.

[4] *Bolton* v. *Buckenham* [1891], 1 Q. B. 278.

[5] *Hewet* v. *Goodrick*, 1826, 2 C. & P. 468.

[6] Per Lord Pres. Inglis in *Nicolsons* v. *Burt*, 1882, 10 R. 121, at 127.

there has been no time actually given, as when the agreement to give time has come to an end before the liability of the surety has arisen, so that the surety's recourse against the debtor has not in fact been interfered with, there is no discharge.[1] An arrangement may seem *ex facie* to involve a giving of time, yet if it does not actually disable the cautioner from at once working out his relief against the debtor, there is no discharge.[2] The difficulty in determining whether, in particular circumstances, time has actually been given, is illustrated by the conflicting judgments in the recent English case, *Rouse* v. *Bradford Banking Co. Lim.*[3] Rouse and others being in partnership, a deed of dissolution was entered into, whereby Rouse assigned his interest to the other partners, who covenanted with him (subject to a certain proviso) to pay the partnership debts, and to indemnify him against them. Among these debts was an overdraft of £50,000 due to a bank. After the dissolution, the terms of which were made known to the bank, a transaction was entered into between the new firm and the bank, whereby the new firm were allowed for a limited period to increase the overdraft to £53,000. Kekewich, J., held that the granting of this overdraft involved a giving of time to the new firm, the principal debtor, during the limited period, and so released Rouse, the surety. This was also the opinion of the Court of Appeal, who, however, found Rouse still liable, upon the ground that, by the terms of the proviso, he must be held to have antecedently consented to time being given.[4] The House of Lords, on the other hand, taking the view that the arrangement for the overdraft of £53,000 was merely a temporary increase of a continuing overdraft for £50,000, which existed before and after the transaction in question, held that there was no agreement to give time, since the bank had as much power to enforce payment of the £53,000 during the limited period, as they had formerly to enforce payment of the £50,000.

Creditor taking additional security from the debtor.

The mere taking of a new security from the debtor, expressly

[1] *Prendergast* v. *Davey*, 1821, 6 Madd. 124. See the American case, *Miller* v. *Hutch*, 39 Amer. Rep. 346 (U. S.); *Price* v. *Edmonds*, 1830, 10 B. & C. 578.

[2] *Hulme* v. *Coles*, 1827, 2 Sim. 12; *Stevenson* v. *Roche*, 1829, 9 B. & C. 707; *Whitfield* v. *Hodges*, 1836, 1 M. & W. 679; *Jay* v. *Warren*, 1824, 1 C. & P. 532; see also *Hay & Kyd* v. *Powrie*, 1886, 13 R. 777; *Torrance* v. *Bank of British North America*, 1873, L. R. 5 P. C. 246; *Petty* v. *Cooke*, 1871, L. R. 6 Q. B. 790; as to form of issue where the question of fact whether time was given was sent to a jury, see *Warne & Co.* v. *Lillie*, 1867, 5 Macp. 283.

[3] L. R. [1894], 2 Ch. 32; L. R. [1894], App. Cas. 586.

[4] As to this, *vide* p. 901.

as a further or additional security, does not affect the creditor's remedy against the cautioner; for the creditor's right to enforce payment of his debt is not thereby suspended.[1] On the other hand, if the consideration for the new security is the postponement of action against the debtor, or if the security in question is given in satisfaction of the original debt, so that it operates to extinguish the debt, the cautioner is discharged.[2] "It is quite true that the giving of additional security will not of itself discharge a surety; but if the additional security is given upon a contract to give time, in consideration of the giving of the additional security, then time given under those circumstances, apart from the consent of the surety, is a discharge of the liability of the surety."[3] Where additional security is given, and at the same time the creditor actually delays to sue the debtor, there is a presumption that the additional security was a consideration for the delay, pointing to a mutual understanding between the parties that time should be given.[4] Where a creditor takes a bill or note from the debtor, it may be taken either by way of payment, or merely as a collateral security.[5] In the latter case, the position of a surety for the debt is in no way prejudiced; it is only when the surety can show that the bill or note was taken by the creditor in satisfaction of the debt or upon an agreement that its receipt should suspend his action on the debt, that the surety is discharged.[6] If the bill or note is taken by the creditor after the debtor's default, the taking of it constitutes a giving of time.[7] So it has been laid down by Parke, B., that "where a man, who has a judgment debt, takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period."[8] In the ordinary case, while the taking of a bill from a debtor is un-

[1] *Twopenny* v. *Young*, 1824, 3 B. & C. 208; *Bell* v. *Banks*, 1841, 3 Man. & G. 258; *Ansell* v. *Baker*, 1850, 15 Q. B. 20.

[2] As to satisfaction of the principal debt, see *supra*, p. 848 *et seq.*

[3] Per Lord Chancellor Cairns in *Oriental Financial Co.* v. *Overend, Gurney, & Co.*, 1874, L. R. 7 H. L. 348, at 361.

[4] See opinions in *Oriental Financial Co.* v. *Overend, Gurney, & Co.*, 1874, L. R. 7 H. L. 348.

[5] The presumption is in favour of it being taken by the creditor as conditional payment; *vide supra*, p. 850. Where the note is taken as conditional payment, and not as satisfying the debt or under an agreement to postpone action, the surety is not discharged—cf. *Wegg-Prosser* v. *Evans*, 1894, 2 Q. B. 101; 1895, 1 Q. B. 108, C. A.; *Petty* v. *Cooke*, 1871, L. R. 6 Q. B. 790.

[6] *Davis* v. *Gyde*, 1835, 2 A. & E. 623.

[7] *Croydon Commercial Gas Co.* v. *Dickinson*, 1876, 2 C. P. D. 46.

[8] Per Parke, B., in *Baker* v. *Williams*, 1845, 14 M. & W. 465.

doubtedly some evidence of an agreement by the creditor to suspend action during the currency of the bill, it is not conclusive evidence of such an agreement; and the question what was the intention of the parties, is a question of fact proper for a jury.[1] So if a new bill is taken from the acceptor of a bill, in lieu of the original bill, the subsequent parties are discharged; but the taking from the acceptor of a fresh bill does not discharge the subsequent parties, if the original bill remains in the hands of the holder, so that the second bill is merely a collateral security, and the holder's right against the acceptor under the original bill is not suspended.[2]

With whom the contract to give time may be made.

It is held, in England, that in order to discharge a surety, the agreement to give time must be made with the principal debtor, and that if it is made with a thirty party, and not with the debtor, the surety is not discharged. Thus in an action by the holder against the drawer of a bill, it was held to be no defence that the holder had, without the drawer's consent, made a binding contract with a third party, a stranger to the bill, to give time to the acceptor, in consideration of an undertaking by the third party to see the bill paid.[3] Even if the third party, with whom the creditor makes the agreement is a co-surety, the surety is not discharged.[4] The reason is, that by such an agreement between the creditor and a third party, not the debtor, the surety is not, as a matter of fact, deprived of the right, when he has paid the creditor, of proceeding against the principal debtor in the creditor's name. His doing so may, indeed, expose the creditor to an action of damages for breach of contract at the instance of the third party, with whom he contracted. But that is no affair of the surety's; for the principal debtor cannot, as a defence to the surety's action, found on the agreement between the creditor and the third party. In one Scotch case, indeed, a cautioner who was bound for the payment of interest in a bond, was held to be liberated by the creditor taking (without the knowledge either of the debtor or of the cautioner) a corroborative obligation from a third party, whereby, on condition of the debt not being called up till a period later than the date originally agreed on, the third

[1] *Palmer* v. *Bramley* [1895], 2 Q. B. 405. As to the competency of parole evidence of the understanding between the parties at the time the note was given, see *Wyke* v. *Rogers*, 1852, 1 De G., M. & G. 1 S. 408, *infra*, p. 903.

[2] *Gordon* v. *Calvert*, 1828, 4 Russ. 581; *Pring* v. *Clarkson*, 1822, 1 B. & C. 14. The importance of retaining possession of the original bill is illustrated in *Bedford* v. *Deakin*, 1818, 2 Barn. & Ald. 210; *Hay & Kyd* v. *Powrie*, 1886, 13 R. 777; *Cook* v. *Moffat*, 1827, 5 S. 774.

[3] *Fraser* v. *Jordan*, 1857, 26 L. J. Q. B. 288, 8 El. & Bl. 303.

[4] *Clarke* v. *Birley*, 1888, 41 Ch. D. 422.

party bound himself for payment of the interest, so long as the principal sum remained unpaid.[1] The case, however, was special, in that the agreement between the creditor and the third party was indorsed upon the original bond, and must have been registered along with it in order to diligence thereon, which circumstance was taken to show that the third party must have interposed with the debtor's privity, so that the matter was in the same position as if the debtor had himself been a party to the agreement.[2] In every case the real test is whether the new agreement prevents the surety, on paying the debt, from having instant recourse against the principal debtor. Thus, even in England, where a creditor in a bond had by an agreement with third parties placed himself in such a position with regard to the principal debtor that he could not demand payment of the bond until certain conditions contained in the agreement with these third parties had been carried out, it was held that the creditor, by thus tying his hands, had given time to the principal debtor and discharged the surety.[3]

The discharge of a cautioner resulting from an agreement by the creditor to give time to the principal debtor, like every discharge resulting from a variation of the original contract, is absolute.[4] Where, however, the guarantee is divisible,—as, for example, where there are several separate transactions between the principals, and successive payments to be made by the debtor at distinct periods,—a creditor who gives time as to one of the transactions or payments releases the cautioner as regards that particular payment only, without affecting his liability in respect of the other payments. In *Bingham* v. *Corbett*, for example, a creditor, who held a continuing guarantee for the price of goods to be supplied at a specified credit, gave time to the debtor for the payment of a certain supply. That supply was ultimately paid for, but the debtor failed to pay for other goods subsequently supplied to him at the specified credit. The Court held that the surety was liable for this default, and refused to hold that the fact of the creditor having given time in a previous transaction released him as to these subsequent supplies.[5] So where a party (with sureties for

The discharge of a cautioner by giving time is a discharge of his whole liability, unless the transactions guaranteed are separable.

[1] *Forsyth* v. *Wishart*, 1859, 21 D. 449.

[2] See per Lord Wood in *Forsyth* v. *Wishart*, 1859, 21 D. 449. His Lordship, indeed, stated that, apart from the specialties, he would have been prepared to hold the cautioner released by the creditor's agreement with the third party.

[3] *Cross* v. *Spriggs*, 1850, 2 Mac. & G. 113.

[4] See, *e.g.*, per Alderson, J., in *Combe* v. *Woolf*, 1832, 8 Bing. 156, at 164.

[5] *Bingham* v. *Corbitt*, 1864, 34 L. J. Q. B. 37; cf. *Dowden* v. *Levis*, 1884, 14 Ir. Rep. Q. B. 307.

the performance of his contract) contracted to take tar from a gas company, and to pay for each month's supply within the first fourteen days of the succeeding month, and the company, after the expiry of the first fourteen days of August, gave time to the debtor by taking from him a promissory note for the July supply, it was held, on the debtor's failure to pay for the supplies made in July and succeeding months, that each month's supply, and the payment thereof by the debtor, was a separable and distinct transaction, and, accordingly, that, although the sureties were released as regards the amount due for July by time having been given, the giving of time in respect of the amount due for July did not release them from responsibility under their guarantee for the amounts due by the debtor for supplies made in the months succeeding July.[1]

Time given, after decree has been obtained against the cautioner, does not discharge him.

After the creditor has obtained a decree against the cautioners, no subsequent dealings with the principal have the effect of discharging a cautioner. Thus where the creditor, after obtaining a decree against both the principal debtor and his cautioner, took from the principal debtor a bill payable six months from its date, the cautioner was not discharged.[2] So in England, after the creditor has obtained a decree against the surety, no arrangement giving time to the principal debtor will discharge the surety.[3] "The creditor having by his decree established his right against the estate of the surety, has a right to proceed under it. All that follows is in the nature of execution of the decree, and the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is no longer *as surety*, but under the decree."[4]

Consent by the cautioner, previously, contemporaneously, or subsequently, prevents his discharge.

A cautioner is not discharged by an arrangement between the creditor and the principal debtor, by which time is given to the latter, if either he has, before the arrangement, agreed that the creditor should have power to give time to the principal; or if he consent to the arrangement giving time when it is entered into: or if he subsequently approve of it. In *Whiting* v. *Burke*,[5] in

[1] *Croydon Commercial Gas Co.* v. *Dickinson*, 1876, L. R. 2 C. P. D. 46.

[2] *Aikman* v. *Fisher*, 1835, 14 S. 56. There were other circumstances in this case which operated to prevent the discharge of the cautioner.

[3] *Jenkins* v. *Robertson*, 1856, 2 Drew. 351.

[4] Per Kindersley, V.C., in *Jenkins* v. *Robertson*, 1854, 2 Drew. 351. Cf. per Lord J. C. Moncreiff in *Crawford* v. *Muir*, 1873, 1 R. 91, at p. 95, where it is pointed out that a holder of a bill does not discharge an indorser by giving time to the acceptor after the bill has been regularly protested for non-payment, and notice thereof given.

[5] 1871, L. R. 6 Ch. 342, *vide* per James, L.J.

which case there was a stipulation in the bond that no arrangement whereby time was given to the debtor should release the sureties, it was observed that such an antecedent consent by sureties to time being given was not unreasonable, as the giving of time usually operated in their favour. In *Yates* v. *Evans*,[1] a memorandum attached to a promissory note by a principal debtor and surety was construed as a consent by the surety at the outset that the holder of the note might, after the note became due, give time to the principal debtor. Again, in *Rouse* v. *Bradford Banking Co.*,[2] it was held by the Court of Appeal, that although the plaintiff, a retired partner of a firm, was in the position of a surety for the partners who remained in the firm, and although an arrangement was made between a creditor and the remaining partners, by which time was given to the latter for the payment of a debt for which the surety was responsible, nevertheless the surety was not released, since he had previously agreed that he should not be entitled to require the remaining partners to pay any of the firm debts, so long as he was kept indemnified against all claims in respect of them, and this agreement was construed as impliedly authorising the remaining partners, the principal debtors, to obtain time, if necessary, to pay the debts.[3] Where a power of extending the credit is stipulated for in the contract between the principals, this power must be exercised before the expiry of the ordinary period of credit arranged for; otherwise, in spite of the stipulation, the surety will be discharged by the extension.[4] The surety's assent may also be effectually given at the date when the new agreement extending time to the debtor is entered into;[5] or it may be given subsequently, to the effect of reviving his liability after it has been extinguished.[6] Similarly, time given by the holder of a bill to the acceptor or other prior party does not discharge an indorser, if the indorser have previously consented, or if he, with knowledge of the facts, subsequently assent, by word or act, to what has already been done. Thus where the acceptor, having been arrested by the holder, offered payment by instalments, and on the holder mentioning the offer to the drawer, the latter said, "You may do as you

[1] 1892, 61 L. J. Q. B. 446.

[2] [1894], 2 Ch. 32.

[3] In this case the House of Lords held that no time was given, and accordingly the question whether the proviso constituted a consent by the cautioner did not arise for consideration—*Rouse* v. *Bradford Banking Co.*, L. R. [1894], App. Cas. 586.

[4] *Croydon Commercial Gas Co.* v. *Dickinson*, 1876, 2 C. P. D. 46.

[5] *Dixon* v. *Thomson*, 1847, 9 D. 679; *Tyson* v. *Cox*, 1823, 1 Turn. & R. 395; *Union Bank of Manchester* v. *Beech*, 1865, 34 L. J. Ex. 133.

[6] Per Lord Eldon in *Mayhew* v. *Crickett*, 1818, 2 Swans. 185, at 192; *Smith* v. *Winter*, 1838, 4 M. & W. 454.

like," it was held that this amounted to an assent, and that the drawer was not discharged by the indulgence given.[1]

The assent of a cautioner to an arrangement to give time will not, unless in special circumstances, be inferred from mere knowledge on his part, combined with silence.[2] Further, a repudiation of liability by the cautioner, and his refusal to pay, will not justify the creditor in giving time.[3] But if a cautioner, when asked to concur in a reasonable arrangement about to be entered into by the creditor for recovering the debt from an insolvent principal debtor, maintains an obstinate silence, he cannot, at least if he can show no actual prejudice, subsequently get rid of his liability upon the ground that the arrangement involved a giving of time.[4] The distinctions between what does, and what does not, amount to consent on the part of a surety are very fine. Thus, on the one hand, where a drawer, aware that time had been given, but thinking himself still liable, said, "I know I am liable, and if the acceptor does not pay it, I will," the drawer was held to have waived his discharge;[5] but, on the other hand, where time was given by the renewal of a bill, and an indorser remarked, "It was the best thing that could be done," it was held that he had not waived his right to a discharge.[6]

A cautioner is not discharged if the creditor, on giving time to the debtor, reserves his rights against the cautioner.

A cautioner is not discharged if the creditor, in agreeing to give time to the principal debtor, expressly reserves his remedies against the cautioner. Such a reservation keeps alive the cautioner's right of relief against the principal debtor, and consequently the cautioner is in no way prejudiced by the creditor's agreement to give time to the debtor.[7] As pointed out by Lord Moncreiff,[8] the earlier decisions in England were to the opposite effect; but since *Kearsley* v. *Cole*,[9] in 1846, the principle has been fully established. The reasons of the rule, as stated by Parke, B.,[10] in that case, are as follows:—"The reserve of remedies has this

[1] *Clark* v. *Devlin*, 1803, 3 B. & P. 363.

[2] *Allan, Buckley, Allan, & Milne* v. *Pattison*, 1893, 21 R. 195. As to the effect of notice to the cautioner of an alteration in the contract between the principals, and subsequent conduct on his part showing acquiescence, see *Sorley's Trs.* v. *Grahame*, 1832, 10 S. 319, 325.

[3] *Johnstone* v. *Duthie*, 1892, 19 R. 624.

[4] *Aikman* v. *Fisher*, 1835, 14 S. 56. Decree had, however, been taken by the creditor against the debtor and cautioner in this case. *Vide supra*, p. 900, also *infra*, p. 907.

[5] *Stevens* v. *Lynch*, 1810, 12 East, 38.

[6] *Withall* v. *Masterman*, 1809, 2 Camp. 178.

[7] *Crawford* v. *Muir*, 1873, 1 R. 91; affd. 2 R. (H. L.) 148.

[8] In *Crawford* v. *Muir*, 1873, 1 R. 91.

[9] 1846, 16 M. & W. 128.

[10] Per Parke, B., in *Kearsley* v. *Cole*, 1846, 16 M. & W. 128, at 135.

effect upon this principle: first, it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him." Where the new arrangement between the principals does, in fact, impair the surety's remedies against the debtor, no reservation of the surety's right, however express, will prevent the surety's discharge. In such a case, words of reservation are merely idle, since a person cannot in a deed reserve rights which, by other terms of the deed, he has necessarily given up.[1] Where the arrangement to give time is in writing, it is necessary, as a rule, that the stipulation reserving to the creditor his remedies against the sureties should be set forth in the writing; for to allow parole evidence of the reservation would, in such a case, be to permit oral evidence to vary a written contract.[2] Where, however, the time is given by the creditor taking a bill or note from the debtor, parole evidence is admissible to show the existence of an agreement between the creditor and the principal debtor, at the date when the bill or note was given, that the transaction should not operate to discharge a surety.[3] Whether the agreement between the principals reserving the surety's remedies is proved by written or parole evidence, it is necessary that the intention to reserve these remedies be distinctly proved; otherwise the surety is free.[4] It is, however, unnecessary that the surety should be a party to the stipulation, or even that he be informed of the arrangement; for it is quite settled that the creditor may give time to the debtor, reserving his rights against the surety, without being under any duty to communicate the arrangement to the surety.[5]

It has been laid down that a surety is discharged if the

Discharge of cautioner by the creditor agreeing with principal debtor to give time to the cautioner.

[1] *Bolton* v. *Buckenham* [1891], 1 Q. B. 278, at p. 281.

[2] *Ex parte Glendinning*, 1819, Buck, 517. Cf. *Mercantile Bank of Sydney* v. *Taylor* [1893], App. Cas. 317; where words of reservation are ambiguous, parole evidence is competent in construing them—*Smith* v. *Harding*, 1877, 5 R. 147.

[3] *Wyke* v. *Rogers*, 1852, 1 De G. M. & G. 408; 21 L. J. Ch. 611. See Bills of Exchange Act, s. 100.

[4] *Oriental Financial Corpor.* v. *Overend, Gurney, & Co.*, 1871, L. R. 7 Ch. App. 142; 1874, L. R. 7 H. L. 348.

[5] Per Byles, J., in *Boaler* v. *Mayor*, 1865, 19 C. B. (N. S.) 76, at 82; see also *Webb* v. *Hewitt*, 1857, 3 K. & J. 438.

creditor agree with the principal debtor to give time to the surety. "If," said Lord Hatherley, L.C., "the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by implication an agreement not to sue the surety."[1] The position of the surety, in his Lordship's view, is changed because, by engaging with the principal debtor that time shall be given to the surety, the creditor ties up his hands from doing that which would throw the surety upon the principal. The reason does not seem quite satisfactory; and it is to be noted that, though the judgment of the Court of Appeal was affirmed by the House of Lords, it was on the ground that the agreement by the creditor, entered into at the instance, not of the surety, but of the principal, bound him to sue neither the principal nor the surety. Such an agreement was held to be open to all the vice of an agreement with the principal debtor for time being given. Where the cautioner himself enters into a separate contract with the creditor, without the debtor's concurrence, that further time should be given, he is liable under the new contract.[2]

Discharge of cautioner by creditor releasing the principal debtor.

If the creditor releases the principal debtor without the concurrence of the cautioner, or if the release of the debtor is the result of some act or omission of the creditor, the cautioner is discharged.[3] The rule is founded on the clearest equity; for the cautioner's right of total relief, in reliance on which he is presumed to have contracted, is cut off if the principal debtor is absolutely discharged.[4] "The law upon this subject is clear and well-settled. If the creditor, without consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he should have paid it to the creditor, the surety is discharged."[5] On this principle, if the creditor voluntarily compounds with the principal debtor for the debt, and thereby alters the cautioner's security or increases his risk, the cautioner is released.[6] So in England a surety is discharged if the creditor voluntarily take a composition from the debtor, or from a third party on his behalf, whereby all further claim against him ceases; and it does not avail the creditor

[1] Per Lord Hatherley, L.C., in *Oriental Financial Corpor.* v. *Overend, Gurney, & Co.*, 1871, L. R. 7 Ch. App. 142; affd. 1874, L. R. 7 H. L. 348.

[2] *Defries* v. *Smith*, 1862, 10 W. R. 189.

[3] Bell, *Prin.* s. 260; *Wallace* v. *Donald*, 1825, 3 S. 433; *Webb* v. *Hewitt*, 1857, 3 Kay & J. 438.

[4] *Lawson* v. *Coldstream*, 1837, 15 S. 930.

[5] Per Kelly, C.B., in *Cragoe* v. *Jones*, 1873, L. R. 8 Ex. 81; see also per Mellish, L.J., *in re Natal Investment Co.* (*Nevill's* case), 1870, L. R. 6 Ch. App. 43, at p. 47.

[6] Bell, *Com.* i. 377.

that it was done by mistake, or even for the surety's benefit.[1] To be safe in taking a voluntary composition, the creditor, in addition to giving the cautioner notice, must either obtain the consent of the cautioner, or expressly reserve his recourse against the cautioner.[2] In order that a release of the principal debtor by the act of the creditor may discharge the cautioner, there must be an actual legal discharge of the debtor, and not a mere intention to release him.[3] But it appears that one partner in a firm may release or compound with a debtor, so as to bind the firm, and consequently discharge the debtor's cautioner.[4]

Discharge prevented, if the cautioner consents to principal debtor's release.

The discharge of the debtor will not liberate the cautioner, if the latter has consented to it. The cautioner's consent may be given beforehand. If, for example, it is stipulated in the guarantee that no discharge of, or composition taken from, the principal debtor shall release the cautioner, the latter continues liable in spite of the principal debtor's discharge, whether the guarantee is for a fixed transaction[5] or for a current account.[6] The cautioner's consent may also be given at the time, either expressly or by implication. Thus the presence of the cautioner, as chairman, at the meeting of the creditors of the principal debtor, at which the creditor in the cautionary obligation acceded to a private composition contract between the debtor and his creditors, was held to show such consent on his part to the discharge of the debtor as to bar him from pleading this discharge as liberating him from his obligation.[7] Similarly, where a creditor acceded to an extra-judicial trust deed discharging the principal debtor, the fact that the cautioner was himself a party to the deed was held to prevent his discharge.[8] In every case of a principal debtor's release, however, the *onus* is upon the creditor to show that the cautioner has consented to continue bound.[9]

Where the debtor's release is not due to the creditor's voluntary act.

In order that the release of the principal debtor may have the effect of liberating the cautioner, it must have been brought about by a voluntary act or contract on the part of the creditor, and not by the operation of law.[10] If the principal debtor becomes

[1] *Lewis* v. *Jones*, 1826, 4 B. & C. 506; *Cragoe* v. *Jones*, 1873, L. R. 8 Ex. 81.

[2] As to these methods of preventing the cautioner's discharge, *vide* next paragraph, and *infra*, p. 907 *et seq.*

[3] *Scholefield* v. *Templer*, 1859, 28 L. J. Ch. 452.

[4] *Hawkshaw* v. *Parkins*, 1818, 2 Swanst. 539.

[5] *Cowper* v. *Smith*, 1838, 4 M. & W. 519.

[6] *Union Bank of Manchester* v. *Beech*, 1865, 34 L. J. Ex. 133.

[7] *Fleming* v. *Wilson*, 1823, 2 S. 336.

[8] *Wright's Trs.* v. *Hamilton's Trs.*, 1834, 12 S. 692.

[9] *Munro* v. *Cameron*, 1821, 1 S. 16.

[10] Cp. *infra*, p. 933.

bankrupt, the creditor may rank on his estate[1] and receive a dividend, and assent to the discharge of the bankrupt or to a composition, without prejudice to his remedies against the sureties; for in case of bankruptcy the debtor is discharged, not by the act of the creditor, but by act of law.[2] Similarly, the cautioners of a debtor, who has entered into an extra-judicial composition, are not discharged if the creditors subsequently sequestrate the debtor for non-payment of the composition.[3] The law on this subject is now statutory; for by the 56th sec. of the Bankruptcy Act, 1856, it is provided: "When a creditor has an obligant bound to him along with the bankrupt for the whole or part of the debt, such obligant shall not be freed from his liability for such debt in respect of any vote given or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition; but such obligant may require and obtain, at his own expense, from such creditor, an assignation to the debt, on payment of the amount thereof, and in virtue thereof enter a claim on the said estate, and vote and draw dividends, if otherwise legally entitled to do so." Upon the bankruptcy of the debtor, in short, the creditor is free to take what measures he chooses to recover his debt, without losing recourse against the cautioner; and if the cautioner is not satisfied, he may pay up the debt, take an assignation, and take his own means for the recovery of the debt. If a composition is really extra-judicial, a stipulation that the debtor's estate is to be administered on behalf of the creditors "in like manner as if he had been adjudged bankrupt," and a release to the debtor by each creditor "in like manner as if he had obtained a discharge in bankruptcy," will not avail to prevent the debtor's cautioners being discharged by the creditor consenting thereto; for the use of such expressions does not make the debtor's release otherwise than voluntary and unqualified.[4]

In special circumstances the creditor may make a reasonable arrangement with debtor, without discharging cautioner.

Also, there may be special circumstances in which a creditor is entitled, without discharging the cautioner, to enter into an arrangement with the principal debtor. Thus Professor Bell lays it down, that where the cautioner is himself insolvent or refuses to pay the debt when called on, the creditor may follow such prudent measures as, in the circumstances of the debtor's affairs,

[1] The creditor is not bound to rank on the principal debtor's estate—*vide supra*, pp. 865, 866.

[2] Bell, *Com.* i. 359 *et seq.*; *Whitelaw & Kirk* v. *Stein*, 20 May 1814, F. C.; *Anderson* v. *Wood*, 1821, 1 S. 28; *ex parte Jacobs*, 1875, L. R. 10 Ch. App. 211.

[3] *Freeland* v. *Finlayson*, 1823, 2 S. 389; *Muir* v. *Scott*, 1825, 4 S. 252.

[4] *Cragoe* v. *Jones*, 1873, L. R. 8 Ex. 81.

may be advisable, without discharging the cautioner; and he mentions a composition as a possibly advantageous arrangement.[1] In such a case it may be for the benefit of all parties concerned that the creditor come to some arrangement with the debtor, or even assent to an extra-judicial composition; and if due notice is sent to the cautioner, and the intention of the principals made clear that the cautioner shall continue bound, the latter will not be liberated, though he has not formally assented to the proceedings.[2] Thus where the holder of a promissory note acceded to a private composition contract and discharged the granter, this was held not to prevent him from being entitled to insist against an indorser, who had become bankrupt, for payment of the instalments of a composition remaining due by him under an arrangement previously entered into on his bankruptcy.[3] Similarly, where the surety has, previously to the release of the principal debtor, paid part of the debt, and given a security (an acceptance) for the remainder, the creditor, notwithstanding his release of the principal debtor, will, in the absence of evidence to the contrary, be taken to have intended that the surety should remain bound, and will retain his right against the surety for the remainder of the debt.[4] It has been suggested that, if a cautioner refuses to acknowledge liability for the debt, the creditor is free to enter into any reasonable arrangement with the principal debtor[5]; but the better opinion is that a mere denial of liability by the cautioner in no way extends the creditor's power of dealing with the debtor.[6] If a surety has entered into a transaction with the creditor, without the concurrence of the principal debtor, whereby he has covenanted to pay the debt in consideration of time being given to himself, he is not discharged by the debtor being subsequently "entirely acquitted" of the debt.[7]

Where the debtor is released, but the creditor's remedies against the cautioners are reserved, the cautioners are not discharged.

A discharge of the principal debtor by the voluntary act of the creditor does not liberate the cautioners, if it is granted subject to an express reservation of his remedies against the cautioners, so that it can be construed as a mere agreement not to sue the debtor, by which the cautioners' rights are in no way prejudiced. If the creditor's right of recourse against the cautioners is thus reserved, the discharge is not a complete and absolute release of

[1] Bell, *Com.* i. 377, 378.

[2] *Whitelaw & Kirk* v. *Stein*, 20 May 1814, F. C.; *White* v. *Robertson*, 1864, 2 Macp. 553.

[3] *Calder* v. *Borthwick*, 1829, 7 S. 840; cf. *Aikman* v. *Fisher*, 1835, 14 S. 56.

[4] *Hall* v. *Hutchons*, 1833, 3 Myl. & K. 426.

[5] *Aikman* v. *Fisher*, 1835, 14 S. 56; per Lord Ordinary and Lord Mackenzie.

[6] *Johnstone* v. *Duthie*, 1892, 19 R. 624.

[7] *Defries* v. *Smith*, 1862, 10 W. R. 189.

the debtor, but merely a *pactum de non petendo*.[1] Thus in *Smith* v. *Ogilvie*,[2] the discharge, granted to the principal debtor on the payment of a composition, contained a reservation of recourse against the cautioner. This was construed as a condition that the discharge should not be effectual to the debtor, in case the cautioner should be liberated thereby, and the cautioner was accordingly held liable for the balance. So where the holder of a bill, after it had been dishonoured and duly protested, granted a discharge to the acceptors of all claims and demands competent to him against them, "reserving entire my claims against any obligants" other than "the acceptors," it was held that the indorsers were not discharged.[3] "The law upon the subject is clear. By proper and apt instrument it is competent for the holder of a security of this kind to agree with the principal debtor not to enforce his remedies against the principal debtor; and if he does that in an instrument, which at the same time reserves his rights against those who are liable in the second degree, there will be no discharge of those persons so liable. The test which has been applied to all these cases is this:—Has that which has been done towards the principal debtor been a transaction of this character, that it will entitle the principal debtor, if he should be sued for contribution or indemnity by the surety, to come to the creditor, and say: 'You have discharged me completely and entirely from the debt, but I am now sued by a person who was security, and that is inconsistent with the discharge which I have received from you.' If, on looking at the discharge, you find that there is nothing inconsistent in it with a proceeding by the surety afterwards against the principal debtor, then the surety is not in any way discharged."[4]

Distinction between an absolute discharge and a *pactum de non petendo*.

In each particular case, it is a question of construction whether the discharge of the principal debtor by the creditor is an absolute, or a merely personal, discharge,—in other words, whether the principal debtor is discharged not only in a question with the creditor, but also in a question with the cautioner.[5] If the discharge amounts merely to personal release of the debtor from action by the creditor, the cautioner is not liberated, for his

[1] See per Lord Chancellor Hatherley in *Green* v. *Wynn*, 1869, L. R. 4 Ch. App. 204.

[2] 1821, 1 S. 159, affd. 1825, 1 W. & S. 315; see also *Lewis* v. *Anstruther*, 1852, 15 D. 260. The session papers show that the defender in this case was the acceptor of the bill. *Bailey* v. *Edwards*, 1864, 4 B. & S. 761.

[3] *Muir* v. *Crawford*, 1873, 1 R. 91; affd. 1875, 2 R. (H. L.) 148.

[4] Per Lord Chancellor Cairns in *Muir* v. *Crawford*, 1875, 2 R. (H. L.) 148, at 149.

[5] See opinions in *Cragoe* v. *Jones*, 1873, L. R. 8 Ex. 81, and in *Bateson* v. *Gosling*, 1871, L. R. 7 C. P. 9.

rights are in no way affected. If, on the other hand, the discharge of the principal debtor is absolute, the remedy against the cautioner is necessarily gone, because the debt is extinguished; and if the debt is extinguished, even a reservation of a right to proceed against the sureties would be *pro non scripto*, for the two things are inconsistent.[1] In determining the question it is not sufficient to look merely at the language used in the discharge; the effect of the arrangement between the creditor and the principal debtor must be considered as a whole in the light of the surrounding circumstances, in order to get at the real meaning and intention of the parties. In *Green* v. *Wynn*,[2] the debtor in a mortgage deed undertook to pay £1000, with interest at 10 per cent., and a surety covenanted to pay the interest in default. Subsequently the debtor assigned his property to a trustee on trust, to sell and divide the proceeds among his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso that nothing in the deed should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor. It was held that this amounted only to a covenant not to sue the debtor, and that the surety was not released, seeing that he might pay the principal sum, and charge the debtor, in spite of the release, for the amount so paid. Even where a deed of arrangement, by which a debtor's property was assigned to trustees for the benefit of his creditors, contained words which, if they had stood alone, would have amounted to a release, a proviso reserving the rights of creditors holding securities was effectual to cut down the transaction into a mere *pactum de non petendo*.[3] In *Webb* v. *Hewitt*,[4] on the other hand, there was a sale by the principal debtor of all his property to the creditor, who took it for what it was worth and in satisfaction of his debt, agreeing at the same time that he would pay five shillings in the pound to the other creditors. It was held that the effect of this transaction was to extinguish the debt; and that being so, even though there had been a clause in the agreement reserving the creditor's rights against the surety, such a reservation could have had no effect, since the debt was gone in virtue of the actual release.

[1] *Nicolson* v. *Revill*, 1836, 4 A. & E. 675; opinions in *Kearsley* v. *Cole*, 1846, 16 M. & W. 128; *Webb* v. *Hewitt*, 1857, 3 Kay & J. 438; *Bolton* v. *Buckenham* [1891], 1 Q. B. 278 at 281.

[2] 1869, L. R. 4 Ch. App. 204.

[3] *Bateson* v. *Gosling*, 1871, L. R. 7 C. P. 9; *Hooper* v. *Marshall*, 1866, L. R. 5 C. P. 4.

[4] *Webb* v. *Hewitt*, 1857, 3 Kay & J. 438, see Page Wood, V.C., at 442 and 444; also remarks of Lord Hatherley on the case, in *Muir* v. *Crawford*, 1875, 2 R. (H. L.) 148.

Effect of discharge couched in general terms.

While a simple discharge of the principal debtor discharges the surety, for the reason that, in the words of an English judge, "it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him,"[1] it is a rule that a discharge to a debtor is strictly construed. "General words in a release are limited always to that thing, or those things, which were specially in the contemplation of the parties at the time when the release was given."[2] Thus a receipt for partial payment is not construed as a release of the debtor; and even where it is accompanied by words of discharge, it will readily be taken, especially where the cautioners are bound jointly and severally with the debtor, as meaning only that the creditor will not make any further claim on this particular obligant, but will take his chance of recovering the balance of the debt from the other persons bound.[3] Where, however, the words discharging the debtor are unambiguous, the creditor can retain the right to sue the surety only where he can show, either from the language of the written release, or by proof of a separate agreement with the debtor, that the debtor accepted the release subject to the condition that he should remain liable to pay the debt to the surety in case of the latter having to pay it to the creditor.[4]

Discharge of cautioners by the release of a co-cautioner.

A discharge or release of one cautioner by the voluntary act of the creditor operates as a discharge of the other cautioners. "It would be against equity," observed Lord Redesdale, "for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always by conscience, as far as he is able to put the party paying the debt upon the same footing as those equally bound."[5] By the release of one cautioner,

[1] Per Mellish, L.J., *in re Natal Investment Co.* (*Nevill's* case), 1870, L. R. 6 Ch. App. 43.

[2] Per Lord Westbury, *London and S. W. Rwy. Co.* v. *Blackmore*, 1870, L. R. 4 H. L. 610, at 623; see Pollock on *Contract*, 5th ed., at p. 483.

[3] See opinion of Lord M'Laren in *Morton's Tr.* v. *Robertson's Jud. Fact.* 1892, 20 R. 72, at 78. In this case, however, the obligants were all principals, and, besides, the trust deed contained a clause reserving to the creditors their claims against the other obligants. Parole evidence is available in construing the effect of a discharge where its terms are ambiguous; see, *e.g.*, in *Smith* v. *Harding*, 1879, 5 R. 147. Cf. *ex parte Good, in re Armitage*, 1876, 5 Ch. D. 46.

[4] See opinion of Kelly, C.B., in *Cragoe* v. *Jones*, 1873, L. R. 8 Ex. 81; *Bateson* v. *Gosling*, 1871, L. R. 7 C. P. 9.

[5] Per Lord Redesdale in *Stirling* v. *Forrester*, 1821, 3 Bligh, 575, at 590; quoted and approved by Lord Blackburn in *Duncan, Fox, & Co.*, v. *N. S. Wales Bank*, 1880, 6 App. Cas. 1, at p. 19.

the right of relief competent to the other cautioners against this particular cautioner, in reliance upon which they contracted, is taken away. The release of the cautioner is, accordingly, a material alteration of the contract, which discharges all the cautioners. In England it seems settled that, in the ordinary case, the release of a joint obligant or cautioner wholly discharges the other joint obligants or cautioners.[1] In Scotland, at least where the obligation was for a sum already due, the effect of the discharge of a cautioner was, at common law, merely to acquit the co-cautioners to the extent of the share which the discharged cautioner should have borne.[2] The leading case is *Stirling* v. *Forrester*,[3] where the Bank of Scotland, as a guarantee of certain bills which had been dishonoured, took four promissory notes from four different parties for £2000 each. One note was given up and a new one accepted; and renewed notes were also given by two other of the sureties. The House of Lords, reversing the Court of Session, held that the legal effect of the transaction was to discharge the fourth surety as to three-fourths of the balance due upon the dishonoured bills; but that he remained liable for one-fourth, that being his own proportion of the debt. "If the creditor," said Lord Redesdale, "discharges one of the co-parceners, he cannot proceed for the whole debt against the others; at the most, they are only bound to pay their proportions."[4] On the other hand, where the cautioner's obligation was a continuing guarantee for a series of successive transactions, and one of the cautioners was discharged while the obligation was still current, so that the responsibility of the other cautioners was altered, the rule of the common law in Scotland, as well as in England, was that the release of the one cautioner wholly liberated the others.[5]

Mercantile Law Amendment Act, s. 9.

The English rule that the discharge of one of several cautioners, without the consent of the others, liberates all from their obligation, has been extended to Scotland by the Mercantile Law Amendment Act, s. 9. It is there provided that: "Where two or

[1] *Mercantile Bank of Sydney* v. *Taylor* [1893], App. Cas. 317; *Nicolson* v. *Revill*, 1836, 4 A. & E. 675; *Evans* v. *Bremridge*, 1856, 25 L. J. Ch. 102 and 334; *Cragoe* v. *Jones*, 1873, L. R. 8 Ex. 81.

[2] Bell, *Com.* i. 376; *Wingate* v. *Martin*, 1829, 8 S. 185; *Gilmour* v. *Finnie*, 1832, 11 S. 193; *Church of England Life and Fire Assur. Co.* v. *Wink*, 1857, 19 D. 1079. See also per Lord Justice Clerk Moncreiff in *Morgan* v. *Smart*, 1872, 10 M. 610, at 615. Cf. Pothier on *Obligations* (Evans), ss. 275, 277, 428–9.

[3] 1821, 1 Sh. App. 37, and (a much fuller report) 3 Bligh, 575.

[4] Per Lord Redesdale in *Stirling* v. *Forrester*, 1821, 3 Bligh, 575, at 591

[5] *British Linen Co.* v. *Thomson*, 1853, 15 D. 315; see distinction drawn by Lord Fullerton, at p. 319.

more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of the cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner [*probably 'creditor' is meant*] consenting to the discharge of a co-cautioner who may have become bankrupt."[1] "This clause," observed Lord Justice Clerk Moncreiff, "cannot apply unless the cautioners are bound *in solidum*; so that the discharge to the cautioner shall be, to him at least, a discharge of the whole debt. It applies to the case of joint and several obligants only, in which a discharge to the one covers the whole ground for which both are bound."[2]

Cases to which the principle of total liberation under this enactment does not apply.

The enactment applies where the obligants are really jointly and severally bound for the same debt, although their obligations are contained in separate writings; but the principle of total liberation, introduced by the Act, was held not to apply where payment of a debt of £105 was guaranteed by one cautioner to the extent of £70, and by another to the extent of £35, the obligations of the two cautioners being in their inception wholly separate.[3] Again, where two or more sureties contract severally, the creditor does not break the contract with one of them by releasing the other. It is only when a surety can show an existing right to contribution from his co-surety, which has been taken away or injuriously affected by his release, that he can escape liability on the ground of the release of the co-surety;[4] and where the parties contract severally, it is no part of the contract of any obligant that other persons shall be parties to the obligation.[5] "When the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. But where it is no part of the contract of suretyship that other persons should join in it, in other words, where he contracts *severally*, the creditor does not break that contract by releasing another several surety; the surety, therefore, cannot claim to be released."[6] Similarly, where one of two *ex facie* joint debtors is really a surety for the other, it is probable that the release of

[1] 19 & 20 Vict. c. 60, s. 9.

[2] Per Lord Justice Clerk Moncreiff in *Morgan* v. *Smart*, 1872, 10 Macp. 610.

[3] *Morgan* v. *Smart*, 1877, 10 M. 610; cf. *Lawrie* v. *Stewart*, 6 June 1823, F. C., and 2 S. 368.

[4] Cf. per Baron Parke in *Kearsley* v. *Cole*, 1846, 16 M. & W. 128, at 136.

[5] *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755.

[6] Per Sir R. P. Collier, afterwards Lord Monkswell, delivering judgment in *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755.

the surety-debtor would in no degree discharge the principal debtor, seeing that no right of contribution is thereby taken away.[1]

Where the creditor's rights against the other cautioners are expressly reserved.

Upon the same principle, where the discharge of a cautioner is not an absolute discharge, but is qualified by an express proviso reserving the creditor's rights against the other cautioners, the discharge operates only between the parties to it, and with the same effect as a discharge *pactum de non petendo*, so that the other cautioners are not discharged. This is the English rule;[2] and although there has been no Scotch case precisely in point since the Mercantile Law Amendment Act,[3] there can be no doubt that sec. 9 of that enactment, in spite of its general terms, does nothing more than assimilate the law of Scotland to the law of England, *i.e.* does not import that the discharge of cautioner will discharge co-cautioners, if, by a reservation of the creditor's rights against the co-cautioners, their rights of relief against the discharged cautioner are in no way prejudiced. "The reason why a release to one debtor releases all jointly is, because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released: but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor."[4] The reservation of rights should appear *ex facie* of the instrument of release, and parole evidence will not be allowed to contradict or modify a release expressed in unambiguous terms. Thus where a bank, the creditor in a cautionary obligation, granted to one of the sureties a release "from all debts due by him to the bank at this date," the other sureties were discharged, and the bank was not allowed to modify the written release by leading evidence of verbal negotiations prior to the release, for the purpose of showing an agreement between the bank and the discharged surety to reserve rights against the other sureties.[5] On the other hand, where the meaning of words of reservation in the written instrument is not clear,

[1] *Fahey* v. *Frawley*, 1890, 26 L. R. Ir. 78, at 86.

[2] *Price* v. *Barker*, 1855, 4 El. & Bl. 760; *Bateson* v. *Gosling*, 1871, L. R. 7 C. P. 9; *Thomson* v. *Lack*, 1846, 3 C. B. 540; *ex parte Carstairs*, 1820, Buck, 560.

[3] *Church of England Assur. Co.* v. *Wink*, 1857, 19 D. 1070, was decided on the common law; *Smith* v. *Harding*, 1877, 5 R. 147, and *Morton's Trs.* v. *Robertson's Jud. Fact.*, 1892, 20 R. 72, were cases, not of cautioners, but of joint and several debtors.

[4] *Per cur.* in *North* v. *Wakefield*, 1849, 13 Q. B. 541.

[5] *Mercantile Bank of Sydney* v. *Taylor* [1893], App. Cas. 317; cf. *Commercial Bank of Tasmania* v. *Jones* [1893], App. Cas. 313.

the effect of the receipt or discharge may have light shed upon it by parole evidence.[1] So, where no formal release has been granted, but a mere agreement between the parties is relied on, it is competent and necessary to have regard to the surrounding circumstances, in order to determine what the intention of the parties really was, *i.e.* whether the agreement operated to discharge the whole claim of the creditor for his debt, or merely to discharge the creditor's personal claim against one obligant, leaving his claim against the other obligants unaffected.[2] In *ex parte Good*,[3] for example, a mere receipt granted by the creditor to one debtor was held not to amount to a release, so as to discharge another joint debtor, since it appeared from the surrounding circumstances that it was not intended to have that effect.

Where the creditor takes a composition from an insolvent cautioner.

The right of the creditor to assent to the discharge of a bankrupt cautioner is expressly reserved in sec. 9 of the Mercantile Law Amendment Act. It is doubtful, however, whether the creditor is safe in consenting to the discharge of a cautioner in an extra-judicial composition; for, in this case, the discharge is brought about not by operation of law, but by a voluntary act on the part of the creditor.[4] Where, indeed, the cautioners' undertaking is for a definite debt, the amount of which is finally determined,[5] it is difficult to see on what equitable ground the discharge of one insolvent cautioner, on his paying part of the debt under a composition contract, should take away the obligation of the other cautioners, unless it can be shown that in some way their rights of relief have been thereby defeated. On this prin-

[1] *Smith* v. *Harding*, 1877, 5 R. 147.

[2] Cf. *Watters* v. *Smith*, 1831, 2 Barn. & Ad. 889; *ex parte Good*, *in re Armitage*, 1876, 5 Ch. D. 46; *Wolmershausen* v. *Wolmershausen*, 1890, 38 W. R. 537; *Wyke* v. *Rogers*, 1852, 1 De G. M. & G. 408; *Willis* v. *De Castro*, 1858, 4 C. B. (N. S.) 216; *ex parte Harvey*, 1854, 23, L. J. Bankr, 26.

[3] *Ex parte Good*, *in re Armitage*, 1876, 5 Ch. D. 46.

[4] A creditor may lodge a claim with the trustee under a private trust, without being bound by a condition of the trust, under which the debtor is discharged, *Ogilvie & Son* v. *Taylor*, 1887, 14 R. 399; cf. *Raimes & Co.* v. *M'Laren*, 1887, Guthrie, *Sheriff Court Cases* (2nd ser.), 70. See also 19 & 20 Vict., c. 79 s. 56.

[5] In *British Linen Co. Bank* v. *Thomson*, 1853, 15 D. 315, Lord Fullerton points out the difference, as regards the legal effect of the discharge of an insolvent cautioner under a composition contract, between continuing guarantees for transactions which are still current, and guarantees for definite debts. In the former class of cases, the discharge of a cautioner under a composition, during the currency of the guarantee, alters the responsibility of the remaining cautioners, and therefore liberates them.

ciple, it was held, in a well-known English case,[1] by Lord Eldon, in equity, that a creditor might accept a composition from one surety and discharge him, and yet recover from the others, notwithstanding such discharge, their shares of the original debt. In that case, Lord Eldon laid it down that the effect of the discharge of one surety upon the liability of the other sureties depended in every case upon the meaning and effect of the bargain between the creditor and the discharged surety.[2] In a recent Scotch case, where a creditor acceded to a trust deed, discharging, on payment of a dividend, the debts due by an obligant in a bond, it was held, in an action by the bondholder against another joint and several obligant, that the bondholder was not barred from claiming from the defender the full balance of the debt, since his taking a dividend from the estate of the insolvent obligant had in no way prejudiced any claim of relief or contribution competent to the defender in a question with his co-obligants.[3] In dealing with the effect of a discharge of one of the obligants upon the liability of the remaining obligants, Lord M'Laren observed: "In order that a discharge granted to a co-obligant should have the effect of releasing the other obligants, it must amount to an unqualified discharge of the joint and several obligation, or (which is the same thing in legal effect) an agreement that, in respect of the partial payment, the debtor shall not only be discharged in a question with his creditor, but shall also be discharged of his liability to contribute in a question with other co-obligants. . . . Such an agreement could not be implied from a discharge or receipt for partial payment in the usual terms, because in such a case the creditor only uses his right to select his debtors, and takes from one what he is able to pay, without pro-

[1] *Ex parte Gifford*, 1802, 6 Ves. 805. In that case the receipt was given by a creditor, who held a number of sureties bound under two promissory notes, to one of the number on payment by him of a dividend under a composition, and bore to be "for £191 and the two notes, which, when fully paid, will be in full of the said debt and all other demands."

[2] *Vide* per Lord Eldon in *ex parte Gifford*, 1802, 6 Ves. 805. The doctrines laid down by Lord Eldon in this case were adversely criticised by Lord Denman in *Nicolson* v. *Revill*, 1836, 4 A. & E. 675. Cp. *Evans* v. *Bremridge*, 1855, 2 K. & J. 174, at 183; see also per Parke, B., in *Kearsley* v. *Cole*, 1846, 16 M. & W. 128, at 136. The case has not, however, been overruled; see per Stirling, J., in *Wolmershausen* v. *Wolmershausen*, 1890, 38 W. R. 537.

[3] *Morton's Trs.* v. *Robertson's Jud. Fact.*, 1892, 20 R. 72. The obligants here were not cautioners, but co-principals; and, further, the trust deed to which the creditor acceded contained a clause expressly reserving the creditor's claims against other co-obligants.

fessing to exert any influence on the liabilities of the obligants *inter se*."[1] On the other hand, where cautioners can show that they have been prejudiced by the dealing of the creditor with an insolvent co-cautioner, they are liberated, at least *pro tanto*. For example, where a creditor entered into a compromise with the trustee on the bankrupt estate of one of several sureties, in virtue of which the creditor was prevented from receiving the dividend paid by the surety's bankrupt estate, it was held by Stirling, J., that inasmuch as the rights of the co-sureties had been prejudiced by the debt not being reduced to the extent of the dividend, the liability of the co-sureties was discharged not wholly, but *pro tanto*.[2] The *pro tanto* discharge was based on the principle that the creditor, by precluding himself from ranking on the estate of the bankrupt surety, had given up a security to which the other sureties were entitled.[3]

Cautioner is discharged by the creditor giving up or losing funds or securities.

A cautioner is entitled, on paying the principal debt, to demand from the creditor an assignation of all funds or securities which the latter held for the debt, in order that he may effectually work out his total relief against the principal debtor.[4] Accordingly, if a creditor, who ought to have certain securities in his full possession or power, has lost or relinquished any of them, or has permitted them to get into the possession of the debtor, or has failed, owing to negligence, to make them effectual by completing his title, the cautioner is discharged to the extent of such security. A cautioner, in short, is *pro tanto* discharged if the creditor has, by act or omission, put it out of his power to assign a security which would otherwise have been available for the cautioner's relief.

Positive acts of creditor in dealing with securities which liberate cautioners.

The kind of dealing on the part of a creditor in regard to securities which suffices to liberate a cautioner was much discussed in *Sligo* v. *Menzies*,[5] the facts of which have been narrated.[6] The majority of the judges laid down as fundamental: *First*, that a cautioner has a right of demanding from the creditor an assignation to all accessory securities for payment of the debt, in order

[1] Per Lord M'Laren in *Morton's Trs.* v. *Robertson's Jud. Fact.*, 1892, 20 R. 72. Where a debtor executes a trust deed for behoof of acceding creditors, subject to the condition that acceding creditors should be held to have discharged their claims in full, a creditor who does not accede to the trust is entitled to a share of the estate in proportion to his debt unconditionally, and can recover that share by direct action against the trustee — *Ogilvie & Son* v. *Taylor*, 1887, 14 R. 399.

[2] *Wolmershausen* v. *Wolmershausen*, 1890, 38 W. R. 537. Cp. per Lord Eldon in *Mayhew* v. *Crickett*, 1818, 2 Swanst. 186, at 192–193.

[3] *Vide* next paragraph.

[4] *Vide supra*, p. 803, *et seq.*

[5] 1840, 2 D. 1478.

[6] *Vide supra*, p. 807.

to his relief; and, *secondly*, that the cautioner has a right, as against the creditor, that the creditor shall not, by his voluntary act, do away with any of the securities to which the cautioner may look for relief, and that, if he violate this obligation, the cautioner is discharged. "The above being the law," the judges go on, "we are unable to see how the act of a creditor who, after acquiring a first debt with a cautioner, and also a heritable security on a certain subject for that debt, voluntarily and without the consent of the cautioner, contracts a second debt, burdening the same subject, and then makes use of this second debt as the medium of withholding from the cautioner assignation in relief of the first heritable security—we cannot see how such an act should not fall under the above rules, as an act inferring discharge of the caution."[1] The creditor, in short, must be able to hand over securities to the cautioner in exactly the same condition as they stood in his hands, and with the remedies on them unimpaired.[2] Thus if the creditor give up funds over which he has a right of retention, or resign claims which have been assigned to him in security of the principal debt, the cautioner is *pro tanto* liberated.[3] So where a creditor, at the time when the surety entered on his contract, had a right to have certain book debts appropriated to reduce the principal debt, and subsequently, without the surety's consent, released his interest in these book debts to the person collecting them, this was held to afford a good defence to the surety.[4]

Again, if the creditor appropriates any security for the debt to another purpose, the surety is discharged to the extent of the value of the security. Where, for example, the plaintiff was surety upon a promissory note to the defendants for a sum lent by them to their tenant, the defendants holding at the same time a mortgage of the tenant's furniture in security of the debt, it was held, upon the defendants seizing the furniture for arrears of rent under a distress, that the produce of the furniture was first applicable to the payment of the promissory note, and that the landlord could not, as against the surety, apply it in payment of rent. The surety, accordingly, was discharged *pro tanto*.[5] The general

[1] Per Lords President Mackenzie, Fullerton, Jeffrey, and Murray in *Sligo* v. *Menzies*, 1840, 2 D. 1478, at p. 1491.

[2] Cp. *Pledge* v. *Buss*, 1860, John. 663; see opinion of Sir W. P. Wood, V.C.; *Campbell* v. *Rothwell*, 1878, 38 L. T. R. 33.

[3] *Walker* v. *Donald*, 1825, 3 S. 433 (N. E. 304).

[4] *Polak* v. *Everett*, 1876, 1 Q. B. D. 669; see per Lord Blackburn, at 675.

[5] *Pearl* v. *Deacon*, 1857, 24 Beav. 186; see observations on this case in *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 764.

rule is, that where a creditor has received monies from the principal debtor which may be applied in payment of the principal debt guaranteed by the cautioner, he is bound to apply them in discharge of that debt.[1] So if the creditor refuses payment of the debt after it is due, and when payment is tendered unconditionally, he will not be entitled subsequently to claim from the cautioner.[2]

Loss of securities by the neglect of the creditor.

A cautioner may be liberated not only by a voluntary act of the creditor, but also where, through mere neglect or omission on the part of the creditor, securities, to the benefit of which the cautioner is entitled, are lost or rendered ineffectual through not being properly perfected. Thus where a creditor held, in security of a loan, a disposition to heritable property, containing an obligation to infeft only *a me*, and also bills by cautioners, the cautioners were relieved from their obligation by the creditor neglecting to complete the title to the heritable property by getting a charter of confirmation,—a neglect which resulted in the property being carried off by a third party.[3] The creditor pleaded that there was a difficulty in completing the title, owing to there being an arrear of feu-duties; but the Court took the view that this was no excuse, it being incumbent on him to give notice to the cautioners, that they might exercise their discretion as to what course to take.[4] The effect of the creditor delaying to complete a heritable bond, so that a posterior bond is granted and made a real right on the lands, is the same as if the creditor were by a voluntary act to renounce a heritable bond held by him in security of the principal debt: in both cases the cautioners are freed.[5] Even where the loss of the securities is not due directly to the act of the creditor, but has occurred through the negligence of a factor or agent, the cautioner may be relieved to the extent of the loss. Thus where funds belonging to the principal debtor were paid into the hands of a factor for the general body of the principal debtor's creditors, including the creditor in a bond in which a cautioner had guaranteed the payment of interest, it was held, on the funds being lost through the factor's intromissions,

[1] *Kinnaird* v. *Webster*, 1878, 10 Ch. D. 139, at 144. If money is deposited with the creditor by a surety under a special agreement, the creditor need not, in a question with co-sureties, appropriate it to the principal debt, though he has power so to do; *Commercial Bank of Australia* v. *Wilson* [1893], App. Cas. 181.

[2] *Cooper* v. *Blakemore*, 1834, 12 S. 834.

[3] *Fleming* v. *Thomson*, 1826, 2 W. & S. 277, reversing Court of Session, 1825, 4 S. 221 (N. E. 224).

[4] Per Lord Gifford in *Fleming* v. *Thomson*, 1826, 2 W. & S., at 292; *Hamilton* v. *Laird of Kinbrachmont*, 1628, 1 Br. Supp. 128.

[5] *Story* v. *Carnie*, 1830, 8 S. 853.

that the cautioner was *pro tanto* discharged.[1] In an English case the principal debtors, at the time of the loan, repayment of which was guaranteed, assigned as security the lease of their business premises, plant, and fixtures, on the footing that they were to continue in possession of the subjects assigned, power being given to the creditor, on their default, to enter into possession and sell the subjects. The creditor, though aware that the principal debtors' bankruptcy was imminent, took no steps either to protect the right in security by registration, or to enter and take possession of the subjects. Owing to this twofold laches, the Court held, on the goods being seized and sold by the trustee in the principal debtors' bankruptcy, that the creditor had deprived himself of the power to assign the security to the surety, and, accordingly, that the latter was discharged to the amount that the assigned goods were worth.[2] So an omission to file a warrant of attorney given by the principal debtor;[3] an omission to register the assignment of a ship;[4] or an omission to give notice of an assignation of certain securities to the trustees in whom they were vested,[5] discharges a surety. Where the creditor pleads the acquiescence of the surety, he must show that the surety was aware of the thing in which he acquiesced, and of the effect of such acquiescence.[6] An omission by the creditor to complete a security more readily discharges a surety, where the act omitted could not have been performed by anyone except the creditor; where the act omitted is one which the surety could equally well have performed himself, he has himself to blame if he neglected to perform it.[7]

Abandonment of diligence by the creditor.

Apart from special stipulation, there is not, between a creditor and a cautioner, any obligation on the part of the former to use active diligence against the principal debtor. Thus a landlord does not lose his right of recourse against a cautioner for a tenant by neglecting to enforce his right of hypothec against the tenant.[8]

[1] *Wright's Trs.* v. *Hamilton's Trs.*, 1835, 13 S. 380; cp. *Caledonian Banking Co.* v. *Kennedy's Trs.*, 1870, 8 Macp. 862, where the estate of a deceased cautioner was held to be liberated by the creditors having concurred in funds of the deceased cautioner being paid away to the principal debtor, who was his residuary legatee; *Wallace* v. *Donald*, 1825, 3 S. 433; *M'Kenzie* v. *Macartney*, 1831, 5 W. & S. 504.

[2] *Wulff* v. *Jay*, 1872, L. R. 7 Q. B. 756; cp. *Polak* v. *Everett*, 1876, 1 Q. B. D. 669. See per Lord Blackburn, at p. 675.

[3] *Watson* v. *Alcock*, 1853, 4 De G. M. & G. 242.

[4] *Capel* v. *Butler*, 1825, 2 S. & S. 457.

[5] *Strange* v. *Fooks*, 1863, 4 Giff. Chanc. Cas. 408.

[6] *Strange* v. *Fooks*, *ut supra*.

[7] *The Queen* v. *Fay*, 1879, 4 Ir. L. R. 606.

[8] *M'Queen* v. *Fraser*, 11 June 1811, F. C.; *Grant* v. *M'Donald*, 1827, 5 S. 317; *M'Ewan* v. *M'Donald*, 1852, 14 D. 809.

So in England a right of distress for rent in arrear has been held not to be a security or remedy to the benefit of which a surety paying the rent is entitled, and, consequently, the creditor does not discharge the surety by giving up this right of distress.[1] The reasons, as stated by Fry, J., were two: (1) that the right of distress is not, in common parlance nor in legal phraseology, a security held for a debt, but a particular remedy which arises on non-payment; and (2) that the right was not in its nature assignable. It is stated by Erskine [2] that a cautioner cannot compel a creditor to consummate an incomplete diligence; but it appears that, if diligence or legal proceedings against the debtor have once been begun by the creditor, the abandonment of them without a good reason may be equivalent to the giving up of a security.[3] Similarly, if a creditor has set in motion against a cautioner a diligence which would operate his payment and the other cautioners' relief, he cannot arbitrarily pass from that diligence and so make the relief of the co-cautioners ineffectual; if he does so, he discharges the co-cautioners to that extent.[4] Of course, a cautioner who claims to be liberated to any extent from his obligation by the creditor abandoning diligence must be able to show that he has sustained some actual loss by the abandonment; if the diligence would not, even if proceeded with, have produced anything available to the cautioner, he is not discharged. Again, a cautioner is not liberated by the creditor, after arresting a large sum belonging to the principal debtor, subsequently restricting it to the amount of a stated account, which formed the warrant for diligence, although the principal debtor is thereby enabled to uplift the balance released.[5] So the discontinuance of personal diligence commenced against the principal debtor does not discharge a cautioner.[6] The law of England is quite in accordance with the Scotch decisions on this subject, the principle being that a creditor who has used diligence against the debtor is, as regards sureties, in the position of

[1] *In re Russell & Russell* v. *Shoolbred*, 1883, 29 Ch. D. 254.

[2] *Inst.* iii. 3. 66.

[3] Bell, *Prin.* s. 263; *Boyes* v. *Ogilvie*, 1738, Elchies *voce* "Cautioner," 7. As regards the effect of relinquishing or stopping short in diligence which has once been set in motion, a distinction has been taken between cases where the creditor's conduct is the result of an agreement with the debtor, and cases in which the diligence was suspended without agreement between the parties, merely because it was unnecessary—Brodie's *Supp. to Stair*, 934.

[4] *Wallace* v. *Lord Elibank*, 1717, M. 3389.

[5] *Paisley Union Bank* v. *Hamilton*, 1831, 9 S. 488.

[6] Bell, *Prin.* s. 263; *M'Millan* v. *Hamilton*, 1729, M. 3390.

a trustee of the funds attached.[1] So, where the holder of a bill has seized the acceptor's goods in execution, he is in the position of a creditor holding the security of a principal debtor, and may so conduct himself as to discharge the sureties.[2]

The discharge of the surety by losing or giving up a security is only a discharge *pro tanto*.

Both in Scotland[3] and in England,[4] where a creditor loses or renders unavailable a security to the benefit of which the surety is entitled, the surety is discharged, not absolutely, but only *pro tanto*. Where there is doubt as to the value of the security lost, the Court may order an inquiry into its value.[5] It is no exception to this rule, that where it is expressly stipulated that the creditor should avail himself of a certain security, his failure to do so is held as an alteration of the contract, or a breach of a condition precedent, and accordingly has the effect of wholly discharging the surety.[6]

Cautioner is not discharged unless the loss of a security is due to the wrongful act or negligence of the creditor.

In order that a loss of securities should discharge a surety, it must be shown that the loss has occurred through the fault or negligence of the creditor. The mere fact that a depreciation in the value of securities has taken place, or even that they have proved absolutely worthless, will not liberate the cautioner, unless it be shown that such loss was in some way attributable to the fault of the creditor.[7] Where no actual loss resulted to the surety from the transaction, a creditor has been held entitled to assign the principal debt, together with the security for it, without giving notice to the surety; and the right of the assignee to enforce the debt against the surety was held not to be invalidated though no notice had been given to the surety.[8] Again, the parting with a security by a creditor in good faith and in the exercise of the general powers of dealing with it conferred by the terms of the arrangement under which he holds it, will not affect the liability of the surety. Thus in *Taylor* v. *Bank of N. S. Wales*,[9] the appellants, who became sureties under a cash-credit bond on the faith of a mortgage of sheep granted by the principal debtor to the creditor as a collateral security, claimed to be released from their

[1] *Mayhew* v. *Crickett*, 1818, 2 Swans. 185; see also per Lord Eldon in *English* v. *Darley*, 1800, 3 Esp. p. 49, at 50.

[2] Byles on *Bills*, 15th ed., p. 324.

[3] *Wallace* v. *Lord Elibank*, 1717, M. 3389; *Wright's Trs.* v. *Hamilton*, 1835, 13 S. 380; *Stirling* v. *Forrester*, 1821, 3 Bligh, 575.

[4] *Taylor* v. *Bank of N. S. Wales*, 1886, 11 App. Cas. 596, per Lord Watson at 603.

[5] *E.g.* in *Strange* v. *Fooks*, 1863, 4 Giff. Chan. Cas. 408.

[6] *M'Tavish* v. *Scott*, 1830, 4 W. & S. 410; *Drummond* v. *Rannie*, 1836, 14 S. 437.

[7] *Hardwick* v. *Wright*, 1865, 35 Beav. 133.

[8] *Wheatley* v. *Bastow*, 1855, 7 De G. M. & G. 261; see per Turner, L.J.

[9] 1886, 11 App. Cas. 596.

liability upon the ground that the creditor had, without notice to them, sold part of the mortgaged sheep, and that, owing to the failure of the purchaser to pay the price, they had been to that extent deprived of the benefit of a security on which they relied for protection. The House of Lords, however, held that parties must have contemplated that, so long as the mortgagor remained in possession, there would from time to time be sales of portions of the mortgaged property in the course of due administration, and that this particular sale, having been carried out in good faith and in the ordinary course of business, did not affect the liability of the sureties. In the case of an ordinary bill the equitable claim of the subsequent parties, who hold the position of sureties for the acceptor, to securities held for the bill does not attach until the bill is dishonoured. "This equity," observed Lord Selborne, "will not incapacitate bankers who hold a bill, accepted by their customer and indorsed by a third party, from carrying on their dealings with that customer by varying the securities received from him according to the ordinary course of those dealings, as long as he remains solvent, and before the acceptance has been dishonoured. But it is an equity which does attach when the bills, overdue and dishonoured, and the securities are found together in the hands of the secured creditor at the time when he requires payment from the indorser; when the creditor has then no other transactions depending with the customer, and no claim upon the securities except for the bills themselves."[1]

Where a security has been given by one of several co-sureties, the creditor has a duty laid on him not to lose or waste it; but the creditor does not preclude himself from going against the other co-sureties for their respective shares of the debt by setting off the share due by the co-surety, who has given the security, against the proceeds of the security.[2]

Right of creditor on the insolvency of debtor.

On the same principle, when the principal debtor becomes bankrupt the creditor is entitled, in dealing with securities, to do what seems best fitted to obtain payment of his debt.[3] Thus, if the creditor hold in security of a debt a policy of insurance on the life of the principal debtor, he may, on the bankruptcy of the principal debtor, surrender the policy to the office in consideration of a sum of money without discharging the sureties.[4] To keep up the policy would be a mere speculation on the part of

[1] Per Lord Selborne in *Duncan, Fox, & Co.* v. *N. & S. Wales Bank*, 1880, 6 App. Cas. 1, at p. 13.

[2] *Margetts* v. *Gregory*, 1862, 10 W. R. (Ex.) 630; *vide* per Bramwell, J.

[3] *Vide supra*, pp. 906, 907.

[4] *Coates* v. *Coates*, 1863, 33 Beav. 249.

the creditor, which might, or might not, turn out beneficial; to realise it, whether by surrendering it to the office or by selling it, is his duty.[1] In another case, where a policy of insurance, deposited by the principal debtor with the creditor in security of the debt, had lapsed owing to the debtor's failure to pay the premiums, the question arose whether the surety was discharged by the creditor, on the bankruptcy of the principal debtor, proving against his estate for the whole amount of his debt without putting any value on the policy, which consequently fell to the trustee. It was held that the policy, since it had lapsed, was no security at all, and, accordingly, that the surety was not prejudiced by its having fallen into the hands of the trustee; and, further, that even assuming it had some value, the creditor was not prevented from surrendering it to the trusteee, and proving for the whole debt on the debtor's estate, by the fact that there happened to be a surety for the payment of the debt.[2] Similarly, where a creditor, who held certain securities from the principal debtor, had his title to these securities challenged by the trustee on the sequestrated estate of the principal debtor, he was held not to have discharged the cautioners by entering into a compromise, whereby, on making payment of a sum of money in full of all claims, he was to obtain absolvitor in the action and a discharge of all claims competent to the principal debtor's trustee.[3]

Duty of a co-cautioner as regards securities held by him for the debt.

When one of several cautioners holds a separate security over the estate of the principal debtors, he is, in the absence of a special agreement to the contrary,[4] bound to communicate the benefit of the security equally to his co-cautioners; and if he loses it or parts with it, the others are *pro tanto* discharged. This holds true whether the security in question is the result of a contract with the debtor at the time when the co-cautioner became a cautioner, or is voluntarily given subsequently, or arises in any other way whatever.[5] Thus where a co-cautioner got a bill as security on paying the principal debt, he was held to have liberated his co-cautioners to the extent of the bill by giving it up without presenting it, although he did so upon the ground that the bill was forged.[6] A cautioner, in short, must in regard to securities observe the same care on behalf of his co-cautioners as

[1] See per Sir John Romilly, M. R., in *Coates* v. *Coates*, 1863, 33 Beav. 249; cp. *Baines* v. *Wright*, 1885, 16 Q. B. D. 330.

[2] *Rainbow* v. *Juggins*, 1880, 5 Q. B. D. 422.

[3] *White* v. *Robertson*, 1864, 2 M. 553.

[4] *Hamilton* v. *Freeth*, 1889, 16 R. 1022.

[5] *Steel* v. *Dixon*, 1881, 17 Ch. Div. 825.

[6] *Hume* v. *Youngson*, 1830, 8 S. 295.

the creditor is bound to observe on behalf of the whole body of the cautioners.[1]

How far the rules as to the discharge of cautioners by acts of the creditor apply, where all the obligants are bound jointly and severally.

The various rules as to the extinction of cautioners' liability by acts on the part of the creditor, prejudicial to the interests of the cautioners, may apply equally, though all the obligants, principal debtors and cautioners alike, are bound in a joint and several obligation.[2] The duty of the creditor to protect the interests of the cautioners, and to do nothing to prejudice their position, is altogether independent of the form in which the obligation is constituted; his duty and responsibility in these respects depend wholly on equitable considerations, and arise as soon as the knowledge of the relations subsisting among his debtors is brought home to him. Where the creditor at the first was aware that certain of the obligants were cautioners, the necessity of his doing nothing to prejudice the interests of the cautioner-obligants subsists from the moment that the obligation was undertaken. Where the creditor, at the time of entering into the contract, was not cognisant of the cautionary relation existing among his debtors, he must, when subsequently he is informed of the fact that certain of the obligants, who appeared to be principals, are merely cautioners for other obligants, protect the interests of the cautioner-obligants, and if, in any of the ways already enumerated, he prejudices their position, he will liberate them from their obligation. Where, for example, a creditor who had no notice of the surety-relation among his debtors at the time of taking the obligation, was subsequently informed that one of them was a surety only, and after that gave time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety was applied.[3] The two essential points are, that the relation of principal and surety shall exist between the joint and several debtors, and that this relation shall have been clearly brought to the notice of the creditor before the commission of the act complained of.[4]

Case of full debtors subsequently arranging *inter se* that some of them shall be sureties for the others, and notifying this to the creditor.

It has been doubted whether this principle is applicable to cases where the obligants were originally, as well between them-

[1] Sometimes it is difficult to determine whether a fund, held by a cautioner, has or has not come from the principal debtor, and whether he is bound to give his co-cautioners the benefit of it—*Stenhouse* v. *Tod*, 1890, 27 S. L. R. 261.

[2] As regards the enforcement of the debt, the right of the creditor is regulated solely by the terms of the instrument, *vide supra*, 676 *et seq.*

[3] *Overend* v. *Oriental Financial Co.*, 1874, L. R. 7 H. L. 348.

[4] *Greenough* v. *M'Lelland*, 1860, 2 Ell. & Ell. 424; see also *Goodman* v. *Litaker*, 1881, 37 Amer. Rep. 602, U.S.

selves as in regard to the creditor, really all principal debtors, but subsequently, by arrangement *inter se*, form the relation of principal and surety among themselves, and give notice to the creditor of this change of relation. Where two joint and several obligants, who were originally both really principal debtors, subsequently entered into an arrangement, under which one of them became sole principal and the other merely a surety, it was held by the Court of Queen's Bench that the creditor's rights were in no way affected by notice of this subsequent arrangement, and that he was entitled to deal with them as if they both continued to be principal debtors.[1] This decision has, however, been practically overruled by the opinions expressed in the House of Lords in the recent case, *Rouse* v. *Bradford Banking Co. Lim.*,[2] where it was laid down that the rules as to a surety being discharged by acts on the part of the creditor prejudicial to his interests are as applicable to a case where one of two persons, who were originally both principal debtors, afterwards becomes, with notice to the creditor, a surety for the other, as they are to a case where the contract with the creditor was from the first one of principal and surety. In the case in question the creditor had certain debtors bound to him jointly and severally; one of them, by subsequent arrangement with his co-debtors, to which the creditor was not a party and to which he did not assent, became only secondarily liable as a surety; it was held that, from the time that this arrangement was notified to the creditor, the debtor secondarily liable had henceforth the rights of a surety as against the creditor. It was laid down by Lord Watson, that "When two or more persons, bound as full debtors, arrange, either at the time when the debt was contracted, or subsequently, that, *inter se*, one of them shall only be liable as a surety, the creditor, after he has notice of the arrangement, must do nothing to prejudice the interest of the surety in any question with his co-debtors."[3]

Evidence necessary to prove knowledge of the surety-relation on the part of the creditor —where the obligation is constituted by bond.

Where the creditor is himself from the first a party to the constitution of the cautionary contract, in which all the obligants are *ex facie* bound as principals, the nature of the transaction as disclosed by the terms of the instrument is generally

[1] *Swire* v. *Redman*, 1876, 1 Q. B D. 536. The view of the Court in this case was that a co-principal cannot alter his position in relation to the creditor without the latter's assent—see *Swire* v. *Redman*, at p. 542.

[2] [1894] App. Cas. 586.

[3] Per Lord Watson in *Rouse* v. *Bradford Banking Co. Lim.* [1894], App. Cas. 586, at p. 598.

in itself sufficient to prove that the creditor entered into the contract in the full knowledge of the cautionary relation subsisting among his debtors.[1] If, however, the cautionary character of the obligation does not appear on the face of the contract, the presumption is that the debtors are all simply joint and several obligants; and even when it is established, as it may always be by parole evidence, that, as between the obligants themselves, some are principals and others cautioners,[2] the law will presume the creditor to be ignorant of this mutual relation among his debtors, till the presumption is displaced by competent evidence of knowledge on his part.[3] It seems the better opinion that, where the obligants are bound as co-principals in a bond or probative deed, in which there is no trace of a cautionary relation, nothing short of clear written evidence that the creditor was cognisant of the cautionary relation existing among his debtors will be permitted to qualify and control the effect of the bond so as to enable an obligant to plead, as against the creditor, that he is really a cautioner, and that this was known to the creditor.[4] Proof of knowledge on the part of the creditor of a cautionary relation subsisting among his debtors, while it does not affect his right of enforcing payment against any of the co-obligants, has the effect of burdening the creditor with various duties, and seriously limiting his right of dealing with obligants, who under their bond have undertaken an *ex facie* absolute liability. The effect, in short, is to put the creditor to a certain extent in the position of a trustee for the cautioner-obligants; and on this ground, it has been argued that no evidence can be admitted to modify the position of the creditor, as shown by the bond, except the writ or oath of the creditor.[5] In the somewhat analogous case of a claim to the benefit of the septennial limitation, it is settled that where an obligant, who is bound as full debtor, claims to be really a cautioner, and, as such, to be entitled to the septennial limitation, it is not sufficient to prove by parole that the creditor had notice of the real relation subsisting among his debtors: nothing short of clear written evidence will suffice.[6]

[1] See p. 674 *et seq.*

[2] *Drummond* v. *Nicolson's Crs.*, 1697, M. 12329; *Smollett* v. *Bell & Rannie*, 1793, M. 12354; also per Lord Cunninghame in *Lindsay* v. *Barmcotte*, 1851, 13 D. 718; *Hamilton* v. *Freeth & Co.*, 1889, 16 R. 1022.

[3] *Drysdale* v. *Johnstone*, 1839, 1 D. 409.

[4] This holds only of an agreement between the creditor and the obligants, for, even where the obligation is constituted by bond, an agreement between the obligants *inter se* may be proved by parole evidence—*Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022.

[5] Dickson on *Evidence*, s. 575 *et seq.*

[6] *Bell* v. *Herdman*, 1727, M. 11039;

Where, on the other hand, the joint and several obligation arises out of a transaction or course of dealing, and is not embodied in a formal deed, or where it is constituted by a bill or note, it is probably now competent to prove by parole that certain of the obligants are cautioners, and that this fact was known to the creditor, so as to bring the obligation within the scope of the rules under which cautioners are discharged by acts of the creditor prejudicial to their interests. At common law, indeed, such a fact as that certain persons, *ex facie* jointly and severally liable under a bill or note, were merely cautioners, and were known to the creditor to be such, could be proved, in a question with the creditor, only by the writ or oath of the creditor, *i.e.* the holder of the bill or note.[1] The effect of s. 100 of the Bills of Exchange Act, 1882, however, seems to be to render parole evidence admissible in Scotland in those cases in which parole evidence is admissible in England.[2] Now, in England it is clearly established that where the names of a number of parties appear on a bill or note as principals, *e.g.* as acceptors of a bill or makers of a promissory note, it is competent to prove by oral evidence that certain of the apparent principals are really sureties, and that the creditor had notice of this fact.[3] Where, for example, one of two makers of a promissory note signed only as surety for the other, and the creditor knew this when he took the note, it was held that the creditor had discharged the surety by giving time to the principal without the surety's consent.[4] The fact that the creditor knew the relation subsisting between the two makers was in this case proved by oral evidence; and further, the Court regarded it as being unnecessary, in order to bring the case within the scope of the rule, to show that the creditor had agreed to treat the surety-maker as a surety.[5] Again, where a bill was accepted for the accommodation of the drawer, and the holder gave time to the drawer, it was held that the acceptor was discharged, since the creditor, prior to the giving of time, though subsequently to the taking of the obligation, had

Evidence competent to prove knowledge on the part of the creditor, where the obligation is constituted by bill or note, or arises out of transactions and is not embodied in a formal deed.

M'Rankine v. *Schaw*, 1714, M. 11034; *Drysdale* v. *Johnstone*, 1839, 1 D. 409. In these decisions, however, the exact words of the Act 1895, c. 5, establishing the septennial limitation, formed a determining element.

[1] *Jackson* v. *M'Iver*, 1075, 2 R. 882; *Hunter* v. *Evans*, 1830, 9 S. 76.

[2] See opinions in *National Bank of Australasia* v. *Turnbull*, 1891, 18 R. 629.

[3] *Overend, etc.*, v. *Oriental Financial Corpor.*, 1874, L. R. 7 H. L. 348; cp. *Bailey* v. *Edwards*, 1861, 34 L. J. Q. B. 41.

[4] *Greenough* v. *M'Lelland*, 1860, 30 L. J. Q. B. 15.

[5] See also *Pooley* v. *Harradine*, 1857, 7 El. & Bl. 431, and *Bailey* v. *Edwards*, 1861, 34 L. J. Q. B. 41.

been verbally informed of the real relation subsisting between his debtors.[1]

Surety to or for a firm is discharged as regards future transactions by a change in the firm—principles of the common law in this matter.

The obligation of cautioners cannot be extended to persons other than those expressly or impliedly included in the original contract; and any extension of liability, which alters the risk of the cautioners without their consent, discharges them from future liability. Accordingly, where a guarantee is granted to or for a firm, it is important to ascertain whether the guarantors clearly contemplate changes in the firm, and agree to become cautioners to or for a fluctuating body; or whether they have in their mind to be liable only to or for the firm as it exists at the date of their undertaking the obligation. If it appears to be the intention of the parties that their undertaking should continue to be binding, notwithstanding changes in the membership of the firm to or for which the guarantee is undertaken, no alteration in the firm will discharge the cautioners. If, on the other hand, such an intention is not shown in the words of the guarantee, and is not necessarily implied from the circumstances of the case,—as where the members of the firm, being very numerous, are necessarily frequently changing,—the guarantor's contract will be binding only so long as the firm remains unchanged.

Statutory provisions.

These common-law principles of construction have been made the subject of express statutory provision. This was first done by sec. 7 of the Mercantile Law Amendment Act of 1856,[2] which section, though repealed by sec. 48 of the Partnership Act of 1890,[3] is re-enacted in a more explicit and somewhat more emphatic form by sec. 18 of the same Statute, as follows: "A continuing guaranty or cautionary obligation, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given."[4] As this statutory rule is merely declaratory of the principles of construction reached, both in Scotland and England, at common law, its effect and application can best be understood in the light of the earlier authorities on the subject.[5]

[1] *Ewin* v. *Lancaster*, 1865, 6 B. & S. 571.

[2] 19 & 20 Vict. c. 60, s. 7.

[3] 53 & 54 Vict. c. 39, s. 48.

[4] *Ib.* s. 18.

[5] There appears to have been no substantial difference on this subject between the law of Scotland and the law of England, even before the Mercantile Law Amendment Act. See Second Report (1855) of the Law Amendment Commissioners, p. 12.

Guarantee given to a firm—change occurring in the firm.

Where a guarantee is given to a firm, a change in the firm is construed, in the absence of proof of a contrary intention, as an alteration of the guarantor's position, and a deviation from the original contract; accordingly, the guarantor is not liable for transactions taking place subsequently to such a change, although he cannot show that his obligation has been rendered in any degree more onerous by the change. A change in the firm, sufficient to put an end to the cautioner's liability, so far as future transactions are concerned, may occur by the introduction of a new partner,[1] or by the death[2] or retirement[3] of an old partner. Where, for example, a cautioner became bound for advances to be made by a firm, and, soon after the date of the obligation, one of the partners in the firm died, and was succeeded by his son, in terms of the contract of copartnery, the cautioner was held not to be liable for advances made by the firm to the principal debtor after the date of the death of the partner, although the business continued to be carried on under the same firm-name, and advances continued to be made by the firm on the faith of the cautioner's obligation.[4] Again, where a party got a cash credit from a banking firm in reliance on a guarantee by cautioners, and, at the end of the first year, the firm desired the principal debtor to draw in future on another firm, of which the partners of the original creditor-firm were, with others, members, it was held, on the principal debtor subsequently becoming bankrupt, that the cautioners were liberated from their obligation by the change made at the end of the first year—no notice of the change having been given to the cautioners.[5] Similarly, in a leading English case, where three persons contracted to form themselves into a banking firm for fifteen years, a cautioner, who had bound himself to repay all sums to be advanced to a customer by the firm during the fifteen years, was held not to be liable for sums advanced after the death of one of the members of the firm, although he had bound himself for all advances to the end of the fifteen years, and although the articles constituting the banking firm made express provision for the substitution of appointees on the death of any of the original partners.[6]

The intention of the cautioner to continue liable may in certain circumstances be implied.

On the other hand, the liability of cautioners may continue,

[1] *Spiers* v. *Houston's Exrs.*, 1829, 3 W. & S. 392; *Bowie* v. *Watson*, 1840, 2 D. 1061; *Wright* v. *Russel*, 1774, 2 W. Bl. 934.

[2] *Elton, Hammond, & Co.* v. *Neilson*, 24 June 1812, F. C.; *Pemberton* v. *Oakes*, 1827, 4 Russ. 154.

[3] *Metcalf* v. *Bruin*, 1810, 12 East, 400.

[4] *Elton, Hammond, & Co.* v. *Neilson*, 24 June 1812, F. C. See also *Bowie* v. *Watson*, 1840, 2 D. 1061; *Philip* v. *Melville*, 21 Feb. 1809, F. C.

[5] *Spiers* v. *Houston's Exrs.*, 1829, 3 W. & S. 392.

[6] *Pemberton* v. *Oakes*, 1827, 4 Russ. 154.

notwithstanding a change in the firm, if it appears that the parties, at the time of entering into the contract, intended that it should so continue. This intention, as was provided by the Mercantile Law Amendment Act,—declaratory of the common law,—may "appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."[1] In spite of the greater apparent strictness of the provision of the Partnership Act, 1890,[2] it would seem that such intention may still, as under the former law, be shown as well by necessary implication from the nature of the firm as by express stipulation of the parties. Professor Bell has pointed out the hardship which would accrue, both to a banking firm and its customers, if it were necessary to have all its bonds of credit renewed upon every change among its partners; and he adds: "but there does not seem in law to be any necessity for this, and generally there is a stipulation against it in the bond."[3] The opinion here expressed, that in the case of a large firm, whose partners are constantly changing, a renewal of guarantees and cautionary bonds is not necessary on every change in the firm, is probably still quite sound. So in England it has been held, where a bond of suretyship was granted to a company, of which the partners were known to be constantly fluctuating, that the cautioner was bound to the *house* of the company, without regard to the individuals composing it, so that no change in the partners affected the surety's liability.[4] At the same time, it is usual and expedient, in all cases of continuing guarantees or cautionary obligations, undertaken to a firm, to insert in the obligation a clear stipulation precisely marking the intention of parties that no change in the firm shall discharge the cautioners.[5] Should a bond held by a firm contain no such stipulation, it is advisable for the firm, if any change has occurred in its membership, to make no further advances to the principal debtor subsequently to such change in the firm, without cancelling the old bond, and taking from the cautioners a new bond to the new firm.

Guarantee given to a third party in respect of the transactions of a firm—change in the firm.

Where the guarantee was given to a third party in respect of the transactions of a firm, *i.e.* where the firm occupied the position

[1] Mercantile Law Amendment Act, 1856, s. 7.

[2] Sec. 18. *Vide supra*, p. 928.

[3] Bell, *Com.* (M'L. ed.) i. 387; *Paisley Union Bank* v. *Hamilton*, 1831, 9 S. 488. The case is different, Bell points out, where the firm is in the position of debtor; for then a change in the firm may materially affect the risk—Bell, *Com.* (M'L. ed.) i. 388.

[4] *Barclay* v. *Lucas*, 1784, 3 Doug. 321. The soundness of this decision has been seriously questioned; see, *e.g.* per Mansfield, C.J., in *Weston* v. *Barton*, 1812, 4 Taunt. 680.

[5] As to the conveyancing style in such cases, see Bell, *Lect.* i. 271.

of principal debtor, it was not quite clear on the older Scots authorities whether the occurrence of a change in the firm, subsequently to the date of the guarantee, put an end to the liability of the sureties for fresh transactions. In *Royal Bank* v. *Christie*,[1] however, in which case all the earlier authorities were reviewed, the law was finally settled by the House of Lords to the effect that, in the absence of an express or implied agreement to the contrary, where a guarantee is given for the transactions of a firm, a change occurring in the constitution of the firm liberates the sureties from liability for transactions subsequent to such change. In that case, a firm, having obtained a cash credit from a bank, granted to the bank, in security of the cash credit, a bond and disposition in security, binding themselves as a firm and as individuals. It was held *inter alia* that by the death of a partner of the firm, the firm, as it had up to that period existed, was dissolved, so far as regards the bank, notwithstanding a special agreement between the partners that the business was to be considered as going on as before for the purpose of settling between the surviving partners and the estate of the deceased partner, and the securities given for advances were liberated *quoad* transactions subsequent to the partner's death.[2] So in England, if a change occurs in a firm, for which a guarantee has been given, the guarantee is revoked as to future transactions, whether the change has occurred through the death or retirement of a partner,[3] or by an increase in the membership of the firm.[4] A strong illustration of this rule is furnished by *Montefiore* v. *Lloyd*.[5] There the defender, as surety, executed a bond by which he undertook that the principal debtor, A., an agent of an insurance company, should pay to the pursuers, the insurance company, all monies received by him for assurances

[1] 1841, 2 Rob. App. 118. This case is important, as showing that the principle applies not only to guarantees, but to other analogous securities. Where, for example, securities are deposited with a firm to secure advances by the firm, they *primâ facie* cover only advances made by the firm, whilst its membership continues the same as when the securities were deposited (see per Lord Eldon in *ex parte Kensington*, 1813, 2 V. & B. 79, at 83; *London and County Bank* v. *Ratcliffe*, 1881, 6 App. Cas. 722, a case of the discharge of a banker's lien over title deeds). A slight manifestation of intention on the part of the borrower that the security should continue, will enable the new firm to hold the securities until all advances, whether made by the old or by the new firm, are repaid (see Lindley on *Partnership*, 6th ed., p. 127; Lindley on *Partnership Act*, 1890, p. 47).

[2] See also *Padon* v. *Bank of Scotland*, 1826, 5 S. 175—a case of the retirement of one of the partners.

[3] *University of Cambridge* v. *Baldwin*, 1840, 5 M. & W. 581.

[4] *Montefiore* v. *Lloyd*, 1863, 12 W. R. C. P. 83.

[5] *Ib.*

effected with the said company. Before signing the bond the defender received a letter stating that A. was about to enter into partnership with B., as agents of the insurance company, and, four months later, A. entered into partnership with B. On the firm, A. & B., subsequently becoming indebted to the insurance company, as their agents, the defender was held not to be liable for transactions taking place after the formation of the partnership between A. and B.[1]

The guarantors may continue liable, in spite of a change in the debtors firm, if the guarantee contemplates such continued liability,[2] or if there exist special circumstances which show that the guarantors, knowing that the creditor is continuing to make advances in reliance on the guarantee, consented by their conduct to continue bound.[3] On this principle, where a debtor in a cash-credit bond subsequently took his son into partnership, the new firm taking over the whole stock in trade and assets of the business, and carrying on trade in the same premises, it was held that the father's liability under the cash credit had been taken over by the new firm along with his other trade liabilities, and that, on the firm being sequestrated after the father's death, the cautioner in the cash-credit bond, who had paid the balance due to the bank, was entitled to rank therefor on the firm's estate.[4]

Change in firm, by incorporation or amalgamation.

A change in a firm, sufficient to revoke a guarantee given to or for the firm, may occur, not only through an alteration in the individual members of the firm, but by a change in its constitution. Thus if a firm is transformed into a corporation, whether by a charter from the Crown or by Act of Parliament, the incorporation operates a change in the identity of the firm, which discharges a surety.[5] On similar grounds, if one company or corporation be amalgamated with another company or corporation, sureties to or for either of the companies or corporations are discharged; for the new company or corporation is a different body from either of its amalgamated members.[6] Where, however, the

[1] In *Leathley* v. *Spyer*, 1870, L. R. 5 C. P. 595, a guarantee, read in the light of surrounding circumstances, was construed as covering transactions by the principal debtor and a partner subsequently assumed. In this case, however, there was also a letter, which might be read as a renewal of the guarantee.

[2] *Leathley* v. *Spyer*, 1870, L. R. 5 C. P. 595; see in this connection *Paterson* v. *Calder*, 1808, 14 F. C. 235, and *Booth* v. *Commercial Bank*, 1823, 2 S. 311.

[3] *Ayton* v. *Dundee Banking Co.*, 1844, 6 D. 1409.

[4] *Miller* v. *Thorburn*, 1861, 23 D. 359; see also *M'Leod* v. *Thorburn*, 1839, 1 D. 359.

[5] *Dance* v. *Girdler*, 1804, 1 B. & P. N. R. 34.

[6] Lindley on *Partnership*, 6th ed., p. 127; see per Lord Eldon in *ex parte Kensington*, 1813, 2 V. & B. 79.

Statute amalgamating two companies contained an express provision to the effect that all bonds entered into with, in favour of, or by, the dissolved companies, should remain valid as regards the new company, and be enforceable as if the new company had executed them, a person who had become surety to one of the dissolved companies for the conduct of one of its servants was held liable to the amalgamated company for a default committed by the servant after the union of the two companies.[1] The registration of a company with limited liability, accompanied by a change in the name, is not such a change as will release cautioners.[2] So, in the case of a guarantee of the conduct of a clerk to two railway companies, it was held, on the two companies being, subsequently to the guarantee, consolidated by Act of Parliament, that the guarantor was not discharged, since the consolidation did not affect the duties or responsibility of the principal debtor.[3]

Effect of the reconstruction of a company under a statutory scheme of arrangement.

Cautioners for a bank are not discharged by a scheme of arrangement between the bank and its creditors, sanctioned by the Court, being entered into after the default of the bank.[4] So cautioners for a joint-stock company are not discharged, if, after an order to wind up the company has been made, a statutory majority of the shareholders agree to a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870,[5] which is sanctioned by the Court. Nor is it necessary to insert in such a scheme a clause reserving rights against cautioners for debts due by the company, for it is by operation of law that the scheme becomes effective to relieve the shareholders of the company, or limit their liability.[6] On the other hand, a scheme of arrangement, though sanctioned by the Court under the Act of 1870, may liberate sureties for the company, if it alters the event upon which, under the original contract, the liability was to arise.[7]

Application of the doctrine of appropriation of payments, where the guarantee is revoked by a change in the firm.

Where a guarantee of a current account is revoked by a change in the firm to or for which the guarantee is given, and dealings under the account guaranteed continue to be carried on with the

[1] *Eastern Union Rwy. Co.* v. *Cochrane*, 1853, 9 Ex. 197.

[2] *Groux's Soap Co.* v. *Cooper*, 1860, 8 C. B. (N. S.) 800.

[3] *London, Brighton, and South Coast Rwy. Co.* v. *Goodwin*, 1849, 3 Ex. 320.

[4] *Young* v. *Trustees, Assets and Invest. Insur. Co.*, 1893, 21 R. 222; *Laird* v. *Securities Insur. Co. Lim.*, 1895, 22 R. 452; *Dane* v. *Mortgage Insur. Corpor.* [1894], 1 Q. B. 54, C. A. In such cases the right of the creditor to proceed against the cautioner on the guarantee, vests immediately on the default of the principal debtor. *Vide supra*, p. 790.

[5] 33 & 34 Vict. c. 104.

[6] *In re London Chartered Bank of Australia* [1893], 3 Ch. 540; *In re English, Scottish, and Australian Chartered Bank* [1893], 3 Ch. 385.

[7] *Mortgage Insur. Co.* v. *Pound*, 1894, 64 L. J. Q. B. 394.

new firm, the transactions of the old and new firms being joined in one entire account, payments made into the account after the change in the firm are presumed to be appropriated towards extinguishing the balance due on the account at the date of the revocation of the guarantee. In this way the balance due at the date of the change, for which the cautioner is liable at that date, may be diminished or extinguished by payments made by the principal debtor subsequently to that date.[1] Where, then, a change in a firm has the effect of revoking a guarantee as regards future transactions, it is expedient, if the guarantor is to be held liable for the debit balance existing at the date of the revocation, that the former current account be broken off at that point, and that subsequent transactions between the creditor and the principal debtor be entered in a new and distinct account.[2]

[1] *Bodenham* v. *Purchas*, 1818, 2 B. & Ald. 39; *Lang* v. *Brown*, 1859, 22 D. 113; *Spiers* v. *Houston's Exrs.* 1829, 3 W. & S. 392; *Christie* v. *Royal Bank*, 1839, 1 D. 745; affd. 1841, 2 Rob. 118. *Vide supra*, p. 854.

[2] *In re Sherry, London and County Bank* v. *Terry*, 1884, L. R. 25 Ch. Div. 692. *Vide supra*, p. 855.

CHAPTER XXVI

SEPTENNIAL LIMITATION

Obligations within the Act, 1695, c. 5.
Obligations to which the Act does not apply.
Effect of the Act on cautioner's liability.
Modes in which the operation of the Act is prevented.

Limitation of cautionary obligation.

THE septennial limitation of cautionary obligations was introduced by the Act 1695, c. 5. That Statute, entituled "Act anent Principals and Cautioners," provides that "considering the great hurt and prejudice that hath befallen many persons and families, and ofttimes to their utter ruin and undoing, by men's facility to engage as cautioners for others, who afterwards failing have left a growing burden on their cautioners without relief; therefore, and for remedy thereof, his Majesty, with advice foresaid, statutes and ordains that no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bonds or contracts for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution: and that whoever is bound for another, either as express cautioner or as principal, or as co-principal, shall be understood to be a cautioner to have the benefit of this Act: providing that he have either clause of relief in the bond, or a bond of relief apart, intimate personally to the creditor at his receiving of the bond, without prejudice always to the true principals being found in the whole contents of the bond or contract: as also of the surety cautioners being still bound, conform to the terms of the bond, within the said seven years, as before the making of this Act: as, also, providing that what legal diligence by Inhibition, Horning, Arrestment, Adjudication, or any other way, shall be done within the seven years, by creditors against their cautioners for what fell due in that time, shall stand good, and have its course and effect after the expiry of the seven years, as if this Act had not been made."[1]

[1] In England, by 21 Jac. I. c. 16, s. 3, if a guarantee is not under seal, the creditor cannot compel the surety to pay after six years have elapsed

Interpretation of the Act.

The construction of the Statute has been fixed by a long series of decisions. He only is held to be a cautioner, within the meaning of the Act, who has a right of total relief against the principal debtor.[1] Thus although in one sense joint and several obligants may be said to bind themselves "with and for" one another, yet, inasmuch as they do not have total relief one against the other, the obligations of mutual relief arising out of a joint and several obligation do not fall within the Statute;[2] and, on the same ground, claims of relief competent to one co-cautioner against another are excluded.[3]

The cautionary obligations contemplated by the Statute fall into two distinct classes.

First class of obligations contemplated by the Statute —where the cautioner is bound expressly as cautioner in the same writing as the principal debtor.

The first class of cases consists of cautionary obligations, in which the cautioner, being bound in the same writing as the principal debtor, is, by the terms of the bond, bound "with and for" the principal debtor, or as "express cautioner." To bring an obligation within this class, it is necessary that the terms in which the obligation is undertaken should clearly show its cautionary character. If the fact of cautionry is thus shown, there is evidently no need either for a clause of relief or for an intimated bond of relief apart. Accordingly, it is settled that the provision in the Act as to the necessity of a clause or bond of relief applies only where the party is bound *ex facie* as a principal.[4] Thus in *Ross* v. *Craigie*,[5] one of two persons, bound conjunctly and severally in a bond, was found entitled to the benefit of the Statute, although there was no clause of relief or separate bond intimated, because it appeared from the terms of the obligation that he was merely a cautioner. As a type of the form of words which has been held to indicate the cautionary relation of parties bound as principals, and thus to render a clause or bond of relief unnecessary, we may take the case of *Scott* v. *Yuille*.[6] There a bond in this form: "We, as principals, and with and for us, A. and B., as cautioners, sureties, and full debtors, bind and oblige us, jointly and severally, etc."—was held to contain in itself sufficient intimation of the cautionry, and

from the period at which the surety first became liable to make payment. If the guarantee is under seal, the creditor's right to enforce the surety's obligation continues until the expiry of twenty years—3 & 4 Will. IV. c. 42, s. 3.

[1] *Ballantyne* v. *Muir*, 1708, M. 11010; *Parke's Crs.* v. *Maxwell*, 1785, M. 11031.

[2] *Parke's Crs.* v. *Maxwell*, 1785, M. 11031.

[3] *Forbes* v. *Dunbar*, 1726, M. 11014.

[4] *Douglas, Heron, & Co.* v. *Riddick*, 1792, M. 11032; 1800, 4 Pat. App. 133; see also the interpretation of the Act by Lord Chancellor in *Scott* v. *Yuille*, 1831, 5 W. & S. 436.

[5] 1729, M. 11014.

[6] 1831, 5 W. & S. 436.

so to fall within the Act.[1] To secure this result, it is not necessary that the word "cautioner" should be actually used in the bond, if, by the use of equivalent words, the cautionary character of the obligation is made apparent. Thus in a recent case, where certain shareholders of a company bound themselves, in a joint and several obligation, "as individuals and by way of corroborative guarantee," for the repayment of money borrowed by the company, it was held that, by the terms of the bond, their obligation was shown to be a cautionary obligation, to which the Act applied.[2]

Obligations falling outside this class.

On the other hand, the mere use of the term "guarantee" in a bond, in which one person binds himself as principal to pay a sum of money, which another person has also contracted to pay, will not suffice to bring the obligation within the operation of the Statute, if the obligation be really a separate and independent contract. Thus where one party granted a bond and disposition in security of a loan, and on the same day another party wrote to the creditor a letter in which the writer, after narrating the granting of the bond, "guaranteed" to the creditor payment of the sum contained in the bond, it was held by the House of Lords that the writer of the letter was not entitled to the benefit of the statutory limitation.[3] The ground of the decision, as explained by the Lord Chancellor, was that although the word "guarantee" was used in the letter, yet the term, as there employed, did not express an undertaking that another should perform what he contracted to do, but amounted to an independent contract to pay the sum due on demand. Further, the Act is construed as applying only to obligations in which the accessory obligant is bound "with and for" the principal obligant in the same document. Accordingly, obligations which, though accessory in their nature, are undertaken separately from the principal obligation, are not within the Act, even though the accessory obligant has total relief against the principal. So a cautioner in a bond of corroboration is not within the Act,[4] the rule depending on the fact that the cautioner in such a bond is not bound with and for the principal debtor in the bond sued on.[5] Upon the same ground, there are excluded from the Act such obligations as a letter guaranteeing to the creditor payment of goods furnished to a third party;[6] an

[1] *Douglas, Heron, & Co.* v. *Riddick*, 1800, 4 Pat. App. 133, and *Monteith* v. *Pattison*, 1841, 4 D. 161, are other examples of bonds similarly construed. *Vide supra*, pp. 674 *et seq.*

[2] *Stocks* v. *M'Lagan*, 1890, 17 R. 1122.

[3] *Wilson* v. *Tait*, 1840, 1 Rob. App. 137.

[4] *Scott* v. *Rutherford*, 1715, M. 11012.

[5] See per Lord Moncreiff in *Monteith* v. *Pattison*, 1841, 4 D. 161, at 166.

[6] *Hog & Co.* v. *Holden*, 1765, M. 11029; Bell, *Com.* i. 375.

engagement to pay a debt, undertaken at a date subsequent to the principal obligation, and in a writing distinct from the principal bond;[1] a missive letter guaranteeing a bond, but not referred to in the bond;[2] a bond for the relief of one of two joint and several obligants in a prior bond, although such bond of relief has been stipulated for at the time the original bond was granted;[3] or a letter binding the writer to procure security to the creditor in a bond granted by a third party, or, failing this, to pay the debt himself.[4]

The Act does not apply where one accepts a bill as cautioner.

The Act does not apply to a cautioner who signed a bill with the acceptor "as security, jointly and severally."[5] In this case, indeed, both the conditions requisite to bring the obligation within the first class of cases contemplated by the Act are fulfilled — the accessory obligation is contained in the same instrument with the principal, and its cautionary character is apparent from the terms of the document. The rule, however, excluding the cautioner from the benefit of the Act, was based entirely on the peculiar and special nature of a bill of exchange. "A bill," it was laid down, "is a document of a nature distinct from that of a bond or contract, is introduced for different purposes, and is invested with different privileges. Its province is, in law, considered to be the transference, not the loan, of money. It does not therefore come under any of those transactions enumerated in the Act 1695, c. 5, and to which that Act was intended to apply."[6] This principle was applied in *Macdougall* v. *Foyer*,[7] where "the judges were clearly of opinion that cautionary obligations in bills of exchange can have no other effect than that of settling questions of relief." The import of the decisions in both the two last-mentioned cases is, according to Lord Watson,[8] correctly stated by Mr. Bell: "Acceptance as a cautioner is deemed absolute acceptance; and the qualification, whatever effect it may have in a question of relief between the parties themselves, has none at all as against the holder of the bill."[9]

[1] *Caves* v *Spence*, 1742, M. 11020.

[2] *Howison* v. *Howison*, 1784, M. 11030.

[3] *Bruce* v. *Stein*, 1793, M. 11033; see also *Ewart* v. *Lothian*, 1762, M. 11027.

[4] *More* v. *Forbes*, 1710, M. 11011.

[5] *Sharp* v. *Hervey*, 1808, Morr. App. *voce* Bill, 22. The same point was raised in a later case, *M'Indoe* v. *Frame*, 1824, 3 S. 295, but the Court found it unnecessary to decide it.

[6] *Vide Sharp* v. *Hervey*, 1808, Morr. App. *voce* Bill, 22. This passage is quoted and approved by Lord President Inglis in *Walker's Trs.* v. *M'Kinlay*, 1879, 6 R. 1132, at p. 1141.

[7] 13 Feb. 1810, F. C.

[8] In *Walker's Trs.* v. *M'Kinlay*, 1880, 7 R. (H. L.), at 96.

[9] Bell, *Com.*, 7th ed., i. 424.

Second class of obligations contemplated by the Statute —where the cautioner is bound as co-principal, and the cautionary nature of his undertaking is shown by a clause, or bond, of relief.

The second class of obligations contemplated by the Act are those in which the cautioner is "bound as principal or co-principal," and the fact of his being a cautioner is shown either by a clause of relief in the bond itself or by a separate bond of relief, personally intimated to the creditor at his receiving the bond. Where there is a separate bond of relief, it would appear that it must be part of the same transaction with the principal bond, and must be intimated to the creditor at the time of settling the transaction;[1] and it certainly can only be from the time that it is intimated to the creditor that the seven years can be taken to run.[2] Further, in the case of a bond of relief apart, the requirement of the Act as to personal intimation is strictly enforced; and private knowledge on the part of the creditor that a bond of relief has been granted by one of his obligants to another is not sufficient to bring the case within the Statute.[3] Thus the Act was held not to apply to a bond in which two persons were bound as co-principals, with no clause of relief or back-bond, although it was proved that one of them was known to be merely a cautioner.[4] Although notarial or judicial intimation is probably not now necessary,[5] provided there exists distinct written evidence of personal intimation, it is still inadmissible to prove the intimation by parole.[6] In one case, indeed, where the creditor in the principal bond was himself the writer of, and also a witness to, a bond of relief granted by one of the two co-obligants in the principal bond to the other, of even date with the principal bond, this was held to make further intimation unnecessary.[7] This decision represents the furthest limits to which the Court has carried the admission of equivalents to the statutory intimation; and the soundness of the decision has been doubted.[8] In *Drysdale* v. *Johnstone*,[9] two of three obligants, bound jointly and severally in a bond, received from the third obligant letters of relief. These letters had been framed by the agent of the creditor in the principal bond, who also had framed the principal bond at the same date; but as regards the two letters of relief, he did not act in the capacity of agent for the creditor. In these circumstances, and in the absence of written proof that the letters were intimated

[1] Bell, *Com.* i. 375.

[2] See per Lord Chancellor in *Scott* v. *Yuille*, 1831, 5 W. & S. 436.

[3] *Bell* v. *Herdman*, 1727, M. 11039.

[4] *Smyth* v. *Ogilvie*, 1825, 1 W. & S. 315.

[5] *Bell* v. *Herdman*, 1727, M. 11039; Bell, *Com.* i. 375.

[6] *Drysdale* v. *Johnstone*, 1839, 1 D. 409.

[7] *M'Rankin* v. *Schaw*, 1714, M. 11034.

[8] *Drysdale* v. *Johnstone*, 1839, 1 D. 409.

[9] *Supra.*

to the creditor, the Court held that the Act 1695, c. 5, did not apply.

Various kinds of cautionary obligations, to which Act does not apply.

The Act by its terms relates exclusively to obligations for sums of money: accordingly, obligations *ad facta præstanda* are unaffected by it, even where they result in a claim for the payment of money.[1] So cautioners for the faithful discharge of an office are excluded.[2] Similarly, in the ordinary case, cautioners in bonds of presentation are outwith the Statute; though in the case of one such bond, in which the cautioner undertook not only that the debtor would appear, but that, failing his compearance, he would pay the debt, the cautioner was admitted to the benefit of the prescription.[3] Again, the various kinds of judicial cautionries are excluded,—as, for example, a cautioner for a judicial factor;[4] or in the confirmation of an executor;[5] or in a judicial proceeding, *e.g.* a suspension.[6] Similarly, the cautioner for a composition in bankruptcy is not released after seven years, at least as regards the creditors who have ranked and claimed in the bankruptcy.[7] With this, however, must be taken the limitation introduced by the Act 19 & 20 Vict. c. 79, s. 144, to the effect that "no person who has not taken an oath as a creditor before the date of the deliverance approving of the composition, shall be entitled to make any demand against the cautioner after the space of two years from the date of such deliverance." Again, cautioners in marriage contracts have not, in the ordinary case, the benefit of the Act.[8] This may either be, as in *Stewart* v. *Campbell*,[9] on the ground that the obligation is one, not to pay, but to lay out and invest, a sum of money in terms of the contract of marriage, or, where the obligation is to pay a specific sum of money, on the ground explained by Lord Moncreiff in *Monteith* v. *Pattison*,[10] that in marriage contracts there seldom is a definite period of payment. It is not, however, essential, that the obligation be for money instantly advanced or borrowed; and any question as to the consideration for which the cautioner undertook the liability is totally foreign to the question whether or not his obligation is within the Act. Thus a party, who bound himself as "cautioner, surety, and full debtor with and for" the principal

[1] *Marshall* v. *Thom*, 1726, Elchies, *vide* Cautioner, 5; *Robertson* v. *Mackinlay*, 1736, M. 11010.

[2] *Strang & Robertson* v. *Fleet*, 1707, M. 11005.

[3] *Monro* v. *Bain*, 1741, M. 11017.

[4] *Kerr* v. *Bremner*, 1839, 1 D. 618; affd. 1842, 1 Bell's App. 280.

[5] *Gallie* v. *Ross*, 1836, 14 S. 647.

[6] *Mackinlay* v. *Ewing*, 1781, Hailes, 881; *Hog* v. *Low*, 1826, 4 S. 708.

[7] *Cuthbertson* v. *Lyon*, 1823, 2 S. 291.

[8] *Stewart* v. *Campbell*, 1726, M. 11010.

[9] *Ut supra.*

[10] 1841, 4 D. 161.

debtor, that the latter should pay a sum of money to his daughter, was held entitled to the benefit of the Act, although he had previously been bound, along with the principal debtor, in a marriage contract that certain houses should be conveyed to the said daughter and her husband, and although it was only on failure to convey these houses, in terms of the marriage contract, that the bond for the payment of the sum of money, the equivalent of the value of the houses, was granted.[1] It was laid down by Lord Fullerton, in *Alexander* v. *Badenach*,[2] that obligations which are plainly future and contingent, and of an indefinite nature, are not within the Act; and the opinion was indicated that the obligations of the cautioners in cash-credit bonds belong to this category.[3]

The Act only applies to obligations prestable by the creditor against the cautioner during the *septennium*.

The principle that, in order to give a cautioner the benefit of the Statute, the obligation must be one upon which, during all the seven years, the creditor had it in his power to do diligence or raise an action, has the effect of excluding from the Act various important classes of cautionary obligations.[4] Thus cautionary obligations for the payment of a sum of money, in which the term fixed for payment does not fall within seven years of the date of the obligation, or in which the arrival of the term of payment depends upon a condition not purified within the seven years, are outside the Act. This strict construction, whereby the benefit of the Act is confined to obligations prestable during the *septennium*, was adopted shortly after the date of the Act in *Balvaird* v. *Watson*.[5] The cautioner in that case intervened to secure the payment of an annuity. On the expiry of the *septennium* he endeavoured to get rid of his liability; but the Court held that the Act did not apply, on the ground that no diligence could be used by the creditor so long as the annuity was punctually paid, which was done during all the seven years. The principle of interpretation thus adopted was followed and confirmed in *Borthwick* v. *Crawford*,[6] the case of a bond payable after the death of the creditor's wife, who survived the seven years; and in *Miller* v. *Short*,[7] a case in which the term fixed for the payment of the principal sum was eight years after the date of the bond. The rule laid down in these early cases was the subject of careful consideration by a bench of seven judges in the recent case of *Molleson* v. *Hutchison*.[8] In that

[1] *Monteith* v. *Pattison*, 1841, 4 D. 161.

[2] 1843, 6 D. 323.

[3] See per Lord Fullerton at p. 330; cp. *Anderson* v. *Wood*, 1828, 1 S. 28.

[4] Ersk. iii. 7. 23; Bell, *Prin.* s. 602; cf. Bell, *Com.* (M'L. ed.) i. 375.

[5] 1709, M. 11005.

[6] 1715, M. 11008.

[7] 1762, M. 11027.

[8] 1892, 19 R. 581.

case a bond for borrowed money, dated in November 1881, bound the borrower to repay the principal sum at Whitsunday 1882, and also contained an obligation by the borrower himself, and by certain persons as cautioners, to pay at said term the interest then due, and interest half-yearly thereafter till repayment of the principal sum. The interest was duly paid until Martinmas 1890. In an action by the creditor against one of the cautioners for payment of his share of the interest due subsequently to that date, the cautioner pleaded that his obligation fell under the septennial prescription. It was held by a majority of the judges that, as the interest sued for was not due till after seven years from the date of the bond, the Act did not apply. The principle of interpretation laid down in *Balvaird*[1] as governing cases of annual payments was held to be applicable, namely, that every year a new obligation arises. Lord M'Laren expressed the opinion that the series of cases beginning with *Balvaird* had "passed into the common law, and are as much a part of the law of guarantee, or cautionary obligation, as the Statute itself." This decision, further, made it clear that in determining the question whether the Statute applies, it is the liability of the cautioner, and not the liability of the principal debtor, that is to be taken as the criterion, *i.e.* in order that a cautioner may have the benefit of the Act, the creditor must have had it in his power to do diligence against the cautioner, for the obligation in question, during the whole currency of the seven years.[2] A cautioner for principal and interest is thus in a better position than a cautioner for interest merely, the former being within, and the latter without, the Statute.[3]

Effect of the Statute on the cautioner's liability.

In obligations falling within the Act, the expiry of the septennial period *ipso facto* operates the total extinction of the cautioner's obligation. A strong illustration of this is furnished in *Carrick* v. *Carse*.[4] There a cautioner bound in a bond, having been called upon by the creditor to pay the sum due, did actually pay after the expiry of the seven years, in knowledge of the law, but in ignorance of the fact that the seven years had expired. In an

[1] 1709, M. 11,005 *supra*, p. 941.

[2] See per Lord President Inglis in *Molleson* v. *Hutchison*, 1892, 19 R. at p. 588; also per Lord Fullerton in *Alexander* v. *Badenach*, 1873, 6 D. 323.

[3] So the limitation does not run where the debt is illiquid and not exigible within the seven years (*Anderson* v. *Wood*, 1821, 1 S. 28). It has been held in a recent English case (*in re Brown's Estate* [1893], 2 Ch. 300), in which a surety gave a guarantee to pay a debt on demand, that, as a demand was necessary before an action could be brought against him, the Statute of Limitations began to run only from the date of demand.

[4] 1778, M. 2931.

action at the instance of the cautioner for repayment of the sum which he had thus paid by mistake, the creditor pleaded that the debt was due *jure naturali*. The Court, however, ordered repetition, on the ground that payment had been made *sine causâ*, and that after the seven years there was no obligation, natural or civil, upon the cautioner. The fact that the creditor is a minor does not prevent the term of limitation from running; and the doctrine of *non valens agere* has here no application.[1] The effect of the Act is to introduce a limitation of the obligation,—in other words, to read into every cautionary obligation falling within its scope the words, "but this obligation shall only endure for seven years." The Act, in short, differs from most of the other Statutes establishing the shorter prescriptions, in that it does not deal merely with the mode of proving, or the legal means of enforcing, an obligation, but goes to the essence of the contract and determines its endurance.[2] Thus it is incompetent, after the expiry of the *septennium*, to prove by a reference to oath, or otherwise, that the sum due under the obligation is resting-owing.[3] Inasmuch as the Act thus introduces a positive limitation of the obligation itself, and does not deal merely with the remedy, it is the *lex loci contractus*, and not the *lex fori*, which decides in any particular case whether the Act is, or is not, applicable. Accordingly, when a contract of cautionry, entered into in Scotland, is sued on in a foreign court, effect is given to the limitation; and, on the other hand, when a contract of cautionry, entered into abroad, is sued on in a Scotch court, the limitation does not apply.[4]

Actings by creditor which prevent cautioner pleading the benefit of Act.

In accordance with the express provision of the Act, the cautioner's obligation is extended beyond the seven years where the creditor has used diligence against the cautioner within the seven years. The limitation introduced by the Statute cannot, like a prescription, be barred or interrupted by diligence, to the effect of keeping the cautioner's obligation in force for a longer period. The timely use of diligence by the creditor is effectual to preserve entire the creditor's claim for what fell due during the seven years; it cannot extend the cautioner's liability beyond the original debt, and the interest falling due within the seven years.[5]

[1] *Ramsay* v. *Miller*, 1706, 4 Br. Supp. 644; *Stewart* v. *Douglas*, 1712, M. 11151; *Gordon* v. *Cumming*, 1707, M. 11190.

[2] *Alexander* v. *Badenach*, 1843, 6 D. 323.

[3] *Cochrane* v. *Fergussons*, 1831, 9 S. 501.

[4] *Alexander* v. *Badenach*, 1843, 4 D. 323; *Scott* v. *Yuille*, 1831, 5 W. & S. 436; *Smith* v. *Bell*, 1829, 7 S. 771.

[5] *Rowand* v. *Lang*, 1738, M. 11041; *Douglas, Heron, & Co.* v. *Riddick*, 1793, M. 11045; *Reid* v. *Maxwell*, 1780, M. 11043.

Where, however, a charge of horning was followed by denunciation, it was found that the cautioner was liable in interest after the seven years upon the accumulated sum at the date of denunciation;[1] and since, by the Personal Diligence Act (112 Vict. c. 114, s. 10), the registration of a charge is made equivalent to denunciation upon letters of horning, the same effects may be produced by registration. It is said by Erskine, that diligence raised within the seven years can have no effect but to secure the special subjects affected by the diligence.[2] It has been expressly held, however, that arrestments used by the creditor against the cautioner, in the course of the seven years, have the effect of preserving to the creditor all manner of diligence competent against the creditor for what fell due within the seven years.[3] Thus the use of arrestment or inhibition during the *septennium* enables the creditor, at any period within the years of the long prescription, to recover payment of the debt due by the cautioner by the use of further diligence. It was found, for example, that an adjudication might be raised, twenty years after the date of the bond, against a cautioner who had been charged with horning.[4] The cautioner's obligation is also preserved if the creditor obtain a decree *in foro* against the creditor during the seven years;[5] but it is doubtful whether a decree in absence would have this effect.[6] Mere citation in an action, though sufficient to interrupt the ordinary prescription, does not preserve an obligation from the operation of the septennial limitation.[7] The statement in the report of the case of *Clark* v. *Stuart*,[8] that the execution of a summons against the cautioner within the seven years had this effect, cannot be relied upon.[9]

Undertakings or conduct of cautioner by which he is barred from pleading the Statute.

The provision of the Statute is emphatic and peremptory to the effect that, on the expiry of seven years, the obligation of the cautioner shall be absolutely extinguished. Accordingly, as a general rule, nothing short of a new and independent obligation entered into by the cautioner will avail to avert the effect of the statutory limitation, and continue his liability after the lapse of the seven years.[10] While, then, by a subsequent deed, the cautioner

[1] *Macmillikin* v. *Monro*, 1714, M. 11040.

[2] Ersk. iii. 7. 24.

[3] *Hunter* v. *Adair*, 1728, M. 11041; *Irving* v. *Copland*, 1752, M. 11043.

[4] *Irving* v. *Copland*, 1752, M. 11043.

[5] Bell, *Com.* i. 376; Bell, *Prin.* s. 603.

[6] See per Lord Eldon in *Douglas, Heron, & Co.* v. *Riddick*, 1800, 4 Pat. App. 133.

[7] *Stuart* v. *Hill*, 1712, M. 11039.

[8] 1779, M. 11043.

[9] Professor Bell describes this statement as "a very doubtful note of a case which is nowhere more fully reported"—1 *Ill.* 358.

[10] *M'Gregor's Exrs.* v. *Anderson's Trs.*, 1893, 21 R. 7.

may renounce the benefit of the Act,[1] it has been held that this cannot be done by any words in the original obligation.[2] The doctrine, however, that a renunciation of the statutory benefit in the original deed will be held *pro non scripto*, was doubted by Lord Chancellor Eldon in *Douglas, Heron, & Co.* v. *Riddick*;[3] and the question must be considered as still an open one. Short of a formal renewal, or corroboration, of his obligation granted by a cautioner within the seven years, the effect of the Act may be elided if it is proved that the cautioner undertook, on condition of the creditor granting him an indulgence, to pay the sum due under the original bond after the expiry of the statutory period.[4] An undertaking by a cautioner, however, will not prevent the extinction of his obligation, unless it amounts to a new and independent obligation on his part to pay the debt after the expiry of the seven years; and, further, it would seem that such an obligation on the part of the cautioner can be proved only by writing.[5] So a letter written by the agent of the principal debtors to the creditors, three years after the expiry of the septennial period, stating that the loan was secured by the personal obligation of the cautioners, and asking for a continuation of the loan at a reduced rate of interest—a request which was agreed to by the creditors—was ineffectual to prevent the operation of the Statute.[6] Professor Bell states that the obligation of a cautioner may be extended beyond the seven years when there have been "negotiations for answering the demand of the creditor, carried on with the cautioner, so as to bar him *personali exceptione* from pleading on the Act."[7] This proposition is not supported by the authority which he cites, *Douglas, Heron, & Co.* v. *Riddick*;[8] as in that case there was an independent undertaking by the cautioner to pay. In no reported case has a cautioner been held to be barred from pleading the Act. On the contrary, in *Scott* v. *Yuille*,[9] it was held, both in the Court of Session and in the House of Lords, that neither the payment of interest after the expiry of the seven years, nor an acknowledgment by the cautioner of an intimation of assignation, disabled the cautioner from taking the benefit of

[1] *Wallace* v. *Campbell*, 1749, M. 11026.

[2] *Norie* v. *Porterfield*, 1724, M. 11013.

[3] 1800, 4 Pat. App. 133.

[4] *Douglas, Heron, & Co.* v. *Riddick*, 1800, 4 Pat. App. 133; *Gordon* v. *Campbell*, 1715, M. 11037.

[5] *M'Gregor's Exrs.* v. *Anderson's Trs.*, 1893, 21 R. 7.

[6] *Stocks* v. *M'Lagan*, 1890, 17 R. 1122.

[7] Bell, *Com.* i. 376.

[8] 1793, M. 11032; 1800, 4 Pat. App. 133.

[9] 1827, 6 S. 137; 1830, 8 S. 485; affd. 1831, 5 W. & S. 436.

the Act. It is doubtful whether, in any circumstances, a plea of personal bar is effectual to prevent the operation of the Act; but, in any case, in order to ground such a plea, it must be shown that the cautioner has, by his representations or conduct, induced the creditor to believe a certain state of facts to be true, and to alter his position by acting on that belief.[1]

[1] *Vide* per Lord Kinnear in *M'Gregor's Exrs.* v. *Anderson's Trs.*, 1893, 21 R. 7, at p. 12. As to the requisites and effects of personal bar, *vide supra*, p. 563 *et seq.* and p. 665.

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